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VOLUME LIII.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2025 OF 1918.

July 30, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Burn.

THE HON'BLE M. R. RY. B. RAJA RAJESWARA SETHUPATHI ALIAS MUTHU RAMALINGA SETHUPATHI AVERGAL, RAJAH OF RAMNAD—DEFENDANT—APPELLANT

versus

VENKATARAMA AIYAR MINOR, BY 2ND RESPONDENT SUNDARAMMAL—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I Mad. of 1908), ss. 155, 192 (e) —Landlord and tenant—Rent, suit for—Set-off —Tenant, whether can set off manibham *as against rent.*

Where, admittedly, arrears of rent are due on a holding; and, admittedly also, a certain sum of money is due from the landlord to the tenant for *manibham*, the tenant is not entitled to set off what is due to him against the rent. Section 192 (*e* of the Madras Estates Land Act distinctly negatives the right of the tenant to plead any set-off as a defence to a claim for rent.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Appeal Suit No. 17 of 1918, preferred against the decree of the Court of the District Munsif, Sattur, in Original Suit No. 334 of 1914.

FACTS appear from the judgment.

Messrs. *R. Krishnamachariar* and *S. Soundararaja Aiyangar*, for the Appellant.—The lower Court erred in recognising the set-off. It must come under some provision or other of the Madras Estates Land Act. The only provisions relating to set-off are those contained in sections 155 and 192 (*e*). Section 155 relates to set-off in cases of eviction. Under section 192 (*e*) no set-off is allowed in claims of rent. The tenant's claim for *manibham* can only be separately enforced. The landlord can claim for the arrears and the distraint proceedings are not illegal.

Mr. *K. Jagannadha Aiyar*, for the Respondent.—The set-off was made outside Court and the prohibition in section 192 (*e*) does not apply. The landlord is only entitled to claim the balance of the rent due to him.

JUDGMENT.—We are constrained to differ from the Subordinate Judge on the question of set-off: admittedly arrears were due on the holding, admittedly also a certain sum of money was due from the landlord to the tenant for *manibham*. The tenant deducted the *manibham* from the rent and paid the balance. The landlord appropriated the payment towards the rent and distrained for the arrears. The property was sold. This suit is to set aside the sale on the ground, among various others, that the sale was illegal.

The Subordinate Judge has held that the tenants were by custom entitled to set off the *manibham* due to them against the rent and that therefore there were no arrears: We are unable to agree with him. There are two sections in the Madras Estates Land Act which relate to set off, sections 155 and 192 (*e*). In the first section a right of set off outside Court is given when there is eviction. That has no application to the present case. In the second section, the Legislature distinctly negatives the right of the tenant to plead any set-off as a defence to a claim for rent. It is contended for the respondents that as the set off was made outside the Court, this prohibition does not affect the tenants, But it must be remembered that *prima facie* each of the two claims referred to by us is mutual and independent. Unless one party chooses to recognize the claim of the other and agrees to arrive at an

amicable settlement, it cannot be said that the action of one of them in deducting what is due to him from what is due from him is binding on the other. Nor can it be said that by the action of the tenants, the right of the landlord to the arrears of rent was put an end to. We must, therefore, hold that there were arrears when the distraint proceedings commenced; the further question is whether the attachment and sale were regular. This question has not been considered by the lower Court, as it was unnecessary to decide it and the other questions in the view it took. We must reverse the decree of the Subordinate Judge and remand the appeal for disposal on the other points raised in the issues. Costs will abide the result.

M. C. P.

Appeal allowed; Case remanded.

PATNA HIGH COURT.
FIRST CIVIL APPEAL No. 177 OF 1916.
July 23, 1919.
Present:—Mr. Justice Mullick and
Mr. Justice Jwala Prasad.
SASTHI KENKAR BANDOPADHYA AND OTHERS—DEFENDANTS—APPELLANTS
versus
MAN GOBINDA CHANDRA AND ANOTHER—PLAINTIFFS AND INDRA NARAIN BANDOPADHYA MINOR AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 253 (4)—Partnership—Partners, liability of, for negligence, extent of—Duty of partners.

Where in a suit for dissolution of partnership and for accounts, the defendants are charged with negligence and contribution is claimed in respect of losses, if the defendants can show that they used such skill and judgment as they possessed in the conduct of the business, they will not be liable to indemnify the plaintiffs for the losses. [p. 4, col. 1.]

The rule of diligence among partners, in the absence of any specific agreement, is that they are not always obliged to use that middle kind of diligence which prudent men employ in their own affairs, they are secure if they act in partnership affairs as they would do in their own, so that if a partner fall into error in the management from want of a larger share of prudence and skill than he is truly master of, he is not liable for the consequences. Good faith is required in a partner as well as diligence and if a partner is guilty of gross negligence, unskilfulness, fraud, or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby. [p. 4, col. 1.]

Appeal from a decision of the Subordinate Judge, Purulia (Manbhum.)

Messrs. *Haribhusan Mukherji, Naresh Chandra Sinha* and *Shishir Kumar Mitter*, for the Appellants.

Messrs. *N. C. Roy* and *Panchanan Banerji*, for the Respondents.

JUDGMENT.

MULLICK, J.—This appeal arises out of a suit for dissolution of partnership and for accounts in respect of a business carried on under the name and style of the Fatka Coal Company. It is now admitted that the shares of the various partners were as follows:—

Plaintiffs Man Gobinda Chandra and Indra Narain Chandra	... 4 annas.
Defendant No. 1	... 2 annas.
Defendant No. 2	... 2 annas.
Defendant No. 3	... 2 annas.
Defendant No. 4	... 1 anna 8 *gandas* and 2 *karas*.
Defendant No. 5	... 1 anna 8 *gandas* and 2 *karas*
Defendant No. 6	... 18 *gandas* 3 *karas*.
Defendant Nos. 7 to 10	... 18 *gandas* 3 *karas*.
Defendant No. 11	... 1 anna 2 *gandas* 3 *karas*.
Defendant No. 13 Fulkumari	... 3 *gandas* 3 *karas*.

It is also now admitted that the business began in 1905.

The suit was instituted on the 19th of July 1911. A preliminary decree was made on the 9th of July 1912 and on the 20th of July 1912 Babu Amaresh Chandra Mukherji was appointed Receiver. The Receiver submitted his report on the 29th of May 1916 and the final decree was made on the 4th of August of that year. The Court found that defendants Nos. 1, 4 and 5 were jointly liable to pay Rs. 4,025-14-6 to the plaintiff, Rs. 2,196-5 9 to defendant No. 2, Rs. 2,459-14-0 to defendant No. 3, Rs. 156 4 3 to defendant No. 6, Rs. 1,050 7-0 to defendants Nos. 7 to 10, Rs 1,381-4-6 to defendant No. 11 and Rs. 221-14-3 to defendant No. 13.

The individual liabilities of defendants Nos. 1, 4 and 5 were ascertained to be respectively as follows:—

Defendant No. 1 ... Rs. 6,381-1-9.
Defendant No. 4 ... Rs. 2,348 2 9,
Defendant No. 5 ... Rs. 2,712-11-9.

Against this decree the present appeal is preferred by defendants Nos. 1, 3, 4 and 5.

The plaintiffs allege that the managing partners of the business from its inception in 1905 to March 1910 were defendants Nos. 1 and 4, and from April 1910 to August 1912 when the Receiver took possession the managing partner was the defendant No. 3. They charge these defendants with negligence and claim contribution in respect of a large number of items.

The first question is whether defendants Nos. 1, 3 and 4 were managing partners at all. Now it is said that the managing partners are named in the partnership deed, but that deed is not forthcoming. The defendants say that plaintiff Man Gobinda was managing partner from 1905 till July 1907 and that the defendants Nos. 1 and 4 managed from August 1907 to April 1910, after which defendant No. 3 took charge and managed the business till the Receiver was appointed.

It appears, however, from the written statements printed at pages 4, 5, 7, 9, and 10 of the paper-book that defendants Nos. 1 and 4 were the managing partners from the commencement till March 1910 and defendant No. 3 from April 1910 till August 1912. The allegation that the plaintiff Man Gobinda was the managing partner at any time has not been made out. But it is clear that he, from December 1905 down to about the middle of 1906, took a very active interest in the management of the colliery. He was actually living at the colliery and in constant communication with defendant No. 4 about various matters connected with its management. This is proved by the letters dated 22nd December 1905 (page 42 of the paper-book), 28th December 1905 (page 43), 14th January 1906 (page 44), 29th Magh 1312 (page 41), 3rd March 1906 (page 36), 11th March 1908 (page 45), 14th March 1906 (page 41). This is also clear from the letter written on the 25th of February 1911 by A. K. Bhar, the manager of defendants Nos. 1 and 4, in answer to Man Gobinda's request for a list of the debts which were about to become barred. He sent him the list printed at page 110 of the paper-book and asked him either to institute a suit jointly with the other partners or to execute the necessary power-of-attorney in favour of some one. Therefore Man Gobinda's present allegation that he was entirely ignorant of what was going on cannot for a moment be accepted, and it has been established he was taking a very keen interest in the management of the colliery during the period when defendants Nos. 1, 3 and 4 were the actual managing partners. So much so that on the 2nd of November 1906 (see letter Exhibit 6, page 113, of the paper-book) defendant No. 4 was obliged to write to Man Gobinda and complain of his general interference in the management of the business, and in particular of his entering into correspondence with the firm of M. L. Laik and Banerji regarding the price at which coal was to be sold to them by the Fatka Coal Company. I think, therefore, that the Subordinate Judge was right in accepting the finding of the Commissioner in regard to this part of the case.

It is next necessary to consider to what extent the defendants Nos. 1, 3 and 4 are liable to contribute for losses.

The learned Vakil for the appellants relies upon clause 2 of section 253 of the Indian Contract Act, which enacts that all partners are entitled to share equally in the profits of the partnership business and must contribute equally towards losses sustained by the partnership business. The learned Vakil for the respondents, on the other hand, relies upon the proposition that the managing partners were trustees and as such are liable for every loss that has been incurred during their management. The learned Vakil also relies upon *Rowe* v. *Wood* (1), but that case does not carry him very far, because it merely decides that one partner cannot exclude another from an equal management of the concern, that it is the duty of each to keep precise accounts, to have them always ready for

(1) (1822) 2 J. & W. 553 at p. 559; 22 R. R. 208, 37 E. R. 740.

inspection and to keep good faith towards the other. It is said, however, that the defendants as trustees departed from the strict line of their duty and are, therefore, liable. If this could be shown they would, in my opinion, be liable whether as partners or as trustees, but, in my opinion, the evidence falls far short of this. If again it is sought to make them liable on the ground of negligence, then the law is different for trustees and partners. A trustee is bound to use the prudence and skill which an ordinary person would take of his own similar affairs. On the other hand, the rule of diligence, in the absence of any specific agreement on the point among partners, has been laid down in the civil law as follows "partners are not always obliged to use that middle kind of diligence which prudent men employ in their own affairs, they are secure if they act in the partnership affair as they would do in their own; so that if a partner fall into error in the management from want of a larger share of prudence and skill than he was truly master of, he is not liable for the consequences, for the partners are themselves to blame in not making choice of an associate of greater abilities, and can recover only for the consequences of gross faults" (Digest 17, 2, 52,). Good faith is required in a partner as well as diligence and if a partner is guilty of gross negligence, unskilfulness, fraud, or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby [*Law* v. *Law* (2)]. The rule is really a part of the law of agency and is, therefore reproduced under that head in section 212 of the Indian Contract Act.

If, therefore, it can be shown that the defendants used such skill and judgment as they possessed, they are not liable to indemnify the plaintiffs for the losses; and I quote below a passage from *Cragg* v. *Ford* (3), which seems to me to put the law very clearly. In that case the question was whether the defendant was to be charged with the loss which had arisen from delaying the sale of some cotton belonging to the partnership. The defendant was the managing partner and was found to have been the person principally entrusted with the charge of management of the business and the winding up of its affairs. The Vice Chancellor, Sir J. L. Knight Bruce, observed as follows: "The plaintiff was, I think, entitled to have the cotton sold sooner than it was and sold at a time when the loss would have been wholly or to a great extent obviated. Under the circumstances if it had been established and proved that the defendant had acted fraudulently or had beyond merely refusing to sell so acted as to prevent the plaintiff from selling, it is very possible that I might have acceded to the plaintiff's demand seeking to charge the defendant with the loss; but fraud is out of the question. The defendant, whether wisely or unwisely, yet, as it must, I think, be taken, in the honest exercise of his judgment, considered that the sale, which was a matter in which he was interested as well as the plaintiff, ought to be delayed; the plaintiff, for anything that appears, might himself have sold the cotton or have taken measures for its sale or have himself possessed of it."

Bearing these observations in view, I now proceed to take up each item in regard to which the learned Vakil for the appellants has addressed us.

The finding of the trial Court in respect of the other items of the Commissioner's report has not been challenged or if challenged at the beginning of the learned Vakil's address, was eventually accepted on the ground that the items were small and that it was not worth while re-opening the finding in this Court.

As regards defendant No. 1,—item No. 20. This is a sum of Rs. 722-11-6 charged against defendant No. 1 alone, for coal sold by the Fatka Colliery to the Dhadka Colliery of which defendant No. 1 was a partner. It is said that the debt has become barred owing to the negligence of defendant No. 1, who being a partner in the Dhadka Colliery profited by that negligence. No reason has been given why a suit was not brought in time to recover this debt.

The liability to contribute would *prima facie* fall upon defendants Nos. 1 and 4. The Subordinate Judge appears, however, to have

(2) (1905) 1 Ch. 140; 74 L. J. Ch. 169; 92 L. T. 1; 53 W. R. 227; 21 T. L. R. 102.

(3) (1862) 1 Y. & Coll. C. C. 280; 62 E. R. 889; 57 R. R. 320.

fixed the whole liability upon defendant No. 1 on the ground that he was a proprietor in the Dhadka Colliery and, therefore, stood to profit more than defendant No. 4. He also seems to have been influenced by the consideration that the defendant No. 1 was jointly and severally liable for the whole debt with his co partners in the Dhadka Colliery. The learned Vakil for the respondents supports this view of the case by referring to section 249 of the Indian Contract Act. The answer, however, is that there is no reliable evidence that defendant No. 1 was in fact a proprietor in the Dhadka Colliery at the time that the debt was incurred. On the contrary the evidence of Debendra Nath Chatterjee at page 56 of the paper-book shows definitely that defendant No. 1 was not a partner then. There is also no evidence to show that the debt was incurred by the Dhadka Colliery for the purpose of the partnership business. Therefore section 249 of the Contract Act will not assist the plaintiffs. But on the charge of negligence I think the plaintiffs ought to succeed. It has not been shown to us that the plaintiffs had any notice of this debt. It was contended by the defendants before the Subordinate Judge that notice was given to the Receiver, but of this there is no evidence before us. There being a complete absence of evidence that defendants Nos. 1 and 4 exercised their usual skill and prudence, we must hold that defendants Nos. 1 and 4 are liable equally.

Items charged against defendants Nos. 1 *and* 5: No. 34, a sum of Rs. 8,345-2-3, and No. 13, a sum of Rs 588-10 0. The former sum represents money recoverable from the firm of J. L. Banerji and Co., which was subsequently amalgamated with the firm of M. L. Laik and Banerji, and the latter sum represents money due from the firm of M. L. Laik and Banerji. The firm of M. L. Laik and Banerji has gone into liquidation since the amalgamation, and the Fatka Coal Company being creditors should have proved their debt in insolvency. This apparently was not done and defendants Nos. 1 and 5 have been made liable, firstly, because there was negligence on their part in recovering the debts, and secondly, because they are two of the partners of the insolvent firm.

From a petition dated the 4th of September 1913 in the High Court of Calcutta printed at page 114 of the paper-book, it would seem that the insolvents showed a part of the debt in their schedule. After the institution of the present suit the defendants pleaded that the Official Assignee who was representing the insolvent firm should have been made a party and that contention was accepted on the 5th March 1912. It will be remembered that the Receiver was appointed in July of that year, and it was open to the plaintiffs to obtain an order from the Court directing the Receiver to prove the debts before the Official Assignee. It is idle for the plaintiffs to say that they had no responsibility in the matter. The Receiver deposes that he does not remember receiving any notice of the debt, but it is quite clear that the Official Assignee was made a party because he was a debtor and the plaintiffs had full knowledge of his liability.

Let us next see whether there was gross negligence on the part of defendants Nos. 1 and 5. Defendant No. 5 certainly was never a managing partner and as for defendant No. 1, although he was a managing partner at a time when a part of these debts was incurred, there is no finding that he did not act in the ordinary course of business and with all the prudence and skill which he possessed.

But it is said that it was the duty of defendant No. 1 to sue J. L. Banerji and Co. and M. L. Laik and Co. before the insolvency. That again depends on evidence. In the present case it has not been shown that defendant No. 1 had notice of the pending insolvency of M. L. Laik and Banerji. The evidence is that the purchasers were old customers, and I am satisfied that defendant No. 1 exercised his usual prudence in giving credit to them. That there was *bona fides* on his part is clear from the following circumstance.

On the 25th of February 1911 his manager submitted a list of debts about to become barred to plaintiff Man Gobinda. The debt of J. L. Banerji and Co. is item No. 15 in this list. The last transaction with J. L. Banerji and Co. appears from this list to have taken place in June 1909. It

was open, therefore, to the plaintiff to bring a suit for its realisation.

I may also notice that on the 10th of October 1909 the plaintiff Company held a meeting at which the assets and liabilities up to the month of June were examined and the manager was directed to take steps for the realisation of the dues and to inform the partners of the final result, and the plaintiff Man Gobinda's son Kunja was directed to sign the Daily Cash Book. The manager, as has already been seen, pressed for the institution of suits but no action was taken by the partners.

In these circumstances neither defendant No. 1 nor defendant No. 5 can be held liable on the ground of negligence.

The other ground on which it is sought to make defendants Nos. 1 and 5 liable is section 249 of the Indian Contract Act. That section would, no doubt, be applicable if it could be shown that the debts were incurred in the usual course of business by or on behalf of the partnership. There is a complete absence of evidence on this point and, therefore, section 249 would not apply.

Therefore the result I arrive at is that the judgment of the Subordinate Judge in regard to items Nos. 34 and 43 must be set aside.

Debts charged against defendants Nos. 1 and 4, item No. 28, a sum of Rs. 5,599-12-0 remaining due from one Hari Lal Nagar on account of the price of coal sold to him, and item No. 51, a sum of Rs. 2,005-8-0 due from R. N. Biswas for the same reason.

It is alleged that the defendants Nos. 1 and 4 have by their negligence allowed these debts to become barred. It appears that the last transaction with Hari Lal Nagar was in February 1909 and the last transaction with Biswas in June 1909, so that the debts did not become barred till after the suit was instituted. The case of the plaintiffs is that there was collusion between defendants Nos. 1 and 4 and Hari Lal Nagar, that Biswas was a fictitious person and that the sums alleged to be due from both have been really misappropriated by the defendants. The case of the defendants is that Hari Lal Nagar and Biswas were both old customers and it would have been folly to bring a suit against them till the last moment.

With regard to Hari Lal Nagar, it is said that he was a man from Rajputana and that he absconded because owing to a sudden drop in the price of coal his business failed, and that the defendants after due enquiry were totally unable to ascertain his whereabouts between 1909 and 1911. With regard to Biswas they deny that he is a fictitious person.

Now the evidence upon which it is argued that Biswas was a fictitious person consists of the testimony of Debendra Nath Chattopadhya, witness No. 2 for the defendants, but that testimony is of the vaguest description. I am not at all satisfied that there is any substance whatever in the allegation that Biswas was not an old and reliable customer to whom the defendants were justified in giving credit.

With regard to Hari Lal Nagar it is established that he was an old customer, but it is said that the defendants should have brought a suit against him and made substituted service under Order I, rule 8, Civil Procedure Code.

It is also contended as regards both Hari Lal Nagar and Biswas that it was the duty of the defendants to bring a suit between 1909 and 1911. I find no evidence of dishonesty or fraud. At most there was an error of judgment and the defendants are, in my opinion, exempted from liability upon the principle enunciated in *Cragg* v. *Ford* (3). It is also to be observed that in the list of debts about to become barred at page 110 of the paper book both these debts appear; also that in the proceedings of the Company of October 1909 the accounts up to June 1909 (presumably including these debts) were passed by the Company. In my opinion the judgment of the learned Subordinate Judge as regards both these items must be set aside.

Item No. 52. This was a small sum of Rs. 173-7-3 representing the price of coal purchased by Sachindra Nath Bose, a clerk employed by the Company. This clerk fell ill, took leave and died during his leave. The defendants plead that the clerk had due to him some pay and as he was an employee, the net balance due from him was treated as an advance of salary. The managing partners had implied authority to make an advance of this kind, which, in my opinion, was for the benefit of the

business. The finding of the Subordinate Judge is, therefore, in my opinion, erroneous and must be set aside.

The result, therefore, is that defendant No. 1 succeeds as to half of item No. 20 (involving a sum of Rs. 361), half of items Nos. 24 and 43 (involving respectively Rs. 4,172 and Rs. 299), half of items Nos. 28 and 51 (involving respectively Rs. 2,799 and Rs. 1,002). Defendant No. 4 succeeds as regards half of items Nos. 28 and 51. Defendant No. 5 succeeds as regards half of items Nos. 34 and 43. The appeal is accordingly decreed to this extent in favour of defendants Nos. 1, 4 and 5 respectively.

In regard to the rest of the items covered by the appeal which is valued at a total of Rs. 19,171, the appeal fails. The successes of defendants Nos. 1, 4 and 5 amount to Rs 16,698, and they will jointly get costs in proportion to this sum and will pay costs in proportion in respect of the balance to the respondents. The costs awarded to defendants Nos. 1, 4 and 5 will be shared by them equally.

As regards the lower Court we decline to interfere with the calculation of the costs awarded by that Court.

The necessary corrections should, therefore, be made in column 4 of the statement submitted by the Receiver and printed at page 105 of the paper-book and a decree prepared accordingly.

JWALA PRASAD, J.—I entirely agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1147 OF 1918.

July 21, 1919.

Present:—Mr Justice Seshagiri Aiyar and Mr. Justice Bakewell.

RAMASWAMI NAICKEN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

VENKATASWAMI NAICKEN AND OTHERS —DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 35—Costs —Discretion of Court, exercise of, interference with, when permissible.

The discretion of a Court as to the award of costs, so long as it is judicially exercised, should not be bound down by any artificial rules, and, where a suit is based on a state of law which has since been overruled either by Statute or by the decision of a superior Tribunal, it would be a sound exercise of discretion to disallow costs. Much, however, depends upon the facts of each case, and upon its presentation by the party and upon the authorities existing at the time the suit was launched. [p. 8, col. 2.]

Second appeal against the decree of the Court of the District Judge of Coimbatore, in Appeal Suit No. 232 of 1917, preferred against the decree of the Court of the 1st Additional District Munsif, Coimbatore, in Original Suit No. 14 of 1915.

FACTS.—The question was whether a mortgage could constitute an antecedent debt for a subsequent alienation of joint family property. Relying on the decision reported as *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (1) an appeal was filed in the High Court. While the appeal was pending, a Full Bench of five Judges upset the decision in *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (1) and consequently the appeal became fruitless and the appellant applied to withdraw it without costs. The respondent claimed them on principle. The question as to costs alone was argued.

The Hon'ble Mr. *S. Srinivasa Aiyangar*, Advocate General, for the Appellants.—The question is not whether a party is to be deprived of his costs, but whether he is to be given his costs. For the award of costs is a matter in the discretion of the Court to which no party can put forward an indefeasible right. The English Law is the same. *Robinson* v. *Rosher* (2), *Sutton Harbour Improvement Company* v. *Hitchens* (3) and *Lancashire and Yorkshire Ry., Co.* v. *Evan* (4). Where the appeal was filed because of the uncertainty of the law, the Court ruled that the parties should bear their own costs. *Baluswami Aiyer* v. *Venkitaswamy Naicken* (5). Misconduct is not the sole ground for not giving costs. *Forster* v. *Farquhar* (6).

Mr. *K. Srinivasa Aiyangar*, for the Respondents.—The Code of Civil Procedure is imperative that costs "shall" follow the event: section 35, Civil Procedure Code. So that even

(1) 48 Ind. Cas. 289; 35 M. L. J. 382.

(2) (1841) 1 Y. & Coll. C. C. 7; 62 E. R. 767; 57 E. R. 211.

(3) (1852) 15 Beav. 161; 51 E. R. 498; 92 R. R. 364.

(4) (1852) 15 Beav. 322; 51 E. R. 562; 92 R. R. 443.

(5) 40 Ind. Cas. 531; 40 M. 745 at p. 751; 32 M. L. J. 24.

(6) (1893) 1 Q. B. 564; 62 L. J. Q. B. 296; 4 R. 346; 68 L. T. 303; 41 W. R. 425.

though a certain latitude is allowed to the Courts, the Courts are bound to record reasons if costs are to be disallowed. I submit that the real test is whether it would be unfair to the unsuccessful party. Where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion and cannot take away the plaintiff's right as to costs. *Kuppuswami Chetty* v. *Zamindar of Kalahasti* (7). See also *Vembu Iyer* v. *Srinivasa Iyengar* (8). The Chancery Courts follow the same rule. See Order LXV, rule 1 of the Rules of the Supreme Court. See also Daniel's Chancery Practice (8th Edition), Volume II, page 1042. The test is given in *Forster* v. *Farquhar* (6). See also *Sutton Harbour Improvement Company* v. *Hitchens* (3).

JUDGMENT.—Following the Full Bench decision in *Arumugham Chetty* v. *Muthu Koundan* (9) we hold that this second appeal fails and dismiss it. The learned Advocate-General who appeared for the appellant did not argue the second appeal, but contended that as it was filed after the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (10) and on the strength of *Badagala Jogi Naidu* v. *Bendalam Papiah Naidu* (1) in which Spencer and Krishnan, JJ., interpreted the Privy Council ruling to mean that a deed of mortgage cannot be relied on as an antecedent debt, this Court should not direct the appellants to pay the respondents' costs. Mr. K. Srinivasa Aiyangar, on the other hand, contended that unless there was misconduct on the part of the successful party or unless it would be manifestly unjust on the merits of the case to visit the defeated party with costs, costs should follow the event. There can be no doubt that the rule enunciated in section 35 of the Code of Civil Procedure as to costs is wider than the English rule (Order LXV, rule 1) as to actions tried by a Jury, which enjoins on the Judge to withhold the costs for the successful party only for *good cause shown*. Even under the English rule, Bowen, L. J., pointed out that in order to deprive the successful party of his costs it is not necessary to prove that the opposite party has been guilty of misconduct. See *Forster* v. *Farquhar* (6) Mr. Justice North in *Walter* v. *Steinkopff* (11) said that the discretion of the presiding Judge is not taken away because he has to decide a bare legal question. The strict rule which was enunciated by Jessel, M. R., in *Cooper* v. *Whittingham* (12) has been practically abandoned in these two cases. Mr. Justice Subrahmania Aiyar in *Kuppuswami Chetty* v *Zamindar of Kalahasti* (7) has based his judgment on the *dictum* of the Master of the Rolls which is no longer law in England. Further, for the present case, there is direct authority in *Robinson* v. *Rosher* (2) and *Sutton Harbour Improvement Company* v. *Hitchens* (3), wherein it has been pointed out that it would be a sound exercise of discretion to refuse costs where a suit was based on a state of law which has since been overruled either by an Act of Parliament or by a superior Tribunal. In our opinion, the above principles are deducible *a fortiori* from the language of section 35 of the Civil Procedure Code.

Under the Indian Law it can safely be stated that the discretion of the Court as to the award of costs, so long as it is judicially exercised, should not be bound down by any artificial rules. A great deal must depend upon the facts of each case and upon its presentation by the party and upon circumstances and authorities which were pre-existing before the suit was launched. In the present case the 1st defendant has been responsible for the whole of the litigation, neither the plaintiffs nor the other defendants have been guilty of any act of commission or omission which can be charged against them. If the judgment of the Divisional Bench had stood, the appellants might have succeeded. That is a consideration which cannot altogether be ignored in apportioning costs.

(7) 27 M. 341.

(8) 17 Ind. Cas. 609; 23 M. L. J. 638 at p. 645; 12 M. L. T. 547.

(9) 52 Ind. Cas. 525; 9 L. W. 565; (1919) M. W. N. 409; 37 M. L. J. 166; 26 M. L. T. 96.

(10) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

(11) (1892) 3 Ch. 489; 61 L. J. Ch. 521; 67 L. T. 184; 40 W. R. 599.

(12) (1880) 15 Ch. D. 501; 49 L. J. Ch. 752; 43 L. T. 16; 28 W. R. 720.

Taking all these circumstances into consideration, we think the appellant should not be made to pay the costs of defendants. We further think that the 1st defendant, who is the *fons et origo* of all the trouble, should be directed to pay the costs of the other defendants in this Court.

M. C. P.

Appeal dismissed;
Costs disallowed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 256 OF 1918.

August 7, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Pandey SATDEO NARAIN—APPELLANT

versus

Srimati RADHEY KUAR—RESPONDENT.

Limitation Act (IX of 1908), s. 15, Sch. I, Art. 182—Execution of decree—Order permitting execution subject to furnishing security, effect of—Stay of execution—Exclusion of time.

The appellant obtained a decree from the High Court on 4th July 1913, and on 13th December instituted execution proceedings and attached certain property belonging to the judgment-debtor. The latter, having applied for leave to appeal to His Majesty in Council from the decree, petitioned the High Court in January 1914 to stay execution of the decree pending the decision of the Privy Council. On this application the High Court on 27th January 1914 passed an order directing execution to proceed upon the decree-holder giving security to the satisfaction of the executing Court for the due performance of any order made by the Privy Council. The Court, on 17th February 1914, fixed the amount of the security and called upon the decree-holder to furnish the same in one month. Owing to the inability of the decree-holder to provide the security the Court, on 28th March 1914, dismissed the execution proceeding. On 18th October 1916 the judgment-debtor's appeal to the Privy Council was dismissed for want of prosecution. On 12th April 1918 the decree-holder again applied for execution, but the judgment-debtor objected that the application was barred owing to the expiration of more than three years from the date the last step was taken, *i. e*, the 13th December 1913. The decree-holder contended that under section 15 of the Limitation Act, the period between the 27th January 1914, when the High Court made the order directing execution to proceed on the furnishing of security, and the 18th October 1916, where the judgment-debtor's appeal was dismissed, should not be computed in the period of limitation. The Court, being of opinion that section 15 of the Limitation Act did not apply as the High Court's order of the 27th January 1914 was not an order staying execution, held that execution was barred by limitation. The decree-holder appealed to the High Court:

Held, that the order of the High Court of the 27th January 1914, whatever the form of it, did in fact in the circumstances, stay the execution of the decree; that apart from any order, the decree-holder already had the right to proceed with the execution, and an order in form allowing him to do that which he was otherwise entitled to do unconditionally but imposing a condition which was impossible of performance and thereby depriving him of his right, was an order depriving him of the right, he otherwise would have had, to continue the execution proceedings, just as much as if the order had been one in form staying execution until the condition was performed and, as the condition could not be performed, the effect was to stay execution altogether; and that, under section 15 of the Limitation Act, the time which had elapsed between the 27th January 1914 and the 18th October 1916 should not be reckoned in computing the period of limitation for filing the execution petition. [p. 10, col. 2; p. 11, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Muzaffarpur, dated the 14th September 1918.

Messrs. *S. M. Mullick* and *N. N. Sen*, for the Appellant.

JUDGMENT.

MILLER, C. J.—This is an appeal from an order of the Subordinate Judge of Muzaffarpur, dated the 14th September 1918 passed in execution proceedings, wherein he allowed the judgment-debtor's objection that the appellant's application for execution of his decree was barred by limitation.

On the 4th July 1913 the appellant obtained a decree from the High Court at Calcutta declaring his title to possession of certain property together with mesne profits and costs, the latter item amounting to something between four and five thousand rupees. On the 13th December in the same year he instituted execution proceedings and attached certain property belonging to the judgment debtor in order to realise the amount of the costs awarded under the decree. The judgment-debtor, having applied for leave to appeal to His Majesty in Council from the decree of the 4th July 1913, filed a petition in January 1914 praying the High Court to stay execution of the decree pending the decision of their Lordships, and on the 27th January 1914 the High Court on that application made the following order:—

"We will allow the decree appealed from to be executed upon the opposite party giving such security as the lower Court may think fit for the due performance of any order which His Majesty in Council may make."

On the 17th February the lower Court fixed the security at Rs. 50,000 to be furnished by the decree-holder in one month from the date. The decree holder, whose financial resources were admittedly insufficient for the purpose, was unable to provide the security which was a condition precedent to his right to proceed in the execution and on the 28th March 1914, as no security had been furnished within the time allowed, the Subordinate Judge dismissed the execution proceeding, the order on that occasion being "No step taken. Dismissed in default." On the 18th October 1916, the judgment-debtor's appeal to His Majesty in Council, which had been admitted by the High Court at Calcutta more than two years previously, was dismissed for want of prosecution. On the 12th April 1918, the decree holder again filed an application for execution of the decree of the 4th July 1913. The judgment-debtor subsequently filed an objection in that execution proceeding contending that it was barred by the expiration of more than three years from the date when the last step was taken, *viz.*, on the 13th December 1913. The decree holder on the other hand contended that under the provisions of section 15 of the Limitation Act the period between the 27th January 1914, when the High Court made the order allowing execution to proceed subject to the decree holder providing security, and the 18th October 1916 when the judgment-debtor's appeal to the Privy Council was dismissed for want of prosecution, should not be taken into consideration in computing the period of limitation.

The objection was heard on the 14th September 1918 and the Subordinate Judge was of opinion that the order of the High Court of the 27th January 1914 was not an order staying execution within the meaning of section 15 of the Limitation Act, and held that the execution of the decree was barred by limitation.

It is from this order that the present appeal is brought. No reported case has been referred to us in which the application of section 15 of the Limitation Act to an order such as the present has been considered. It is contended on behalf of the respondent-judgment-debtor that the order is not one staying execution, but in fact an order allowing execution to proceed subject to a condition to be performed by the decree-holder, and the latter's inability to execute the decree is not due to any order of the Court staying the execution but to his own default in providing security.

The decree-holder-appellant on the other hand contends that whatever be the form of the order, it in substance restricts his right to proceed with the execution and in fact stays the execution by imposing upon him an obligation which it was impossible for him, in the circumstances, to comply with. In support of his contention we have been referred to an unreported case decided by the Calcutta High Court and mentioned in the notes portion of the Calcutta Weekly Notes, Vol. XVII at page CLI [*Chidam Santya* v. *Shaik Pachumuddin Naik* (1)], in which the material facts are similar to the present case and was a decision in his favour. In my opinion the order of the High Court, whatever be the form of it, did in fact, in the circumstances of this case, stay the execution of the decree. It must be remembered that, admittedly, the decree-holder was not in a position to provide the security demanded. Had he been in a position to do so and had, nevertheless, purposely refrained from providing the security, different considerations might arise in considering whether there was any default on his part which contributed to the non prosecution of the execution proceedings, but such was not the case. In my opinion it is essential to look at the real effect of the order and not merely at the form. The effect in the present case was undoubtedly to stay the execution of the decree unless a condition impossible of performance were complied with by the decree-holder, and I do not think that the stay of proceedings can be attributed to his default simply because the condition imposed was beyond his power to comply with. Apart from any order, he already had the right, notwithstanding the appeal from the decree of the High Court to His Majesty in Council, to proceed with the execution and an order in form allowing

(1) 17 C. W. N. CLI (151).

him to do that which he was otherwise entitled to do unconditionally but imposing a condition which was impossible of performance and thereby depriving him of his right, is an order depriving him of the right he otherwise would have had to continue the execution proceedings just as much as if the order had been one in form staying execution until the condition was performed and as the condition could not be performed, the effect was to stay execution altogether. This view is to some extent supported by the decision in the case of *Gunesh Dutt Singh* v. *Mungree Ram Chowdhry* (2) in 1873, where an order was made staying execution of a decree unless security was given pending an appeal from the decree to the Privy Council. It was there held that the time which elapsed between the date of the conditional stay order and the date of the decision by the Privy Council should not be counted in computing the period of limitation for taking execution proceedings. In my opinion the effect of the order in question clearly brought about the state of circumstances contemplated by section 15 of the Limitation Act, and I hold accordingly that the time which elapsed between the 27th January 1914 and the 18th October 1916 should not be reckoned in computing the period of limitation for filing the execution petition. If that period of time be deducted, the application of the 12th April 1918 is not time-barred. A further point was taken by the appellant that the second application for execution should be regarded as a continuation of the previous proceedings, but the view already expressed makes it unnecessary to consider this question. In the result the appeal is allowed with costs here and in the lower Court. The order appealed from is set aside and the Subordinate Judge is directed to proceed with the execution proceedings according to law.

FOSTER, J.—I agree with the view taken by the learned Chief Justice that section 15 of the Limitation Act is applicable to this particular case and that the appeal should be allowed. At first I was impressed by the argument advanced on the side of the respondent that the High Court order, passed undeniably under Order XLV, rule 13 (2) (*b*) of the Civil Procedure Code, was in its express terms not an order of stay or injunction in the technical legal sense, but an order permitting the execution pending the judgment debtor's appeal to His Majesty in Council, the permission being qualified only by an order that the executing Court should fix and require security. On the other side the appellant argues that (as is recognised in the first part of rule 13) he had the right then existing to proceed with his execution, and the judgment-debtor moved the High Court to restrict that right, giving as his reason the fact that the decree-holder had no property. So, he urges, the parties and the Court were in agreement that the decree-holder, who was directed to furnish security, could not do so, and the order for security would in effect be a stay of execution.

These being the arguments, the question is whether section 15 of the Indian Limitation Act is confined to cases of direct stay or injunction or can be extended to orders which indirectly but very proximately and effectually cause a stay. I do not think an acceptance of the latter proposition will unduly strain the interpretation of the section. Looking at rule 14 of Order XLV, I see that the High Court is empowered to increase the security to be required from the decree holder-respondent in the Privy Council appeal; the object manifestly being to ensure a full indemnification of the judgment-debtor appealing to His Majesty in Council. It is there provided that if the increased security be not furnished, the Court "shall as far as may be practicable, stay the further execution of the decree." It seems to me reasonable to gather from this that if the law requires a stay in default of part of the security, a stay must be the inevitable and necessary consequence of a default in respect of the whole security. In the present case the whole security was estimated and required, so the High Court's order necessarily implied a stay of execution in case of failure to furnish it.

So the order passed under Order XLV, rule 13 (2) (*b*), is in substance a restriction on an existing right to execute a decree; it is an inhibitory order suspending that right by an order *nisi*. The suspension was made absolute by the Subordinate Judge's order dismissing the execution on the 20th March 1915. In *Gunesh Dutt Singh* v. *Mungree Ram*

(2) 19 W. R. 186.

Chowdhry (2) it was held that where a judgment-debtor, who has appealed to the Privy Council, obtains a Rule *nisi* from the High Court suspending execution until security is given, and this Rule is subsequently made absolute, it does not operate against the decree-holder in the matter of time; limitation not running against him until the result of the appeal is known, or the Rule otherwise falls to the ground; and the Court based its decision on the necessary effect of the High Court's order. No doubt that case was governed by Act XIV of 1859 (*vide* section 1, Act IX of 1871), but I find so highly esteemed a work as Woodroffe and Ameer Ali's Commentary on the Civil Procedure Code quoting it as still an authority bearing upon Order XLV, rule 13, of the Code. It may be argued that the Subordinate Judge's order was of no effect, and that the decree-holder could, if he had the will and the means, have come into Court immediately after the order of dismissal of his execution and offered the security and demanded re-opening of the execution. I do not accede to this proposition. In my opinion the High Court's order of the 27th January 1914 left the terms of the order for security to the Subordinate Judge, and the terms of such an order in usual practice include a provision as to the time within which security is to be furnished. As examples of this practice, I would take the provisions for security in Order XLV, rule 1, and in Order XLI, rule 10, of the Code; in both cases the time fixed by the Court is an essential part of the order. A contrary opinion would involve great hardship and expense to a judgment-debtor; for he would have to remain in uncertainty and on the defensive in the execution case for an indefinite period. So I take it that the Subordinate Judge's dismissal of the execution was a final order passed in due course of law; and that that order constituted in itself an absolute dismissal of the pending execution. My conclusion is that in the circumstances of this particular case the order of the High Court, and what I may call the ancillary orders of the Subordinate Judge, did in fact stay the execution proceedings within the meaning of section 15 of the Limitation Act.

The learned Vakil for the appellants quoted and laid stress upon the rule in the Privy Council ruling *Qamar-ud-din Ahmad* v. *Jawahir Lal* (3). The rule appears to me to be that when in an execution case certain proceedings have intervened to interrupt the course of the execution and that execution has not been finally dismissed and there has subsequently been an application to renew the execution proceedings so interrupted, the second application should be taken to effect a revival of the first application; provided that the interruption has not been caused by any act or default of the decree-holder. But here there was, as I have held, a definite final order dismissing the first application, and there was no application for revival; in fact the second application was a new application for execution in the form prescribed in Order XXI, rule 11, Civil Procedure Code. I am, therefore, doubtful as to the applicability of this particular rule.

On the other hand I have, as the result of a full consideration of the facts of this particular case, arrived at the conclusion that limitation is, and in fact can only be, saved by the terms of section 15 of the Limitation Act.

Appeal allowed.

(3) 27 A. 334; 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1394 OF 1918.

May 29, 1919.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Duval.

Seikh GAZIRADDIN MANDA—DEFENDANT—APPELLANT

versus

GANGARAM MANDAL—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 5—Landlord and tenant—Lease, construction of—Lessee, whether tenure-holder or raiyat*—Appeal, second—Occupancy rights, acquisition of—Question, whether can be raised for first time in second appeal.*

Where a lease was granted on condition that if a tenant settled on any portion of the land leased out, the lessee would surrender to the lessor that portion and would get in exchange for the same lands of

similar description, and that the lessee would not cut down any tree, nor would he have any right to sell, to make a gift of, or to transfer any portion of the land in any way:

Held, that the land was not settled with the lessee for the purpose of settling tenants thereon, and that the interest created by the lease was that of a *raiyat*. [p. 14, col. 1.]

Where a question as regards the acquisition of a right of occupancy by an under-*raiyat*, or regarding the rights of a tenant holding over, is not raised in the lower Courts, the High Court in second appeal will not allow the point to be urged for the first time. [p. 14, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Rajshahye, dated the 18th April 1918, affirming that of the Officiating Munsif, 2nd Court at Maldah, dated the 19th March 1917.

FACTS appear from the judgment.

Babu *Phanindra Lal Maitra*, for the Appellant.—In the lease which the plaintiff's father executed in favour of the superior landlord, it is stated that he originally held 74 *bighas* of land and he took 50 *bighas* more and consolidated them into one. There is no evidence as to what was the character of the tenancy which he originally held, and the terms embodied in the *kabuliyat* are consistent with the right of either a tenure-holder or a *raiyat*. Therefore as the area held was more than 100 *bighas* at the time when the defendant took the lease, the presumption under section 5, clause (5), of the Bengal Tenancy Act shall arise.

Subsequent conduct also supports the view that the plaintiff was a tenure-holder. He let out all the lands to tenants at a money rent. He was silent in his plaint as to whether he was an occupancy *raiyat* or not. In the *kabuliyat* which the defendant executed and was accepted by the plaintiff, the plaintiff's title was not specifically described. Everywhere we find the term which may mean a tenure-holder or a *raiyat*. Therefore, if it be so, the defendant is either a non-occupancy *raiyat* or an occupancy *raiyat*.

If he is a non-occupancy *raiyat* for a term, as the term expired in Kartik 1320 and as the suit was brought in Magh 1322, *i. e.*, more than six months after the suit is barred by limitation under the special provisions of the Bengal Tenancy Act.

If he is an occupancy *raiyat*, no cause has been shown for the ejectment.

Now if the plaintiff is an occupancy *raiyat* and the defendant an under-*raiyat*, there is evidence on the record showing that he was allowed to hold over.

In the written statement the defendant pleaded that even if he was an under-*raiyat*, by local custom or usage he had acquired a right of occupancy and there was an issue to that effect. The first Court held that he was an under-*raiyat*. The Appellate Court did not consider the point.

As the Court proceeded wrongly in not deciding the point it must have gone into, the defendant is entitled to a specific finding on that point.

As to the construction of the *kabuliyat* where it is stated that the defendant held the land as *ichhadhin uchhed joggya korfa praja swarup*, the meaning is ambiguous.

If he is a tenant-at-will liable to eviction, how can he be a tenant for a term?

The defendant was holding land long since and after the execution of the *kabuliyat*, defendant continued to possess the same land for the same rent. Therefore, there was no necessity for a fresh *kabuliyat* and there was no consideration for that contract. Hence the *kabuliyat* is void for want of consideration and inadmissible in evidence.

Babu *Mohini Mohan Chakraburty* (with him Babu *Nishit Nath Ghatak*), for the Respondent.—The plaintiff is an occupancy *raiyat*, as can be gathered from the *kabuliyat*. *Manmatha Nath* v. *Anath Bandhu Pal* (1) refered to.

The Court below has come to a finding of fact as to the occupancy right for the term of the lease.

The term of nine years is only restricted to under-*raiyats*.

Holding over does not give him any right without the consent of the landlord.

Other points were not taken in the lower Court.

Babu *Phanindra Lal Maitra* briefly replied.

JUDGMENT.—This appeal arises out of a suit for recovery of possession of the lands in dispute, on the allegation that the defendants were under-*raiyats* holding under a lease which had expired. The main defence was that the defendants were not under-*raiyats* but *raiyats* and that the plaintiff himself was a tenure-holder.

(1) 50 Ind. Cas. 222; 23 C. W. N. 201 at p. 206.

GURUSWAMI PANTULU *v.* BUDHKARAN LALL.

The lower Appellate Court has found that the plaintiff was an occupancy *raiyat* and that the defendant, therefore, was an under-*raiyat*.

The principal contention of the appellant before us is that the lower Appellate Court ought to have held that the interest of the plaintiff was that of a tenure-holder. It is pointed out that the area of the land exceeds 100 *bighas* and, therefore, the presumption arises that he was a tenure holder, that the *kabuliyat* itself states that the plaintiff had been holding 75 *bighas* of land from before and that by the *kabuliyat* another 50 *bighas* of land were taken settlement of, the two *jamas* being consolidated into one of 125 *bighas*.

Now in the *kabuliyat* under which the plaintiff holds the land it is stated:—"If a tenant settles on any portion of the land mentioned in this *kabuliyat*, I shall surrender to the Sircar that portion according to the local custom. I shall get in exchange for the same lands of similar description from other places....." This indicates that there were no tenants settled on the land at the time the *kabuliyat* was executed: and not only so but it also shows that the land was not settled with the plaintiff for the purpose of settling tenants on the land. The other terms of the lease rather go to support the view that the lessee was not a tenure-holder. For instance, the lessee was not allowed the right to cut down any tree, nor had he any right to sell, to make a gift of, or transfer any portion of the land in any way. Of course, a tenure-holder also may enter into such a contract; but having regard to all the terms, we think that the Court below has rightly construed the document as showing that the interest created was that of a *raiyat*. Then again, the *kabuliyat* executed by the defendant on the 4th Assin 1311 states that he had been holding the land from 1304 as an *ichhadhin uchhed joggya korfa praja*. These words mean that he has been holding the land as an under-*raiyat*, liable to be ejected at the will of the landlord, and it is to be observed that this *kabuliyat* was for a term of nine years.

Having regard to all these circumstances, we are unable to hold that the finding of the Court below, namely, that the interest of the plaintiff was that of a *raiyat*, is incorrect.

It is next contended that the Court below ought to have considered the question, whether the defendant, even if he was an under-*raiyat*, had acquired a right of occupancy according to local custom. This question was not urged before the lower Appellate Court. It is necessary to go into questions of fact in order to decide this question. The lower Appellate Court was not asked to consider this question and we cannot allow such a question to be raised here.

The last contention is that the lower Appellate Court has not considered the question whether the defendant has been holding over, in which case he was entitled to a notice to quit.

The Court of first instance found that the defendant had failed to show that the plaintiff realised any rent from him after the expiration of the term of the lease, and the question does not appear to have been urged before the lower Appellate Court.

In these circumstances, we think that the appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 16 OF 1918.

March 9, 1919.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

M. GURUSWAMY PANTULU—PLAINTIFF—APPELLANT

versus

BUDHKARAN LALL KHAJANCHEE, REPRESENTATIVE OF RITHCARU LALL KHAJANCHEE, AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 11, 65—Mortgage by minor, validity of—Minor, whether bound to refund money.

Where a mortgage turns out to be invalid because the mortgagee, at the date of the mortgage, was a minor, he cannot be held liable to refund the mortgage-money even if he misrepresented his age. [p. 16, col. 1.]

Appeal from the judgment of Mr. Justice Bakewell passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 457 of 1916.

GURUSWAMY PANTULU v. BUDHKARAN LALL.

FACTS will appear from the following judgment of

BAKAWELL, J.—Defendants Nos. 3 to 8 represent purchasers at a sale under a mortgage decree obtained by the first mortgagee. Plaintiff is the holder of a registered mortgage who should have been, but was not, made a party to the suit. Plaintiff now sues on his mortgage and is in the same position as if this were a suit against the prior mortgagee and the mortgagor, and defendants Nos. 3 to 8 represent both these parties.

The defendants have pleaded that the plaintiff's mortgage is invalid as having been executed by the 2nd defendant, the mortgagor, during his minority. The 2nd defendant's mother Chellammal was appointed guardian of his person and property by an order, dated the 20th of February 1900, which also empowered her to raise a loan by a mortgage of his property. The petition Exhibit IV, which is verified by the 2nd defendant's mother, recites the members of his family and states that at the date of his father's death, 16th October 1892, he was of the age of seven years or thereabouts and that he was born in or about the beginning of the year 1885. The first witness for the defendants has married a sister of the 2nd defendant, and he states that the 2nd defendant is the last born child of his father and was born in Madras about 1886, and he produces a copy from the Register of Births which he says relates to the 2nd defendant and gives the date of birth of the child therein mentioned as the 13th of January 1886. Persons in the position of the 2nd defendant's mother are generally very inaccurate as to dates; and the first witness for the defendants is also somewhat inaccurate, because he says that the 2nd defendant's father died when he was about five years old, but I see no reason to doubt that that witness was a truthful witness, and having special regard to the fact that he states that the 2nd defendant was the last born child of his father, I accept the Birth Register as giving the date of his birth. The 2nd defendant was, therefore, aged about 18 years and 9 months at the date of the mortgage.

The plaintiff's case has been that he was deceived by the fraudulent representation of the 2nd defendant into the belief that he was of full age at the time of the mortgage. It is evident from the evidence of the plaintiff and his witnesses that the plaintiff had at the date of the mortgage suspicions as to the true age of the 2nd defendant; he asked the 2nd defendant to produce his horoscope and he produced a copy; one of his witnesses says that the document was pinned on to the mortgage deed; he took a letter from him referring to this horoscope and stating that it shows that he was born in 1883 and he says that he made enquiries of the neighbours. He obtained certificates of encumbrances relating to the property which disclosed a mortgage executed by the 2nd defendant's mother. He says that he made enquiries of the mortgagee and was told that the mortgage had been executed by the 2nd defendant and Chellammal, his mother. According to the plaintiff he was on the verge of discovering that the mortgage had been executed by the guardian of the minor, but he never actually made the discovery. I decline to believe him. If the plaintiff took all these precautions to investigate the title of the 2nd defendant, it is impossible to believe that he did not take the further step of either inspecting the mortgage deed which would probably have shown that it was executed under a title conferred by the Court, or of obtaining further information as to the 2nd defendant's age. The mortgage was executed for various sums advanced in the year 1904. The 2nd defendant was a dissolute young man. The plaintiff seems to have slept upon his rights, professes ignorance even of the sale of the property and made no attempt to obtain any interest on his money, and I think that the circumstances in the case show that he was aware that the 2nd defendant was a minor and took the documents which accompanied the mortgage for the purpose of throwing a favourable colour on the transaction.

The plaintiff's mortgage will, therefore, be declared to be invalid and his suit must be dismissed with costs of two sets of defendants, Nos. 2, 3 and 6 to 8, and of the 5th defendant.

NATHUNI PRASAD *v.* ANWAR KARIM.

Mr. *V. Viswanatha Sastri*, for the Appellant.

Mr. *Mahomed Ibrahim Sahib*, for the Respondents.

JUDGMENT.—We agree with the learned Judge that the 2nd defendant was a minor at the date of the mortgage. It was, therefore, invalid and even if he misrepresented his age, he cannot be held liable on principles of equity to refund the money. *R. Leslie Limited* v. *Sheill* (1) approved in *Mahomed Syedol Ariffin* v. *Yoh Joi Gark* (2), both of which have been referred to by this Court in *Raghavayya* v. *Subbayya* (3). The appeal is dismissed with costs, one set.

M.C.P.

Appeal dismissed.

(1) (1914) 3 K. B. 607; 83 L J. K. B. 1145; 111 L T. 106; 58 S. J. 453; 30 T. L. R 460.

(2) 39 Ind. Cas. 401; (1916) 2 A. C. 575; 86 L. J. P. C. 15; 43 I. A. 256; 115 L. T. 564; 32 T. L. R. 673; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157 (P. C.).

(3) 43 Ind. Cas. 908; 7 L. W. 124.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 373 OF 1918.

July 31, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Das.

Lala NATHUNI PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Syed ANWAR KARIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 111 (d)—*Lease—Merger, when arises*—Mokarari *lease, whether incumbrance—Bengal Land Revenue Sales Act (XI of 1859)—Bengal Tenancy Act (VIII B. C. of 1885)*.

The entire interest of the lessee and the entire interest of the lessor must vest in the same person in the same right before it can be said that a lease of immoveable property has determined by merger within the meaning of clause (*d*) of section 111 of the Transfer of Property Act. [p. 17, col. 1.]

A *mokarari* is not an incumbrance at all except for the purposes of the Bengal Land Revenue Sales Act and the Bengal Tenancy Act. [p. 17, col. 2.]

Appeal from a decision of the District Judge, Gaya.

Messrs. *Rajendra Prasad* and *Hurnarain Prasad*, for the Appellants.

Messrs. *Khurshed Husnain, Rai Guru Saran Prasad* and *Nawal Kishore*, for the Respondents.

JUDGMENT.

DAS, J.—This appeal arises out of a suit brought by the plaintiffs to enforce a mortgage-bond executed by one Tabarak Hussain on the 2nd November 1904. Tabarak Hussain is now represented in this litigation by defendants Nos. 1 to 5. Defendants Nos. 6 to 9 are the subsequent purchasers of two annas of the proprietary interest of Tabarak Hussain in the eight annas of Mouzah Pardhana; defendant No. 11 is the mortgagee in respect of a two-annas *mokarari* interest in the same property.

The lower Appellate Court has given a modified decree to the plaintiffs, that is to say, it has given them a decree for sale, declaring that the property mentioned in the mortgage-bond is to be sold in case of failure to pay, but that the two-annas share of defendants Nos. 6 to 9 is not to be deemed to be sold in execution of the decree.

The appellants contend that they are entitled, in execution of their mortgage decree, to sell two annas out of the eight-annas share belonging to the mortgagor in village Pardhana free from incumbrance, and that to this extent the decree of the lower Appellate Court should be reversed.

The mortgage bond is perfectly clear on this point. The mortgagor mortgaged his two-annas share out of his eight-annas proprietary interest free from mortgage. The defendants Nos. 6 to 9 have purchased two annas out of the eight-annas share subsequently to the execution of the mortgage, but Mr. Khurshed Hussain, on behalf of the subsequent purchasers, argues before this Court that the mortgagees ought not to throw any portion of the burden on them, and that the equities between the parties can be properly adjusted by allowing the plaintiffs to sell two annas out of the six annas of the proprietary interest of the mortgagor, leaving him two annas free from any incumbrance at all. In this connection, we are unable to agree. It seems to us that the right of the mortgagee is to proceed against any two annas he likes out of the eight-annas proprietary share which was of the mortgagor. That is his right under the mortgage and that right has not been taken away by anything that has happened subsequently.

ABDUL MAJID v. HARI CHARN HALDER.

Defendants Nos. 6 to 9 have purchased the property subsequently to the execution of the mortgage, and they cannot compel the mortgagees to confine themselves to any particular portion of the property. We think, therefore, that this portion of the decree ought to be reversed.

Another question that has been argued before us by Mr. Rajendra Prasad on behalf of the appellants is, that, on a proper construction of the mortgage bond, he has got a mortgage security not only on the two annas share of the proprietary interest of the mortgagor but also on the two annas of the *mokarari* share which the mortgagor inherited just before the mortgage. The point arises in this way. The mortgagor, as the proprietor of the eight annas share of the village, granted a *mokarari* in 1851 of the entire eight annas in favour of his wife *Musammat* Kabiran. Now *Musammat* Kabiran died in 1904, and after her death the mortgagor as the husband of Kabiran inherited two annas out of the eight annas *mokarari* interest which was carved out of the proprietary interest in favour of Kabiran. The mortgage in favour of Mr. Rajendra Prasad's clients was executed subsequently to the date when the mortgagor inherited his two-annas share of the *mokarari* interest.

The first argument advanced by Mr. Rajendra Prasad is that there was a merger of the *mokarari* interest in the proprietary interest and, therefore, there is no *mokarari* now subsisting and that by his purchase he is entitled to get direct possession of the property. It seems to us that there cannot be a merger, because the mortgagor was the proprietor in respect of the eight annas share in the village, whereas he inherited merely a two annas share in the *mokarari* Section 111, clause (*d*), of the Transfer of Property Act provides that a lease of immoveable property determines, in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right. It is obvious that the entire interest of the lessee and the entire interest of the lessor must vest in the same person in the same right before it can be said that a lease of immoveable property has determined.

Now, it is not denied by Mr. Rajendra Prasad that the six-annas interest in the *mokarari* still vests in persons other than the proprietor. Therefore, it seems to us, there cannot be a merger in this case. The case of *Amatoo* v. *Sheik Muksud Ali* (1) is an authority for this proposition.

In the next place, it is argued by Mr. Rajendra Prasad that, whether there has been a merger or not, the mortgagor undoubtedly, intended to give a mortgage in respect not only of his proprietary interest but also in respect of his *mokarari* interest, and he relies upon the passage in the mortgage bond, where the mortgagor covenants that his interest is free from incumbrance. Mr. Rajendra Prasad says that a *mokarari* is an incumbrance and, therefore, he has got a mortgage free from the *mokarari* interest which was in the mortgagor. It seems to us that a *mokarari* is not an incumbrance at all except for the purposes of Act X of 1859 (B. C.) and the Bengal Tenancy Act. In our opinion, therefore, this contention on behalf of the appellants must be overruled. The result, therefore, is that this appeal succeeds in so far as the plaintiffs will be entitled to a mortgage decree for the amount claimed by them and will be entitled in execution of that mortgage decree to sell two annas out of the eight-annas proprietary share of the mortgagor in village Pardhana free from incumbrance.

We make no order as to costs in this Court.

COUTTS, J.—I agree.

Appeal partly accepted.

(1) 28 Ind. Cas. 314; 19 C. W. N. 435.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 745 OF 1917

July 11, 1917.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, Kt.

ABDUL MAJID—PLAINTIFF—APPELLANT

versus

HARI CHARN HALDER AND OTHERS—DEFENDANTS RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 111 (e)—Landlord and tenant—Surrender of tenancy for consideration, validity of—Registration, whether necessary.

ABDUL MAJID *v.* HARI CHARN HALDER.

Where in execution of a rent decree the tenant judgment-debtor surrendered the tenancy to the landlord decree-holder, the latter agreeing to forego his claim for rents due:

Held, that the surrender, though for consideration, was operative, and that the provisions of the Transfer of Property Act did not require a registered instrument to evidence the surrender.

Appeal against the decree of the District Judge, 24-Parganas, dated the 10th January 1917, affirming the decree of the Munsif, 2nd Court, Alipur, dated the 10th July 1915.

FACTS of the case will appear from the following extracts from the lower Appellate Court's judgment:—

"The appeal arises out of a suit for *khas* possession after declaration of title thereto. Ketabdi Mondal held the disputed land under defendant No. 1. After him, his widow defendant No. 2 also held it. Defendant No. 3 in execution of a money decree against defendant No. 2 purported to have purchased the disputed land in March 1911. In January 1914 defendant No. 3 sold the land to plaintiff by a registered Kobala. The defence of defendant No. 1 who has appeared was that Ketabdi as well as defendant No. 2 held the land as tenants at-will. In execution of a rent decree against defendant No. 2, defendant No. 1 put up the tenancy to sale, on which defendant No. 2 filed a petition of compromise in which she agreed to surrender the land in consideration of the defendant No. 1's foregoing the rents due. Defendant No. 1 agreeing to such compromise, the execution case was dismissed. The petition of compromise was dated 26th September 1910. Thereafter defendant No. 1 let out the land to a tenant for 3 years and the land is at present in the *khas* possession of defendant No. 1." The suit was dismissed by both the Courts below.

Babu *Samatul Chandra Dutt* (with him Babu *Satish Chandra Mukerjee*), for the Appellant.—My submission is that the deed of surrender, as they call it, ought to have been registered, because it was not a surrender but sale with consideration therefor. It comes under section 54, Transfer of Property Act. Refers to *Rangayya Appa Rau* v. *Kameswara Rau* (1). My next point is that the tenancy if not permanent is transferable. Refers to *Huromohun Mookerjee* v. *Ranee Lalun Monee* (2), *Banee Madhul Banerjee* v. *Joy Kishen Mookerjee* (3), *Doorga Pershad Misser* v. *Brindabun Sookul* (4), *Nil Madhab Sikdar* v. *Norttam Sikdar* (5). The Appellate Court is wrong in holding that the tenancy is not transferable.

Babu *Gobinda Chandra De Roy* (with him Babu *Mon Mohan Banerji*), for the Respondents, was not called upon to reply.

JUDGMENT.

WALMSLEY, J.—In this case the first question that arises is whether the surrender made by the widow in September 1910 was operative, because, if it was, there was nothing for the plaintiff's vendor to sell when the sale took place in the following March.

It is contended on behalf of the plaintiff appellant that the surrender was not really a surrender, but a sale, because there was consideration, the consideration being the rent for which a decree had been obtained and accrued since the date of the suit. It appears to me that there is no reason for saying that it was not a surrender to the landlord; no authority has been shown to us for holding that the surrender must be by an instrument registered. For these reasons this appeal must be dismissed with costs.

SHAMSUL HUDA, J.—I agree. Under section 111 of the Transfer of Property Act, a lease of immoveable property determines, by express surrender, that is to say, by the lessee yielding up his interest under the lease to the lessor, by mutual agreement between them. It is found that in this case the lessee did surrender her interest by mutual agreement, and it seems to me that it makes no difference that the mutual agreement was by reason of a consideration that was received from the tenant by the landlord. The Transfer of Property Act does not require a registered document in such cases and no authority has been shown to us in support of this contention.

The appeal is, therefore, dismissed with costs.

Appeal dismissed

(1) 20 M. 367; 7 M. L. J. 59; 7 Ind. Dec. (N. S.) 261.

(2) 1 W. R. 5.
(3) 12 W. R. 495; 7 B. L. R. 152.
(4) 15 W. R. 274; 7 B. L. R. 159.
(5) 17 C. 826; 8 Ind. Dec. (N. S.) 1095.

JOTINDRA NATH ROY *v.* ISOF GOLDER.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1324 AND 1360 OF 1917.

April 30, 1919.

Present:—Mr. Justice Newbould.

JOTINDRA NATH ROY—PLAINTIFF—APPELLANT

versus

ISOF GOLDER—DEFENDANT—RESPONDENT IN No. 1324 OF 1917.

TRAILOKYANATH GHOSE—DEFENDANT—RESPONDENT IN No. 1360 OF 1917.

Bengal Tenancy Act (VIII B. C. of 1885), s. 153, applicability of—Suit for rent with alternative prayer for assessment of fair and equitable rent—Appeal, second, whether lies—Bengal Estates Partition Act (V B. C. of 1897), s. 44—Partition—Collector, whether can assess rent—Batwara *papers, evidentiary value of.*

Section 153 of the Bengal Tenancy Act does not apply to a suit for recovery of rent, with an alternative prayer for assessment of fair and equitable rent. [p. 19, col. 2.]

Lala Dhanukdhari Lal v. *Baburam Ahir*, 4 Ind. Cas. 745; 10 C. L. J. 629, relied on.

Under section 44 of the Bengal Estates Partition Act the Partition Deputy Collector has authority to assess rent. [p. 20, col. 1.]

In a suit for rent the entries in *batwara* papers prepared under the Bengal Estates Partition Act are some evidence of the existence of the relationship of landlord and tenant between the parties and also some evidence as to the rents payable by the defendant. [p. 20, col. 1.]

Appeals against the decrees of the Subordinate Judge, 1st Court, Jessore, dated the 10th May 1917, affirming that of the Munsif, 3rd Court at that place, dated the 17th May 1916.

FACTS appear from the judgment.

Dr. *Jadu Nath Kanjilal*, for the Respondent in No. 1360 of 1917, raised a preliminary objection that as the appeal arose out of a suit for rent in which the amount claimed was less than Rs. 50, the second appeal was barred by the provisions of section 153 of the Bengal Tenancy Act.

Babu *Debendra Nath Mandal* for Dr. *Dwarkanath Mitter* (with him Babu *Naran Chandra Kar*), for the Appellant.—The preliminary objection to the competency of this appeal has got no substance in it. The suit out of which this appeal has arisen is not for recovery of rent only. In the suit, as will appear from the prayer portion of the plaint, there is also a prayer for assessment of fair and equitable rent, and so section 153 is not bar to the competency of this second appeal. I rely on *Lala Dhanukdhari Lal* v. *Baburam Ahir* (1).

On the merits, my submission is that the Court below did not accept as evidence certain entries in the *batwara* papers prepared under the Estates Partition Act showing the amount of rents payable by the tenants, because it considered that the Partition Deputy Collector could not assess rent. I submit that under section 44 of Act V. B. C. of 1897 the Partition Deputy Collector had authority to assess rent, and the entries in the *batwara* papers are admissible in evidence. Refers to *Janki Dobey* v. *Kirtarath Roy* (2). Unless and until the defendants rebut the presumption arising in favour of the plaintiff, a fair and equitable rent should be assessed and no local enquiry for that purpose is necessary.

Dr. *Jadu Nath Kanjilal*, for the Respondent.—The learned Subordinate Judge has held in effect that the entries in the *batwara* papers should not be relied upon in assessing the fair and equitable rent and, therefore, he is right in holding that the rent cannot be assessed without a local enquiry for the purpose. The lower Courts did take into consideration the entries in the *batwara* papers and have rightly held that they cannot be regarded as very valuable evidence. If your Lordship thinks that the lower Court did not consider whether the presumption arising from the entries has been rebutted or not, the cases may be sent back for a finding on that point.

Babu *Debendra Nath Mandal* briefly replied.

JUDGMENT.—These two appeals arise out of two suits for recovery of rent, with a prayer in the alternative for assessment of fair and equitable rents and for recovery of rents thus assessed for the period in suit.

A preliminary objection has been taken that under section 153 of the Bengal Tenancy Act no appeal lies. It appears to me that that section is not applicable, as this is not merely a suit instituted for recovery of rent, as the plaintiff seeks in the alternative other relief, that is, for assessment of fair and equitable rent. An authority for this view will be found in the case of *Lala Dhanukdhari Lal* v. *Baburam Ahir* (1),

(1) 4 Ind. Cas. 745; 10 C. L. J. 629.
(2) 4 Ind. Cas. 316; 13 C. W. N. 93.

As regards the merits of the case it is contended, and the contention appears to me to be sound, that the lower Courts have erred in law as regards the evidentiary value of certain partition papers under the Estates Partition Act (V of 1897 B. C.). In the case of *Janki Dobey* v. *Kirtarath Roy* (2) it was held that entries in *batwara* papers prepared under this Act as to the amounts of rents payable by tenants are evidence in the same way as entries in the Record of Rights prepared under Chapter X of the Bengal Tenancy Act are evidence under section 103B of the Bengal Tenancy Act, though they may not be very valuable evidence.

As regards the entries, the learned Subordinate Judge says: "The Partition Deputy Collector has no authority to assess any rent." This is incorrect, as section 44 gives him the power of an officer empowered to prepare the Record of Rights under Chapter X of the Bengal Tenancy Act. The entries in these *batwara* papers are some evidence of the existence of the relationship of landlord and tenant between the parties and also some evidence as to the rents payable by the defendants if that relationship exists. Whether the presumption arising from these entries has been rebutted or not is a question which a Court of fact must decide. But the Subordinate Judge was not justified in saying that the rents could not be assessed without a local enquiry if the presumption in the plaintiff's favour had not been rebutted by other evidence.

For the respondent in Appeal No. 1360, it is contended that the plaintiff's own evidence, Exhibit No. 1, shows that there was a tenure between the defendants and the plaintiffs. Whether this is so or not I express no opinion, as that is a question which will have to be decided by the lower Appellate Court.

These two appeals are decreed, the judgments and decrees of the lower Appellate Court are set aside and the cases remanded to that Court for a re-hearing and disposal in accordance with the observations I have made.

Costs of these appeals abide the result of the re hearing.

Appeals allowed;
Cases remanded.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 32 OF 1918.

August 21, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Jwala Prasad.

HERAMBA NATH BANDOPADHYA —DEFENDANT—APPELLANT

versus

SURENDRA NATH MITTRA AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Pleader and client—Pleader, whether can effect compromise in respect of matters outside scope of suit—Compromise, validity of—Civil Procedure Code (Act V of 1908), s. 47, O XXXVIII, rr. 5, 11—Decree passed in suit—Suit, subsequent, in respect of same property, maintainability of—Attachment before judgment—Attachment after decree, whether necessary—Question of law, whether can be raised at any stage—Procedure—Evidence Act (I of 1872), s. 35—Report made by peon in execution proceedings, admissibility of.

The authority of a Pleader to compromise a suit on behalf of his client, does not extend to his effecting a compromise in respect of matters outside the scope of the suit. [p. 27, cols 1 & 2.]

Where property is attached before judgment, the fact that a decree is made in the plaintiff's favour does not determine the attachment, which continues in full force. [p. 30, col. 1.]

A question of law raised upon facts which are on the record, can be raised at any stage of the suit. [p 31, col 2.]

Where a decree is obtained in respect of certain property, and a suit in respect of the same property is brought by a person, who is not the representative of the judgment debtor affected by the decree, before the decree is put in execution and there are no proceedings pending in which an application under section 47 of the Civil Procedure Code could be made, that section is no bar to the suit. [p 31, col. 2.]

The peon's return in execution proceedings, being an official record made by a public servant in the discharge of his official duty, is admissible in evidence. [p. 29, col. 1.]

First appeal from a decision of the Subordinate Judge, Dhanbad, dated the 5th December 1917.

Messrs. *S. M. Mullick* and *S. N. Bose*, for the Appellant.

Messrs. *P. C. Manuk* and *A. B. Mukerjee*, for the Respondent.

JUDGMENT.—This is an appeal by Heramba Nath Bandopadhya, the defendant No. 1 in the suit, from a decision of the Subordinate Judge of Dhanbad, dated the 5th December 1917, in which he passed a decree in favour of the plaintiffs.

The suit was instituted before the Subordinate Judge on the 12th September 1916 by the plaintiffs as heirs and representatives of Charu Chandra Mittra, claiming certain

declarations the effect of which was, put shortly, to confirm their title to a colliery, known as the Ranidih Colliery, free from all encumbrances and to prevent the defend ant No. 1 from selling the property under an attachment which he had obtained in the Calcutta High Court before judgment in a previous suit (No. 300 of 1911) brought by him against the then owners of the colliery, who are the remaining defendants in the present suit.

The site of the colliery was originally acquired by one Sashi Bhusan Chattopadhya, the father of the defendants Nos. 4 to 6 and husband of the defendant No. 7, under a lease for a term of 999 years granted by Gopi Nath Chattopadhya on the 8th October 1907. By a registered deed, dated the 8th October 1908, the lessee transferred a 4 annas share in the lease to Naba Chandra Chattopadhya, the defendant No. 2, and a 2-annas share to Kunja Behari Dutta, the defendant No. 3, retaining the remaining 10-annas share himself. On the 24th August 1908 Sashi Bhusan and his transferees, the defendants Nos. 2 and 3, executed a mortgage of the entire 16 annas share in the lease of the colliery to Heramba Nath Bandopadhya, the appellant, to secure a cash advance of Rs. 30,000 at 15 per cent. interest per annum and a commission of 5 annas per ton on the amount of coal raised. On the 5th September 1908 Sashi Bhusan died and his 10-annas share in the colliery passed to his four sons. One of the sons has since died. His three surviving sons and his widow who, between them, now hold his 10 annas share are respectively the defendants Nos. 4 to 7. On the 17th April 1909 Heramba Nath Bandopadhya, the mortgagee, under a deed of management executed by the defendants Nos. 2 to 7, was placed in charge of the colliery as managing agent under the name of Achard & Company of which firm he was the sole partner, and on the same day the defendants Nos. 4 to 7 as heirs of Sashi Bhusan agreed to sell him their 10-annas share in the colliery in the *benami* name of his wife Anilabala Debi, receiving from him the sum of Rs. 5,000 as earnest money. On the 10th September 1910 the defendant Heramba ceased to be the managing agent of the colliery and Charu Chandra Mittra, the predecessor-in-interest of the plaintiffs, was put in possession by the heirs of Sashi Bhusan who were then the 10-annas share-holders. It is the plaintiffs' case that on the same day an agreement in writing was entered into between the heirs of Sashi Bhusan (the defendants Nos. 4 to 7) and Charu Chandra Mittra for the sale of the 10-annas share to the latter. This document was not produced in evidence, but sometime later, *viz.*, on the 27th August 1913, these defendants in fact transferred their interest to Charu Chandra by a registered deed of that date, which recites that the assignment of the colliery to Charu Chandra was in accordance with a letter dated the 10th September 1910 and acknowledges payment of part of the consideration money at various dates between the 10th October 1910 and the date of the assignment.

On the 23rd March 1911 the defendant Heramba instituted the suit numbered 300 of 1911 in the High Court of Calcutta against all the 16-annas share-holders of the colliery (the present defendants Nos. 2 to 7) to recover a sum of Rs. 32,000 odd for advances made and expenses incurred in connection with the management of the colliery during the time of his agency, and, two days later, on the 25th March, applied to the Court in that suit under Order XXXVIII, rule 5, for an attachment before judgment of the colliery, on the allegation that the defendants were about to dispose of it by sale to Charu Chandra Mittra and had no other means out of which the claim could be satisfied. On the 27th March 1911 the High Court granted an order *nisi* under Order XXXVIII, rule 5, calling upon the defendants in that suit to show cause why they should not furnish security to satisfy any decree that might be passed against them and in default thereof, why the colliery should not be attached and, at the same time, the Court ordered an *interim* attachment to issue until such cause had been shown. On the 19th May the defendants in that suit appeared to show cause. The defendants Naba Chandra Chattopadhya and Kunja Behari Dutta, the owners respectively of 4-annas and 2-annas shares in the colliery, gave an undertaking on that occasion not to alienate or in any way deal with their respective shares in the colliery during the pendency of the

authority in favour of their respective Pleaders to consent to these terms.

(*e*). In case the said defendants fail to proceed and file such authority as in sub-clause (*d*) of clause (2) hereof within three weeks from the date hereof, the terms contained in sub clauses (*a*) to (*e*) of clause (2) hereof will not come into operation".

On the 12th September 1913 the sum of Rs. 1,22,000, the decretal amount with interest and costs then due under the compromise mortgage decree, was deposited in Court by Charu Chandra Mitra in favour of the appellant Heramba, the plaintiff in that suit, and on the 26th September 1913 this sum was withdrawn on behalf of the appellant.

It will be observed on referring to clause 2 of the compromise agreement above set out that in arriving at a settlement of that suit the parties endeavoured to settle also the several other actions which were then pending between them. The appellant, however, contends that the terms contained in clause 2 of the compromise agreement never became operative because sub clause (*d*) of clause 2 was not complied with, and by sub-clause (*e*) it was provided that unless the express authority mentioned in sub clause (*d*) should be filed in Court within three weeks the terms of clause 2 of the agreement should not come into operation. In these circumstances, the appellant contends that he is entitled to proceed to execute his decree in Suit No. 300 of 1911 and to sell the attached property in satisfaction of his decree. Hence, the respondents have brought the present suit claiming the declaration already referred to. The respondents further contend that the writ of attachment issued on behalf of the appellant in that suit was not properly served and if process was served, it was not in fact a writ of attachment at all binding on the property but merely an order of the Court upon the owners of the property enjoining them from parting with their interest, and the appellant's right, if any, lies in damages against the persons enjoined and gives him no lien upon the property.

It appears that an application was made on behalf of the judgment debtors in Suit No. 300 of 1911 to have satisfaction entered in that suit on the ground of the agreement contained in clause 2 of the compromise in the mortgage suit. This application was made in August 1914 before the High Court at Calcutta and was refused, the Court being of opinion that the terms contained in sub-clauses (*d*) and (*e*) of clause 2 had not been complied with and further that the application was time-barred. In our opinion, that decision does not bar the present suit.

The main issues raised before the Subordinate Judge in the present suit were whether the appellant was bound to enter satisfaction in the High Court Suit No 300 of 1911 in pursuance of the terms of the compromise in Suit No. 105 of 1912 and whether the terms of the compromise had been complied with by the defendants in that suit so as to bind the parties by the terms of clause 2 and secondly, whether the attachment of the property in suit was properly effected in Suit No. 300 of 1911.

The learned Subordinate Judge, as far as we are able to follow his reasoning, came to the conclusion that the compromise agreement was not expressed in clear and unambiguous terms and that, therefore, it was permissible under the second proviso of section 92 of the Evidence Act to admit oral evidence as to the real meaning and intention of the parties expressed in the written agreement. He accordingly relied upon a statement of Charu Chandra's Manager, Ram Prasad Mittra, who was at Purulia when the compromise was come to. This witness said that he did not know the details of the compromise but he knew that on payment being made of the decretal amount all disputes between the parties would be settled. The Judge accordingly found that all that was necessary to bring into operation the terms of clause 2 of the agreement was that the decretal amount should be paid and that the conditions in clause 2 (*e*) ceased to be binding on payment of the decretal amount. It seems clear that the learned Subordinate Judge entirely misapprehended the scope and effect of section 92 of the Evidence Act. Oral evidence for the purpose of contradicting written documents or ascertaining the intention of the parties is not

admissible. [See *Balkishen Das* v. *W. F Legge* (1).] It is true that by the sixth proviso of the section evidence is admissible of facts which show in what manner the language of a document is related to existing facts, but the evidence relied on by the learned Subordinate Judge was not given with the object contemplated in the sixth proviso. Its object clearly was to vary the terms of the written contract by showing an intention, not expressed therein, to treat the condition contained in sub-clauses (*d*) and (*e*) of clause 2 as inoperative as soon as the decretal amount mentioned in clause 1 should have been paid. Although it is true that an ambiguous agreement affords no protection to the person seeking to rely upon it in order to avoid an obligation, he would otherwise be under, it would appear that the learned Subordinate Judge did not consider the element of ambiguity from this point of view. Had he done so it is not easy to see, when one considers the nature of the ambiguity which he conceived to exist, how this would have assisted the present plaintiffs. It is unnecessary, however, in our opinion, to pursue this matter as the document does not appear to us upon a true construction to contain any ambiguity at all. It consists of two clauses, the first of which provides that there shall be a consent decree upon certain terms enumerated in sub clauses (*a*) to (*e*). These sub-clauses clearly provide that there shall be a mortgage-decree for a named sum including interest, commission and costs, for which all the defendants except the minor were to be personally liable. Interest from the date of the decree is to run at 15 per cent. per annum, the decree is not to be executed for six weeks. During that period Charu Chandra Mittra had the option, if the claim was not in the meantime satisfied (presumably by the other defendants in the suit), of paying off the decretal amount and receiving an assignment of the decree from the decree-holder. The second clause related to matters outside the scope of the suit and could not properly form a part of the decree in that suit, but might be regarded as part of the terms of compromise and as such would be binding upon the parties when recorded. It related to claims in the various other suits pending at that time between the parties or some of them and provided that each should forego their respective claims against the others, and as presumably the Pleaders representing the parties in the mortgage suit would not necessarily be authorised in that suit to compromise claims between the respective parties in other suits, it provided that the defendants should file in Court express authority in favour of their respective Pleaders to consent to these terms. This was no doubt stipulated in order to put an end once and for all to the chance of any dispute arising thereafter as to the authority of the respective Pleaders to bind their clients, and by sub-clause (*e*) it was expressly provided that unless the authority should be filed within 3 weeks from the date of the compromise, the terms of clause 2 should not come into operation. It is difficult to see in what respect the agreement can be said to be ambiguous. The mortgage suit was to be compromised on the terms mentioned in clause 1, whether or not those mentioned in clause 2 should come into operation, and those mentioned in clause 2 were only intended to come into operation, if and when the defendants should expressly authorise them in the manner therein indicated. If the conditions imposed by sub-clauses (*d*) and (*e*) of clause 2 were not performed, then the mutual obligations imposed by the earlier part of the clause ceased to be operative. In our opinion it is difficult to read this document in any other manner. The learned Judge was impressed by the fact that the decretal amount of Rs. 1,20,000 was more than the total amount claimed in the mortgage suit which was Rs. 85,588 and that, therefore, the decretal amount was probably arrived at by including a portion of the appellant's claim in Suit No. 300 of 1911. We have great doubts whether he was entitled to consider this question at all but, in any event, it leaves out of consideration the fact that the sum due at the date of the decree for principal, interest and commission under the mortgage of the 24th August 1908 amounted to about Rs. 1,24,000. This calculation, it is true, is based upon

(1) 27 I. A. 58; 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

an increased rate of interest after the first year as provided by the mortgage bond, and it is contended that the increased rate was not legally recoverable. It does not appear, however, that any objection upon this score was raised in the mortgage suit and it is, in our opinion, not legitimate to speculate as to how the decretal amount was arrived at. It is further contended that as the Court recorded the compromise on the 30th August 1913, that is, more than 3 weeks after the date of the compromise itself, it was not competent to the appellant to contend that the provisions of sub clauses (*d*) and (*e*) of clause 2 had not been complied with. It was argued that before recording such a compromise the Court was bound to ascertain for itself that it was valid and binding and if in fact the condition had not been at that time fulfilled, clause 2 of the compromise would not have been recorded and, therefore, any failure to comply with that condition must be taken to have been waived by the parties. The learned Judge considered that as the compromise had been recorded by the Court under the provisions of Order XXIII, rule 3, of the Civil Procedure Code, it must be regarded as a lawful agreement and that if the appellant's contention were accepted as to the effect of clause 2, there was no agreement at all so far as that clause was concerned and that the Court would not record mere negotiations not binding upon the parties. We are unable to accede to this argument. The agreement was in fact filed on the 29th July and when the decree was passed on the 30th August, there was nothing to show that the Court made any enquiry as to whether the conditions had been fulfilled or that this matter was even mentioned. The Court might well have assumed in the absence of any mention of the matter that the condition had been fulfilled and, in any event, it was no part of the Court's duty to ascertain whether the parties had complied with the condition. It might involve a long and intricate enquiry which the Court was, in our opinion, not bound to enter into. The agreement, on the face of it, was lawful and what the ultimate effect of it might be was not a matter which it was the duty of the Court at that time to enquire into.

It further remains to consider whether the condition imposed by clause 2 (*d*) was in fact complied with. This question depends mainly upon the effect of certain *vakalatnamas* which have been produced in evidence and on the oral testimony of Ananga Mohan Bhattacharji, a Pleader engaged on behalf of Kalitara Debi and her minor son Bidhu Bhusan in the mortgage suit at Purulia in which the compromise was come to. He was called as a witness on behalf of the plaintiffs in the present suit. From his evidence it appears that the draft compromise was written out in the Bar Library at Purulia on the afternoon of the 29th July after discussion between the Pleaders and others representing the parties. They then looked into the record to ascertain from the *vakalatnama* filed how far each of the parties had given authority to their Pleaders to compromise the suit. It appeared that no *vakalatnama* had been filed by Srimati Kalitara Debi the defendant No. 4 in that suit, on her own behalf, although she did sign one on behalf of her minor son Bidhu Bhusan who was also a defendant. The petition asking for the compromise decree (Exhibit 6), therefore, prayed that she might be allowed 7 days to file a *vakalatnama*. This was, in fact, not filed until the 30th August, the time for doing so having been extended by order of the Judge. It was urged on behalf of the respondents that as this petition only asks for 7 days for filing the *vakalatnama* and as the compromise in clause 2 allowed 3 weeks for filing express authority, it ought to be assumed that all the parties were agreed that the express authority required had in fact been filed by all the parties except by Kalitara Debi and as they were all anxious to get the matter through, the time was reduced to 7 days. We are quite unable to draw any such inference from the terms of this petition. As Kalitara Debi had filed no *vakalatnama* at all, it was quite obvious that there was nobody who could compromise the suit on her behalf much less agree to terms relating to matters outside the suit and, therefore, it was necessary in any event that some authority on her behalf should be provided, and this was undoubtedly the object of asking that the decree should only be passed after her authority had been

obtained. The 7 days would expire on the 5th August but the time was subsequently extended by order, as appears from the order sheet (Exhibit 11), to the 30th August. On that day Kalitara Devi's *vakalatnama* was in fact filed. It also purports to be executed on behalf of Abani Bhusan, Indu Bhusan and Bidhu Bhusan, the defendants Nos. 1 to 3 in the mortgage suit. It is marked Exhibit 5 in this case. It authorises the Pleaders named therein to file any petition whatever or *solenama* or deed of settlement, and it is probably wide enough to cover the special terms mentioned in clause 2 of the compromise. It further appears that on the 29th July a *vakalatnama* (Exhibit 4) had been executed on behalf of the same defendants Nos. 1 to 3 and Naba Chandra, the defendant No. 5, and was filed the same day. The latter had also previously filed a *vakalatnama* jointly with Kunja Behari on the 20th April 1912 (Exhibit 1). If, in fact, the existing *vakalatnama* executed by the parties in favour of their Pleaders were regarded as a sufficient compliance with clause 2 (*d*) of the compromise, it remains to be explained why any of them should subsequently have filed others. Exhibit 4 authorises the Pleaders to file a compromise-deed in connection with the suit and "to do any other act in connection with this suit on our behalf". Assuming that Exhibits 4 and 5 may be interpreted as giving the authority required by clause 2 (*d*), there was, nevertheless, no such express authority executed as required on behalf of either Kunja Behari or Charu Chandra, the other two defendants in the suit, after the compromise was entered into, nor was Exhibit 5 filed within the 3 weeks stipulated. It is true that a *vakalatnama* on behalf of Kunja Behari had been filed in the suit on the 20th April 1912, and a similar document was filed on behalf of Charu Chandra on the 26th June 1913. These are in the usual form authorising their Pleaders to act for them and to compromise the suit and can in no sense be regarded as express authority to consent to the terms of clause 2 of the compromise agreement, which are matters outside the scope of the mortgage suit altogether. Counsel no doubt has a general authority to compromise a suit on behalf of the client engaging him, but this does not extend to collateral matters outside the scope of the action, see *Nundo Lal Bose* v *Nistarini Dassi* (2). The authority of a Pleader is certainly no greater, and it has been held that he has not even authority to compromise the matters in dispute in the suit itself unless specially empowered to do so. [See *Musammat Sirdar Begum* v. *Izzut ool nissa* (3)]. This appears to us obviously to have been the reason why clause 2 of the compromise contained the stipulations as to filing the express authority therein mentioned and as there was an express condition that if such authority were not filed within 3 weeks the terms of clause 2 should not come into operation, there was in our opinion no compliance with this provision. Even if the time be extended up to the date of the decree, *viz*, the 30th August there is not even then any express authority filed by Charu Chandra or Kunja Behari nor have they since complied with the stipulation. It was urged by the appellant as significant that the assignment executed by Abani Bhusan and others, the 10 annas share-holders, to Charu Chandra on the 27th August 1913 transferred to the purchaser the vendors' claim which they had put forward by way of set off or counter claim against Heramba in Suit No. 300 of 1911, which is one of those mentioned in the compromise. This, they contended, points to the conclusion that the parties to that instrument regarded the suit as still subsisting at that date. We do not think much importance can be attached to this. It is, however, much more significant that none of the parties made any attempt to enter satisfaction in Suit No. 300 of 1911 until long after the time stipulated, and no attempt was made by Naba Chandra and Kunja Behari to withdraw their suit for malicious attachment until the 10th July 1917, which was 10 months after the present suit was instituted. In our opinion there was no compliance with the provisions of sub clause (*d*) of clause 2 and under clause (*e*), the earlier terms of that clause never became operative.

The learned Subordinate Judge considered that the decree having once been passed in

(2) 27 C. 428, 4 C. W. N. 169; 14 Ind. Dec. (N. S.) 282.

(3) 2 N. W. P. H. C. R. 149.

accordance with the terms of the compromise so far as it related to the suit and the compromise having been recorded there was an end of the matter, and a failure to comply with the special stipulations was of no consequence. It is not easy to follow him through this part of his argument. Assuming that the terms of clause 2 had the same binding force as a decree, it is clear that they were subject to a condition and if the condition was not complied with, those terms cannot become operative. The learned Judge also found that the parties varied the terms of the agreement by excluding sub clauses (*d*) and (*e*) of clause 2. We are unable to find any evidence of such an agreement to vary the terms. Had such an agreement been come to before the decree was passed, it may safely be assumed that those clauses would have been deleted from the compromise and would not have been recorded.

It was next urged that Heramba by taking the money out of Court waived his right to object that the conditions imposed by clause 2 had not been fulfilled. This argument has, in our opinion, no force. Clause 2 was in its operation independent of clause 1. The first clause was to operate in any event, the second only in the event of the express authority being filed. By the first clause Charu Chandra Mittra had the option of paying the decretal amount into Court, in which event he would be entitled to an assignment of the decree in his favour. There was no compulsion upon him to do so but by so doing he gained certain advantages. He avoided a sale of the property in which he was interested and stepped into the shoes of the mortgagee. In our opinion, the first clause operated in any event, and was in no way dependent upon the second clause becoming operative. Heramba, therefore, by taking out the money cannot be taken to have waived his right to the performance of the conditions attached to the second clause.

It remains to consider whether the attachment was properly effected and if so, what the effect of such attachment was as against the claims of the plaintiffs. The Subordinate Judge found that it had not been proved that the writ of attachment had been served on the colliery. He arrived at this conclusion by refusing to accept the evidence of Ashutosh Munshi, a servant of the appellant who accompanied the serving peon when the service was alleged to have taken place. The peon himself at the date of the trial was away on leave and although a summons was issued for his attendance as a witness, he could not be found and hence he was not called at the trial. The peon's return of the service of process of attachment with his affidavit attached testifying to the service and signed by him was put in evidence subject to objection. His signature was proved by the Naib Nazir of the Court of the District Judge of Purulia. A certified copy of the writ of attachment, with an endorsement by the Nazir that it appeared from the peon's return that it had been duly served, was also put in and proved. A copy of the plaint in Suit No. 638 of 1911 brought by Naba Chandra and Kunja Behari against the appellant claiming damages for wrongful attachment was also put in evidence and not objected to. Paragraph 9 of that document states in terms that an agent of the appellant appeared at the colliery on the 14th June 1911 with peons of the Purulia Civil Court and others and caused the attachment to be made, and that it was conducted by the peons by beat of drum and that notices were passed at the colliery and also delivered to the agent there. The writ of attachment was one of the notices therein referred to. It seems to us that evidence of the service of the writ of attachment is overwhelming. The reasons given by the learned Judge for not accepting the evidence of the witness Ashutosh Munshi, whose name appears as one of the identifiers in the peon's report, do not commend themselves to us and we accept his evidence as that of a witness of truth. Apart from his evidence there is also the admission in the plaint in Suit No 638 of 1911 just referred to. This is an admission by two of the plaintiffs' predecessors-in-title to the property, the subject-matter of the suit, made at a time when they had an interest in that property. Under section 18 of the Evidence Act such statements are admissions from which an inference adverse to the plaintiffs in the suit may be drawn,

This document corroborates absolutely the other evidence in the case. In our opinion, it makes no difference that the attachment was withdrawn by the order of the High Court of Calcutta, so far as the shares of the plaintiffs in that suit are concerned. It is an admission that their share was attached. That share as well as the rest is the subject-matter of the present suit and there was only one attachment of the whole property. We further think that the peon's return, being an official record made by a public servant in the discharge of his official duty, was clearly admissible in evidence, the peon's signature having been duly proved and the document produced from the proper custody. The form of return is that prescribed by the General Rules and Circular Orders, Vol. II, Civil, Appendix B, No. 5, and the affidavit is made under the provisions of Order V, rule 18, read with Order XLVIII, rule 2, of the Civil Procedure Code. There can be no reasonable doubt, in our opinion, that the attachment was duly served. The evidence of Ram Prasad Mittra, who was in Calcutta at the time and swears that he heard nothing about it, may or may not be true. We rather suspect the latter but in any case it is not of such a nature as to have any weight against the positive evidence of Ashutosh Munshi, corroborated as it is by the documentary evidence produced.

It was next urged on behalf of the respondents that the process served was not an attachment at all, but merely a personal order directing the defendants in that suit not to part with their shares in the property. The terms of that document have already been quoted in an earlier part of this judgment. The respondents in support of this contention relied upon the case of *Mahendra Narain Saha* v. *Gurudas Bairagi* (4). That was a case where an order was made by the Subordinate Judge upon the defendants to show cause why an attachment of their property should not issue before judgment, and pending the hearing of the Rule they were directed not to part with their property. The form of order was not that prescribed by Order XXXVIII, rule 5, of the Civil Procedure Code and no order attaching the property was in fact made. When the defendants appeared to show cause, the Court was satisfied that no reason for attaching the property had been made out and dismissed the application. From this there was an appeal to the High Court. A preliminary point was taken that no appeal lay from such an order. The question was whether the last order dismissing the application was one made under Order XXXVIII, rule 6. If so, an appeal lay but not otherwise. The High Court decided that it was not an order made under rule 6. In fact no attachment had been ordered under rule 5 and the procedure laid down in rule 6 had not come into operation. What was done was in effect a dismissal of an application under rule 5 from which there was no appeal, and the Court dismissed the appeal on the preliminary objection. In the case now under consideration an order under rule 5 was clearly passed on the 27th March 1911 (Exhibit H) calling upon the defendants to show cause why security should not be given and ordering attachment to issue until such cause should be shown. The writ, which was eventually served (Exhibit E), recites that an order of attachment had been made and prohibits the defendants from parting with the property until further order of the Court. The further order of the Court on the 19th May 1911 ordered the attachment to be removed, so far as the interest of the three defendants who gave an undertaking was concerned, and to continue so far as the interest of the other defendants was concerned until the final disposal of the suit. The latter order would appear to have been properly made under rule 6 or Order XXXVIII and kept the attachment in so far as it was not withdrawn. In the case relied upon no order of attachment was ever made and it affords no authority for the respondents' present contention.

It was further contended, however, that the attachment ceased when the decree was passed, the suit being then finally disposed of within the terms of the Order. It would be a strange result if the benefit of this procedure should cease to operate at the moment when the plaintiff obtained a decree in his favour so as to deprive him of the fruits of victory, and it seems clear from the terms of rules 9 and 11 of

(4) 33 Ind. Cas. 689; 23 C. L. J. 392.

Order XXXVIII that such was not the intention of the Legislature. The former relates to the circumstances under which the Court shall order the attachment to be withdrawn, *viz.*, when security is provided or the suit dismissed. The latter provides that where the property is under attachment by virtue of the provisions of that Order and decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution to apply for re attachment of the property. In our opinion the attachment continued in full force after the decree was passed in favour of the plaintiff in Suit No. 300 1911. See *Ganu Singh* v *Jangi Lal* (5).

It was next contended that the writ of attachment was bad because it was not in the form prescribed in Appendix F, No. 5, of the Civil Procedure Code. The form there set out is a composite form addressed to the bailiff commanding him to call upon the defendants to give security or show cause and to attach and keep in safe custody the property until further order. These forms are subject to variation (See Order XLVIII, rule 3). Form No. 5 of Appendix F would appear to be adapted to the case of moveable property as the bailiff is directed to keep the property under safe and secure custody. There is no special form adapted to the case of immoveable property, but in Appendix E which is applicable to attachments in execution, a special form No. 24 is provided to meet the case of immoveable property and is more like the form employed in the present case. It appears from the affidavit of Nilmony Roy and from the evidence of that witness given at the trial that the order of the 27th March 1911 calling upon the defendants in Suit No. 300 of 1911 to show cause was duly served and the defendants in fact appeared to show cause before the writ of attachment was served. There was, therefore, no necessity to serve again a similar notice with the writ of attachment, and the form prescribed in Appendix F was not in the circumstances applicable. Moreover, it must be remembered that that suit was brought in the Calcutta High Court in the exercise of its original jurisdiction and the forms prescribed under its own rules of procedure under the powers saved by section 129 of the Civil Procedure Code differ in many respects from those in the appendices to the Code. We think that until the contrary is shown, we must presume that the writ which bears the seal of the Calcutta High Court was a valid writ authorised by its own procedure.

A further point was taken on behalf of the respondents that, as by the compromise the appellant agreed to transfer his rights under the mortgage decree to Charu Chandra on payment of the decretal amount, he surrendered his right of sale under the attachment to the latter. The attachment was no doubt subject to existing liens including Heramba's own rights as mortgagee, but subject to this the equity of redemption could be attached and the transfer of the mortgage, decree, although it may have given the transferee a prior claim on the proceeds to the extent of the amount of the mortgagee decree, cannot affect the right of sale under the attachment. What the respective rights of the parties may be once the property is sold we are not concerned with in the present suit, which merely prays for a declaration that the property belongs to the plaintiffs free of all incumbrances and that the appellant is not entitled to sell it in execution of his decree in Suit No. 300 of 1911.

The next point urged by the respondents was that by a letter of the 10th September 1910, that is, before the attachment was effected, the defendants Nos. 4 to 7 had already entered into a contract with Charu Chandra for the sale to him of their share in the colliery and that of the consideration money Rs. 51 was paid on the 10th October 1910 and Rs. 200 on the 18th May 1911, although the assignment was not actually executed until the 27th August 1913, the attachment having taken place on the 14th June 1911. It is contended that the respondents had on the latter date an interest in the property which could be enforced against the owners and that they were entitled to priority over the rights of the attaching creditor. It is clear by the terms of section 54 of the Transfer of Property Act that a contract for the sale of immoveable property

(5) 26 C. 531; 13 Ind. Dec. (N. S.) 941.

creates no interest in or charge upon the property in this country. It was pointed out, however, that no interest in or charge on the property is created even by an attachment and that Charu Chandra could have enforced a suit for specific performance of the contract contained in the letter of the 10th September 1910. He, therefore, had a right existing prior to the attachment within the meaning of Order XXXVIII, rule 10. The case of *Madan Mohan* v. *Rebati Mohan* (6) was relied upon in support of this contention. There is no doubt much force in this argument, but there is no evidence to show what the terms of the letter of the 10th September 1910 were or how far it gave any right to Charu Chandra which could have been enforced by a suit for specific performance. The point was not taken before the trial Judge and had it been taken strict proof of the contract, if any, contained in the letter of the 10th September would have been required. This letter was not produced and it is impossible to say how far it gave any right to Charu Chandra to insist upon an assignment of the property. A mere reference to such a letter in the deed of assignment of the 27th August 1913 is no evidence against the appellant, nor does the deed of assignment itself show what its terms were. No reason is given for its non-production and its contents must remain a matter of pure surmise. We cannot assume from evidence of this nature, especially as the question was not raised or discussed in the trial Court, that Charu Chandra acquired any enforceable rights under this latter at all. In these circumstances we are bound to hold that the attachment was not affected in any way by this matter.

A further question was raised on behalf of the appellant, namely that section 47 of the Civil Procedure Code was a bar to the present suit. This point was not taken in the written statement. The learned Judge considered that as Order VIII, rule 2, had not been complied with, the appellant was not entitled to raise the point. He further considered that as there had been no valid attachment of the property at all in Suit No. 300 of 1911, the plaintiffs in the present suit were not the representatives in interest of the judgment-debtors in that suit and that the section did not apply. This part of his judgment would appear to be open to several objections. The question is purely one of law and the facts upon which it has been raised are on the record. It is, therefore, open to the plaintiff to raise it at any stage of the suit. We do not think, however, that section 47 is a bar to the present suit. The suit was brought before the decree was put in execution and there were no proceedings then pending in which an application under section 47 could be made. The facts relied upon by the plaintiffs in their suit affect not the execution of the decree so much as the decree itself, which was passed on the 22nd November 1915 and which it is claimed should not have been passed at all in the face of the compromise of the 29th July 1913. Moreover, as the attachment of the shares of the defendants Nos. 2, 3 and 4 was set aside by the order of the 19th March 1921, that property is not now the subject of any attachment and the plaintiffs are not the representatives of those judgment-debtors by reason of having acquired their share in the colliery which no longer forms a part of the attached property. Had the appellant admitted this possibly, there would have been no necessity to claim a declaration so far as this portion of the property is concerned, but no such admission was made and it was contended that the whole property had been attached. In the result we think that the decree of the Subordinate Judge should be varied and that a decree should be entered in lieu thereof declaring that the plaintiffs are entitled to the $8\frac{1}{2}$-annas share in the Ranidih Colliery, which they purchased from the defendants Nos. 2 to 4, free from the attachment. The appellant has succeeded in part and is entitled to proportionate costs of this appeal.

The respondents will recover their proportionate part of costs of the lower Court.

Decree varied.

(6) 34 Ind. Cas. 953; 23 C. L. J. 115; 21 C. W. N. 188.

On both these points, there have in the past been a number of suits between some of the same parties,—one batch of suits in the Manamadura Munsif's Court, a second batch before the Special Deputy Collector of Ramnad and the third before the Deputy Collector of Devakottah It is contended for the appellants that the decisions in all these suits constitute *res judicata* so far as the parties and property concerned are the same. In the Manamadura suits, there was no appeal beyond the District Court except in two cases which came to the High Court and in those two cases, the High Court reversed the decision of the lower Courts. Mr. Moore accordingly holds that the question is not *res judicata* as regards the defendants in the Manamadura suits who did not appeal, because to hold otherwise would lead to certain startling results, and Mr. Venkataramayya also appears not to consider the decisions as *res judicata* and regards them as of small evidentiary value in view of the contrary opinion of the High Court. It is difficult to see why questions that have once been settled between the parties should not be deemed to be *res judicata* merely on the ground that similar questions between the same parties have been decided otherwise in other litigation, and the learned Vakil for the respondent does not support the finding of the District Judges on the grounds given by them, but so far as the case decided by the Manamadura Munsif is concerned, he relies on the language of section 11 of the Civil Procedure Code for holding that they are not *res judicata*. His contention is that under section 11, the Court which decided the first suit must have become competent at the time of such decision to try the subsequent suit and relies on a ruling in *Kunji Amma* v. *Raman Menon* (1). We do not think that this case really supports his plea. No doubt the Judges said that they were of opinion that the only reasonable construction to be put upon the words "Court of jurisdiction competent to try such subsequent suit" must be held to refer to the jurisdiction of the Court at the time when the suit was heard and determined, but that the Judges did not really mean to decide that the Court must be competent on the date of judgment and not on the date of the institution of the suits appears to be clear from the fact that they approved the view of the Calcutta High Court in *Gopi Nath Chobey* v. *Bhugwat Pershad* (2) and *Rughunath Panjah* v. *Issur Chunder Chowdhry* (3). In the former of these cases it was clearly held at page 707 as follows: 'The reasonable construction of the words 'in a Court of jurisdiction competent to try such subsequent suit' seems to us to be that it must refer to the jurisdiction of the Court at the time when the first suit was brought, that is to say, if the Court which tried the first suit was competent to try the subsequent suit if then brought, the decision of such Court would be conclusive under section 13, although on a subsequent date, by a rise in the value of such property or from any other cause, the said Court ceased to be the proper Court, so far as pecuniary jurisdiction is concerned, to take cognizance of a suit relating to that property." This view is followed in *Rughunath Punjah* v. *Issur Chunder Chowdhry* (3) and also *Rai Charan Ghose* v. *Kumud Mohun Dutt Chowdhry* (4). At the date of institution of the first suit in the Manamadura Court, that Court had jurisdiction to try the subsequent suit and the fact that that jurisdiction was taken away by the passing of the Estates Land Act shortly before the judgment was pronounced, would not make it a Court not competent to try the subsequent suit within the meaning of section 11. We, therefore, think that the decision of the Manamadura Munsif which was not appealed against constituted *res judicata* as well as the two decisions of this Court. So far as the cases decided by the Special Deputy Collector are concerned, there was no appeal and his decision is undoubtedly *res judicata*. In the third class of cases before the Deputy Collector of Devakottah, no appeal was preferred in some of the suits and his decision would, therefore, be final in those cases. So far, therefore, as the previous litigations related to the same land or between the same parties, we think that

(1) 15 M. 494; 2 M. L. J. 262; 5 Ind. Dec. (N. S.) 696.

(2) 10 C. 697; 5 Ind. Dec. (N. S.) 468.

(3) 11 C. 153; 9 Ind. Jur. 289; 5 Ind. Dec. (N. S.) 861.

(4) 2 C. W. N. 297; 25 C. 571; 13 Ind. Dec. (N. S.) 377.

the questions therein raised and decided must be held to be *res judicata*. There are, however, other cases before us to which the principle of *res judicata* will not apply and these will have to be decided on the merits. The contention of the respondent on the first of the two questions before us which was upheld by the District Judge is that the charge of Sarasari is illegal because it is an enhancement of rent. Rent was originally charged for dry crops on the suit dry lands, and the right to levy Sarasari now claimed is claimed on the ground that these lands have been irrigated by water taken from the landlord's tank and for this water, he is entitled to a reasonable compensation. It has been held in *Thayammal* v. *Muttia* (5). *Venkata Rao* v. *Vaithilinga Udayan* (6) and *Battina Appanna* v. *Yarlagadda Venkatoramalinganna* (7) that a charge for water taken by the tenant is not enhancement of rent. No doubt, under section 3 (11) of the Estates Land Act, such charge, even if not consolidated with the rent, will come within the definition of rent. But for that reason alone, it is not necessary to hold that the charge for water in excess of the prior dry rent is an enhancement of rent.

It is suggested that the landlord's remedy would be to sue for compensation for the use of water taken, but that, within the meaning of the Estates Land Act, would be in effect a suit for rent and would be governed by the provisions of that Act. Nor can he sue for damages for loss of water when, as a matter of fact, he has consented to the tenant taking that water. It is not disputed that any water taken was taken with the permission of the landlord, and we think it is only reasonable to infer from such taking by consent a contract between the parties that the landlord shall be entitled to a reasonable compensation for the water. The question, therefore, would be whether the charge of Sarasari, which is the average Varam collected on paddy lands in the village, is a reasonable charge. It is very difficult to fix exactly the proper charge for the water, for the quantity of water, taken must vary according to the season of the year and also the nature of the crop raised on the land. So far as the landlord is concerned, the most profitable use of the water would be to facilitate the cultivation of a paddy crop as it would result in his obtaining his share of the produce in paddy, and the landlord might well say that all the water taken from his tank should be utilised for such purpose. If the tenant utilised it for less remunerative crops, such as chillies and cotton, as in the present case, can he be heard to say that he should pay less? It is a somewhat difficult question, but we find that Sarasari has been levied in the past. Sarasari being a curious method of levying compensation, which would hardly suggest itself to a landlord in modern days, it is evident that it must be levied according to old existing custom, and this would also appear from the technical meaning which is attached to the word itself. By its levy the landlord gets no more for his water than he would get by supplying water to wet lands, and there seems to be no ground for depriving him of what he can ordinarily expect to get for his water. The tenant is not bound to take water to dry lands, and consequently he suffers no hardship by being asked to pay the full price for water taken by him. He has his remedy in his own hands, *i.e.*, he can cease to take water. The landlord on the other hand has not a similar remedy, for the application of the water to paddy crops or to Vanpayier crops lies in the tenant's hands. In these circumstances it seems to us that the levy of Sarasari by the landlord is only a reasonable and equitable compensation for water supplied by him, and must be allowed. As there is no finding as to whether water was taken for the suit years, appellant's Vakil says he will be satisfied with a mere declaration. The decree will, therefore, be modified accordingly.

As regards the cesses claimed, Mr. Moore allowed all the cesses of Varapattu and Varisaipattu lands. Mr. Venkatarmiah disallowed the cesses in the case of Varisaipattu lands and as regards Varapattu lands disallowed Amanji, Pakkilai and Tayermutti. The appellant's Vakil stated that he does not press Pakkilai and Tayermutti

(5) 10 M. 282; 3 Ind. Dec. (N. S.) 950.
(6) 12 M. L. J. 22.
(7) 42 Ind. Cas. 464; 33 M. L. J. 355; 6 L. W. 443.

Varapattu lands are the ordinary wet lands in respect of which the landlord and tenant divide the actual produce, while Varisaipattu lands are lands paying a fixed paddy rent.

The Special Deputy Collector disallowed Pakkilai, Tayermutti and Amanji and allowed the other cesses claimed, on the ground that "these cesses have been customarily paid by the landlords in kind as part of their rent." There can be little doubt that the cesses have been paid for a long series of years by the tenants without objection

The Karnam (P. W. No. 1) deposes that on Varapattu lands Kanganam, Eswaran Koil Mahamai, Kulavettu, Kadiraruppu (cooly), Karnam Swatantram, Kudivaram, Kaipichai are deducted as common charges and the balance divided between the landlord and tenant. Out of these common charges some go to the landlord and some to the *ryot*. He states that out of the Kadiraruppu 3 measures are taken out of every 14 Marakkals and added to the landlord's share as Amanji. As regards Varisaipattu lands he states that Kanganam, Kulavetu, Tayermutti, Amanji, Eswaran Koil Mahimai, Pakkilai Swatantram, Vamadai, Vaikalkattu are the cesses levied.

The plaintiff appeals against the decision of Mr. Venkataramiah disallowing the cesses claimed and the defendants have filed a memorandum of objections against the decision of Mr. Moore as regards the cesses allowed.

In our judgment in *Vadamali Thiruvanatha Sevuga Pandia Thevar Avergal* v. *Sankara Moorthi Naidu* (8) we have given what in our opinion are the tests to be applied and the considerations which should weigh with the Court in allowing or disallowing cesses which have been paid for a long time without dispute and to the difference between cesses which are deducted out of the gross produce and those deducted out of the tenant's share. We observed as follows: "In considering whether any particular cess claimed and which has been paid for a series of years is enforceable or not, the first thing to be considered is whether the cess claimed has any direct or proximate bearing on the purpose for which the land is let. If the cess is payable in respect of such purpose, it will *prima facie* be one which is binding on the parties and the onus will be on the tenant to show that owing to some special circumstances it is not binding on him. When the cesses are in their nature unconnected with the object for which the land is let, they can only be claimed by the landlord under contract between him and the *ryot*, supported by consideration or usage for which a legal origin is either proved or presumed from the nature of the cess and long course of payment." While on the one hand mere length of payment will not, as pointed out in *Sunaaram Iyer* v. *Theetharappa* (9), give to a cess, which is purely voluntary or which is on its face illegal, a binding character, payment during a long course of years will be presumptive evidence that the payment of a cess had a legal origin, if the cess is of such a nature that a contract to pay it may be reasonably inferred.

As regards cesses deducted out of the gross produce before division of the Varam, there is nothing to prevent the parties from agreeing that certain expenses, which they consider to be beneficial to both of them, should be met by them in common, and in such cases so long as the levying of the cess is not a device by the landlord to give himself a purely personal benefit, the purpose for which the cess is levied is immaterial. It will, of course, be open to the tenant to show that the purpose for which the cess is levied has failed or that the landlord has not been appropriating the cess to the purpose for which it is claimed and levied.

So far as cesses in connection with temples are concerned, they have been held to be purely voluntary in *Siriprapu Ramanna* v. *Mallikarjuna Prasada Nayudu* (10), *Rimalingam Chettiar* v. *Ramasami Aiyar* (11) and *Devanai* v. *Raghunatha Row* (12). Eswaran Koil Mahamai will, therefore, be disallowed.

As regards Varisaipattu land, there is obviously no necessity for Kanganam

(8) 49 Ind. Cas. 688; 42 M. 197; 36 M. L. J. 109; 9 L. W. 218; 25 M. L. T. 249.

(9) 40 Ind. Cas. 159.

(10) 17 M. 43; 3 M. L. J. 207; 6 Ind. Dec. (N. S.) 29.

(11) 13 M. L. J. 379.

(12) 18 Ind. Cas. 298; (1913) M. W. N. 886; 13 M. L. T. 351.

which is a cess for superintending harvest, as the landlord gets a fixed paddy rent irrespective of the produce and no supervision is necessary. Tayermutti and Pakkilai have been given up. Eswaran Koil Mahamai is for the reasons above given not enforceable. The Deputy Collector has disallowed Amanji, and it has not been shown that the cess is one that can be enforced.

We do not see sufficient grounds to disallow the other cesses. They have been paid for several years without objection and have been found by the Deputy Collector to have been paid for a long series of years as part of the rent. The decrees of the lower Courts as regards cesses will be modified accordingly.

Appellants will get costs in Second Appeals Nos. 1327—1353 and 1356—1361, will pay costs in 1956—1973, and on the memoranda of objections, each party will bear his own costs as also in Second Appeals Nos. 1354-1355.

These second appeals and the memoranda of objections having been set down to be spoken to this day, the Court delivered the following

JUDGMENT.—The statement submitted by the parties will be forwarded to the District Judge for report as to the correct amount to be awarded in each decree after hearing the parties. The report will be submitted within two months from the date of receipt of records in his Court and seven days will be allowed for filing objections.

These second appeals and the memoranda of objections coming on for hearing after the return of the report submitted by the District Judge, Ramnad at Madura, in compliance with the order of this Court, dated 18th December 1918, the Court delivered the following

JUDGMENT.—We have already held that the decision in certain previous suits constitutes *res judicata* between the parties, but the District Judge thinks that the question of cesses must be treated on a different footing. The right to levy cesses could and should have been raised in the prior litigation and the question must now be deemed to be *res judicata* In other respects the District Judge's report is accepted, but it must be noted that Vamadai Vaikalkattu is not claimed for Varapathu lands and it is admitted that Vasi was given up at the last hearing. No argument was addressed to us as regards fishing rent, and in this respect we express no opinion but confirm the findings of the District Judge. Decree will be drawn up in accordance with the above.

M. C. P.

Order accordingly.

PATNA HIGH COURT.
CIVIL REVISION No. 149 OF 1919.
August 20, 1919.
Present:—Mr. Justice Atkinson and Mr. Justice Adami.
BHAJAN AHIR—PETITIONER
versus
Musammat GANGESHWAR KUAR—OPPOSITE PARTY.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 40, 69 (1) (b)—Civil Procedure Code (Act V of 1908), s. 94 (c), (e)—Jurisdiction of Revenue Court to determine shares of produce to which landlord and tenant are entitled—Proceeding under s. 40, Bengal Tenancy Act Injunction restraining party from proceeding with application, legality of.

A Revenue Court is competent, under section 69 (1) (*b*) of the Bengal Tenancy Act, to decide a dispute between a landlord and a tenant as to the proper shares of the produce to which each is entitled. [p. 38, col. 2.]

A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under section 40 of the Bengal Tenancy Act restraining him from further proceeding with an application made by him under that section to a Revenue Court. [p. 38, col. 2.]

Appeal from a decision of the Munsif, Arrah.

Mr. *Parmeshwar Dyal*, for the Petitioner.

Mr. *Jal Gobind Prasad Singh* (with him Mr. *Purnenda Narain Sinha*), for the Opposite Party.

JUDGMENT.

ADAMI, J.—The petitioner moves this Court to set aside an order passed by the third Munsif at Arrah, in Title Suit No. 33 of 1 19, restraining the petitioner from further proceeding with an application made by him under section 40 of the Bengal Tenancy Act before the Deputy Collector at Arrah.

BHAJAN AHIR v. GANGESHWAR KUAR.

The petitioner is an occupancy *raiyat* and holds land on a *bhaoli* rent under the opposite party, his landlord. It appears that on the 16th November 1918 he applied to the Sub-Divisional Officer for the appraisement of the produce of that land under section 69 of the Bengal Tenancy Act, claiming that he should receive 60 per cent. of the produce while his landlord's share was 40 per cent. thereof. The landlord, opposite party, objected that she was entitled to get 50 per cent of the entire produce less 5 seers in each maund. The Sub-Divisional Officer held that a Revenue Court in proceedings under section 69 was not competent to decide what were the respective shares of the parties, and that the question could only be determined by a Civil Court.

On the 23rd December 1918 he ordered appraisement to be made on the share basis alleged by the petitioner, since the Amin reported it to be correct On the 27th February 1919, the petitioner and other tenants made an application, under section 40 of the Bengal Tenancy Act to the Deputy Collector, for the commutation of the produce rent payable by them into a cash rent. Then on the 4th April 1919 the landlord, opposite party, on the strength of the decision of the Sub-Divisional Officer in the proceedings under section 69 of the Bengal Tenancy Act, instituted a suit in the Court of the Munsif for a declaration that he was entitled to receive a rent in kind from the petitioner at the rate of 50 per cent. of the produce, less 5 seers per maund, and for the recovery of arrears due. On the same date the opposite party prayed for the issue of an injunction staying the proceedings under section 40 in the Revenue Court on the ground that the question in issue there would be the same as that to be decided by the Civil Court.

The Munsif rightly refused to issue an order on the Revenue Court to stay the proceedings under section 40, but he did issue an order against the petitioner, restraining him from proceeding with the section 40, Bengal Tenancy Act, case until the disposal of the civil suit and sent a copy of the order to the Revenue Court. He held that such an order was justified under clauses (*c*) and (*e*) of section 94 of the Civil Procedure Code in the ends of justice, in that the Revenue Officer might again consider that he was incompetent to decide the question of shares and might be guided by the decision in the case under section 69 to the detriment of the opposite party, plaintiff in the suit.

It is clear to us that, in the first place, the Revenue Court in the proceedings under section 69 was wrong in holding that the dispute as to the proper shares of the produce could not be decided in that Court, and in the second place, that the Munsif acted improperly in the circumstances of this case in ordering the petitioner to refrain from prosecuting his application under section 40.

Section 69 (1) (*b*) allows the Collector, if there is a dispute as to the division of the produce, to appoint an officer to divide it. A dispute as to the division of the produce apparently includes a dispute as to the shares into which it is to be divided. It would seem that the Sub Divisional Officer in the proceedings under section 69 and the Munsif as also the learned Vakil for the opposite party have relied on the decisions in the cases of *Mir Tapurah Hossein* v. *Gopi Narayan* (1) and *Nukheda Singh* v. *Ripu Mardan Singh* (2) in support of the contention that a Revenue Court cannot decide a dispute as to the shares in the produce, but neither of those rulings is in any way applicable. They merely determine that in proceedings under section 69 a Revenue Court has not jurisdiction to decide a *bona fide* dispute as to the character of the holding or as to the nature of the rent No such dispute existed in this case.

If the Sub Divisional Officer was not prepared to decide the issue as to the proper shares, he should have referred the dispute to the Civil Court under section 70 (5), but he was competent to decide it under section 69 (1) (*b*).

To come next to the order of injunction complained of in this application. It is clear to me that it was made in an improper exercise of the Court's discretion. The petitioner had under the law a right to apply for a commutation of the rent in kind into a cash rent, the relief sought for had nothing to do with the relief sought for by the opposite party in her suit, the commutation case was filed before the suit and in no sense was it a fraudulent or *mala fide* exercise of the petitioner's statutory rights; and the fact that the Munsif sent to the Revenue Court a

(1) 7 C. L. J. 251.
(2) 4 C. W. N. 230.

copy of his order restraining the petitioner from prosecuting his application was virtually an intimation to the Revenue Court that an injunction had issued against further proceedings. It is true that the letter addressed to the Deputy Collector was called a letter of request and the Deputy Collector was asked to adjourn the commutation application, but it virtually amounted to an injunction and the effect of the actual order issued against the petitioner was to forbid him further to take part in commutation cases, and the natural result of compliance with the order would have been the dismissal of his application for default of prosecution.

We find that the order restraining the petitioner from proceeding in the matter of his application under section 40 of the Bengal Tenancy Act was improper and we must, therefore, set it aside with costs in favour of the petitioner measured at three *gold mohurs*.

ATKINSON, J.—I agree.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2367 OF 1909.

July 5, 1911.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Carnduff.

RAM PRASAD NARAYAN—PLAINTIFF—APPELLANT

versus

DAUD DURZI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review—Bengal Tenancy Act (VIII B. C. of 1885), s. 104 sub-s. (2), order under, whether reviewable on ground of error.

Proceedings before the Revenue Authorities under sub-section (2) of section 104 of the Bengal Tenancy Act, 1898, as it stood before its amendment, were in the nature of a suit and an order made therein was in the nature of a decree. Consequently, such order is reviewable on the ground of error by the Settlement Authorities. [p. 40, col. 2.]

Appeal against the decree of the Subordinate Judge, Mozufferpur, dated the 11th June 1909, modifying that of the Munsif, Motihari, dated the 22nd February 1909.

Babus *Umakali Mukerjee* and *Ashoy Kumar Banerjee*, for the Appellant.

Babu *Sailendra Nath Palit*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for rent. The plaintiff claimed to realise rent at the annual rate of Rs. 26-8-9. The defendant resisted the claim on the ground that rent was payable by him only at the rate of Rs 22 13 3. Each side produced a settlement Khatian in support of his claim which bore the same date, namely, the 9th June 1897. The Court was, therefore, called upon to inquire under what circumstances the two Khatians, apparently contradictory, had been made. It transpired that under sub-section (2) of section 104, as it stood before its amendment in 1898, the Record of Rights was finally published on the 9th January 1897, and that so far as the present tenant was concerned, the rent was stated to have been settled at Rs. 22-13 3. Immediately after the final publication, an application appears to have been made on behalf of the landlord to the Assistant Settlement Officer to correct the entry. The Assistant Settlement Officer suggested a reference to the Settlement Officer and consequently on the 23rd July 1897 an application was made for alteration of the record to the latter officer. The Settlement Officer called for a report, as a result of which the record was amended, so that the rent payable by the defendant was entered as Rs. 26 : 0 instead of Rs 22 13-3. The proceedings before the Revenue Authorities further make it clear that the tenant appeared and agreed to this alteration. The plaintiff now seeks to recover rent at the altered rate. The defendant contends that the alteration in the Record of Rights was *ultra vires* because the Settlement Authorities had no jurisdiction to revise the order previously made. The Court of first instance gave effect to the contention of the landlord and made a decree in this favour. Upon appeal the Subordinate Judge has reversed that decision.

On behalf of the landlord, appellant, it has been argued that the Revenue Authorities had inherent jurisdiction to recall the erroneous order previously made and to modify the entry in the Record of Rights as published. On behalf of the respondent,

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this contention has been sought to be negatived by a reference to the case of *Shambhu Chandra* v. *Purna Chandra* (1). It has further been argued that the decisions of this Court in the cases of *Brahmanunda Mahapatra* v. *Arjun Kaut* (2) and *Durga Churn Law* v. *Haleen Mandal* (3) indicate that the decision of the Settlement Officer was in the nature of a decree and consequently could be revised only by way of appeal.

In our opinion the contention of the appellant is well founded and must prevail. The two cases upon which reliance is placed by the respondent, namely, *Brahmanunda Mahapatra* v. *Arjun Raut* (2) and *Durga Churn Law* v. *Hateen Mandal* (3), show conclusively that a decision under sub-section (2) of section 104 operates as a decree. It follows consequently that the Settlement Authorities have jurisdiction to review the decree on the ground that it is erroneous. This view is supported by the decision of this Court in the case of *Achha Mian Chowdhry* v. *Durga Churn Law* (4). It becomes unnecessary, therefore, to consider the wider question whether every Court has inherent power to review an erroneous decision. It may be pointed, however, that this view does receive support from the observations of their Lordships of the Judicial Committee in *Syud Tufuzzool Hossein Khan* v. *Rughoonath Pershad* (5) as also from the decision of this Court in *Haradhun Mookerjee* v. *Chunder Mohun Roy* (6). We are not unmindful, however, that the contrary view has sometimes been maintained: *Babaji* v. *Babaji* (7) and *Ramsing* v. *Babu Kisansing* (8). The decision of the Court of appeal in *Drew* v. *Lewis or Willis* (9) may also possibly support the view that it is competent to a Court to review its decision only where there is statutory authority in that behalf. As we have stated, however, it is not necessary for us to found our decision on that ground. We hold here that the proceeding before the Revenue Authorities was in the nature of a suit, that the order made by the Settlement Officer was in the nature of a decree and that the decree was consequently reviewable on the ground of error by the Settlement Authorities. In this view, it becomes unnecessary for us to consider in detail whether even, if we had been obliged to hold that the Settlement Authorities had no jurisdiction to review their order, it would have been open to the tenant, who had consented to the order, to challenge it on the ground that it was *ultra vires*. But we may observe that the observations of their Lordships of the Judicial Committee in *Ledgard* v. *Bull* (10) might possibly present an insuperable bar in the way of the respondent. In that case their Lordships held that when the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter and be bound by his decision on the merits when those are submitted to him. In the case before us it has been found that the alteration in the record was made by the Settlement Authorities upon the joint application of the landlord and the tenant, and it is clearly not open to the tenant to turn round and contend that the order was made without jurisdiction and is not binding upon him.

The result, therefore, is that the decree made by the Court of appeal below must be set aside and that of the Court of first instance restored with costs throughout.

Appeal allowed.

(1) 35 C. 176; 7 C. L. J. 103; 12 C. W. N. 122.
(2) 1 C. L. J. 310.
(3) 29 C. 252; 6 C. W. N. 238.
(4) 25 C. 146; 2 C. W. N. 137; 13 Ind. Dec. (N. S.) 99.
(5) 14 M. I. A. 40 at p. 48; 7 L. B. R. 186; 2 Suth. P. C. J. 434; 2 Sar. P. C. J. 656, Rafique & Jackson's P. C. No. 10; 20 E. R. 701.
(6) Marsh. 205; W. R. F. B. 66; 1 Hay. 577.
(7) 15 B. 650; 8 Ind. Dec. (N. S.) 438.
(8) 19 B. 116 (F. B.); 10 Ind. Dec. (N. S) 78.
(9) (1891) 1 Q. B. 450; 60 L. J. Q. B. 264; 64 L. T. 760; 39 W. R. 310; 55 J. P. 373.
(10) 13 I. A. 134; 9 A. 191; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S) 561 (P. C.).

GOLAB KUER *v.* BIBI SAIRA.

PATNA HIGH COURT.

CIVIL REVISION No. 216 OF 1919.

August 21, 1919.

Present :—Mr Justice Jawala Prasad and Mr. Justice Foster.

Musammat GOLAB KUER AND ANOTHER—PETITIONERS

versus

Musammat BIBI SAIRA AND ANOTHER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O IX, r. 2, 8—Plaintiff, failure of, to pay process-fee—Defendant, application by, for time to file written statement, whether amounts to appearance—Suit, dismissal of, for default—Conditions of order, non-compliance with—Revision - High Court, power of interference of.

Where a plaintiff has made default in paying the fee for service of a summons on the defendant, but notwithstanding this defendant applies to the Court for time to file written statements, the filing of such application amounts to an appearance by the defendant under rule 8 of Order IX of the Civil Procedure Code, and the Court would not be justified in dismissing the suit under rule 2 of that Order.

As rules 2 and 8 of Order IX of the Code require certain conditions to be satisfied in order to vest jurisdiction in a Court to pass an order thereunder, an order made by a Court, where these conditions are not fulfilled, is open to revision by the High Court under section 115 of the Civil Procedure Code.

Civil revision from a decision of the Subordinate Judge, Mozafferpore.

Mr. *Rajendra Prasad* for Mr. *Rai Guru Saran Prasad*, for the Petitioners.

Mr. *Fakhuruddin* for Mr. *Tahir*, for the Opposite Party.

JUDGMENT.—This application is directed against the order of the Subordinate Judge, dated the 9th May 1919, as being without jurisdiction. The order purports to dismiss Suit No. 31 of 1919 under Order IX, rule 2, of the Civil Procedure Code, on account of the failure of the plaintiff to pay *talbana* for service of summons on the defendants and to file copies of the plaint. The applicant contends that they, being defendants, had already entered appearance on the said date and the proviso to the said rule 2 bars the passing of the order under rule 2 and that the only order that the Court could pass was one under rule 8 of Order IX. The plaint was registered on the 12th March 1919 fixing the 9th May for settlement of issues. On 9th May, although the *talbana* was not paid for service of summons upon the defendants, and although no summons was issued, yet two of the defendants, the petitioners in this case, filed an application asking for time to file written statements. The plaintiff did not at all appear or take any steps to prosecute the suit.

It is contended on behalf of the opposite party that the mere filing of the application for time does not amount to an appearance by the defendant under rule 8. This contention cannot find favour with us, inasmuch as the appearance for the defendant is sufficient whether it be by the filing of written statements or by a petition to take time to file written statements. The Court could, therefore, pass an order only under rule 8 and had no jurisdiction to pass an order under rule 2 as against the applicants. No doubt the defendant No. 3, the husband of the plaintiff, did not enter any appearance on the 9th of May and it was open to the Court to make an order under rule 2 if any relief was claimed against that defendant.

It is next contended that this Court cannot interfere with the aforesaid order, however illegal or irregular, under section 115 of the Civil Procedure Code, as no question of jurisdiction is involved. Both rules 2 and 8 require certain conditions to be satisfied in order to vest jurisdiction in a Court to pass an order under those rules and if those conditions are not fulfilled, the Court has no jurisdiction to make an order under rule 2 or rule 8, as the case may be.

The first condition in order to give jurisdiction to make an order under rule 2 is that contained in the proviso that the defendant should never have appeared at all. Thus if the defendant does appear in spite of non-service of summons, the Court's jurisdiction to pass an order under rule 2 ceases. If, on the other hand, the defendant does appear and the Court does not make an order under rule 8, the Court then refuses to exercise the jurisdiction vested in it by Order IX, rule 8 It was held in some of the cases cited in Mullah's Civil Procedure Code that to pass a decree *ex parte* against a defendant, treating the delivery of summons by post to a person who was not shown to have been a defendant as a good service, is a material irregularity which affects the exercise of the jurisdiction of

the Court and as such is fit to be revised under section 115 of the Civil Procedure Code. The contention of the opposite party is, therefore, overruled and the order of the 9th of May of the Court below is set aside, and the suit will be dismissed as against the defendants Nos. 1 and 2 under Order IX, rule 8.

The order of this Court dated the 6th August 1919 staying Title Suit No. 79 of 1919 in the Court of the Subordinate Judge, first Court, Patna, is hereby withdrawn.

Application accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 869 OF 1918.

May 12, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Cuming.

BHOLA NATH CHOWDHURI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

HARIMANI DASI AND ANOTHER— DEFENDANTS—RESPONDENTS.

Execution of decree—Hindu Law—Widow, estate of, sold in execution of decree Purchaser, estate taken by —Claim to absolute estate—Burden of proof—Sale of widow's estate and reversioner's interest jointly, effect of.

Where an auction-purchaser of the right, title and interest of a Hindu widow sets up an absolute estate, it is for him to prove that something more than is evidenced by the sale certificate passed to him, and, in the absence of other materials, it is not for a reversioner in a suit brought by him for possession to prove that an absolute estate had not passed. [p. 42, col. 2; p. 43, col. 1.]

Where a reversioner joins a widow in a conveyance by which the widow sells her widow's estate and the reversioner his reversionary interest in favour of a reversionary daughter, the sale is good and operative and cannot be assailed. [p. 43, col. 1]

Appeal against the decree of the District Judge, Burdwan, dated the 21st February 1918, affirming that of the 1st Munsif, Burdwan, dated the 1st September 1916.

Babus *Dwarka Nath Chuckerbutty* and *Hira Lal Sanyal*, for the Appellants.

Babus *Mahendra Nath Roy* and *Peary Mohan Chatterjee*, for the Respondents.

JUDGMENT.—This is a suit by reversioners. It relates to two sets of properties which originally belonged to one Krishnahari Roy. He died leaving a widow named Jadumoni. The plaintiffs are the representatives of the reversioners. Jadumoni died in 1319 B. S. Schedule (*kha*) related to five plots of land. The plaintiffs' claim as regards plots Nos. 3 and 4 was given up by them and plots Nos. 1, 2 and 5 are to be dealt with.

These plots Nos. 1, 2 and 5 were sold at Court sale. It appears from the written statement that plots Nos. 1 and 2 were purchased by Rameswar in the name of his brother-in-law Nityananda and plot No. 5 was purchased by the Burdwan Raj at an auction sale on the 21st *Baisak* 1264. The Maharaja sold that plot to Rameswar on the 18th *Chait* 1282. Rameswar made a gift of it to his daughter defendant No. 1 on 10th *Kartick* 1284 and she is in present possession thereof. Both the Courts below have treated the plaintiffs' claim in respect of these plots as barred by limitation. They held that the present law of limitation is not applicable, but the sale having taken place before 1871, the plaintiffs are barred as 12 years had elapsed from the date of sale.

The appellants contend that their cause of action was not upon the sale, but upon the death of the widow and they refer to Exhibit D, which relates to plot No. 5 as showing that what was sold was the right, title and interest of the judgment-debtor, namely of Jadumoni. The learned District Judge has held that there is nothing to show that it was the widow's estate that was sold, and inasmuch as the sale took place 60 years ago, the plaintiffs are barred. The only document of title which has been produced is Exhibit D, which shows that the widow's right, title and interest only was sold and nothing more No doubt it was held in *Jugul Kishore* v. *Jotendro Mohun Tagore* (1) that it was necessary to look into the decree and the nature of the suit to ascertain what was really sold in execution of the decree. These documents are not forthcoming now. But it is clearly upon the person asserting an absolute estate having purchased the right, title and interest of a Hindu widow as shown by the sale certificate to show that something more has passed to him.

In the absence of other materials, therefore, we do not think that the learned Judge

(1) 10 C. 945 11 I. A. 83; 9 Ind. Jur. 155, 4 Sar. P. C. J. 553, 5 Ind. Dec. (N. S.) 657 (P. C.).

was right in throwing upon the plaintiffs the Burden of proving that an absolute estate had not passed. It was laid down as early as the case of *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (2) that only when the estate of the husband was sold or where possession was taken from the widow adversely that a suit not instituted within 12 years would be considered as barred even as against the reversioners. But this particular case is excepted. We have also referred to the sale-proclamation Exhibit F2, which contains nothing more than the name of the Maharaja as decree-holder and the name Jadumoni as the judgment debtor.

We think, therefore, that the plaintiffs were in time in instituting the suit so far as plot No. 5 is concerned. It is admitted that the same sale upon the same decree governs the other two plots, namely, Nos. 1 and 2, although no documents are forthcoming which relate to them. The fact of the purchase at that time from the Hindu widow who held the estate as such, shows that nothing more than a widow's estate passed.

We are asked, having regard to the way in which the learned Judge treated this matter in the Appellate Court, to remand this case for further evidence. There is no indication whatever that any further evidence is or can be forthcoming. The whole of the case of defendant No. 1 is set out in paragraph 15 of her written statement. We do not think that this is a fit case for remand on this point.

The appeal, therefore, so far as plots Nos. 1, 2 and 5 of Schedule (*kha*) are concerned is allowed.

After the sale of these properties what remained to the widow were the properties mentioned in Schedule (*ka*). She purported to deal with them in 1891. It was an alienation in which the then reversioner Rameswar joined, the alienation being in favour of Rameswar's daughter. It purports to be a conveyance by which the widow was selling her widow's estate and the reversioner his reversionary interest, that is to say, both of them joined in the conveyance in favour of the reversioner's daughter. It has been held in *Nobokishore Sarma* v. *Hari Nath Sarma* (3) that such a sale is good and operative. This case has been dealt with in *Debi Prosad Chowdhry* v. *Golap Bhagat* (4). Sir Lawrence Jenkins, C. J., held that the decision of that case was not assailable and the validity of the sale depended upon the whole of the estate having been alienated with the consent of the reversioner. The learned District Judge has found that Jadumoni parted with all her properties by that document and that the next reversioner joined with her at that time. We think he was quite right in applying the principle laid down in the case of *Debi Prosad Chowdhry* v. *Golap Bhagat* (4), and we uphold his decision so far as the properties in Schedule (*ka*) are concerned.

Each party will bear his own costs throughout.

Appeal allowed in part.

(2) 9 W. R. 505; B. L. R. Sup. Vol. 1008 (F. B.).
(3) 10 C. 1102; 5 Ind. Dec. (N. S.) 737.
(4) 19 Ind. Cas. 273; 17 C. W. N. 701; 17 C. L. J. 499; 40 C. 721.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1034 OF 1918

August 7, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Das.

LOKORAM, MINOR, THROUGH GRANDMOTHER MANI KUARI—APPELLANT

versus

BIDYA RAM MAHTO AND ANOTHER—RESPONDENTS.

Evidence Act I of 1872), s. 116—Landlord and tenant—Estoppel, extent of—Tenant, whether can question status of landlord.

Under section 116 of the Evidence Act a tenant is precluded from denying the title of his landlord, but it is open to him to question the status of his landlord. [p. 44, col. 2.]

Appeal from a decision of the Judicial Commissioner, Chota Nagpur.

Mr. *Sushil Madhab Mullick*, for the Appellants.

Mr. *Atul Krishna Ray*, for the Respondents.

JUDGMENT.

COUTTS, J.—This was a suit for a declaration that certain lands, which were specified in schedules *ka* and *kha* of the plaint, were the plaintiff's *raiyati* lands and that they

were held by the defendant No. 1 as an under-*raiyat*. The plaintiff's case was that the Maharaja of Chota Nagpur gave his grandfather Churan Ram a *ticca* of Mouzah Jamira in which the lands given in schedules *ka* and *kha* are situated and that he also gave the plaintiff's father Madho Ram the lands specified in these schedules as his *raiyati* holding and that Madho settled these lands with the defendant No. 1 as an under *raiyat*. The defendants, on the other hand, contend that no *raiyati* interest was created in Madho Ram and that the settlement with them was a *raiyati* settlement from the tenure holder. The Court of first instance has found that there was no *raiyati* interest created and that the status of the plaintiff is that of a tenure-holder and that the defendants are *raiyats*. The suit was accordingly dismissed and this decision has been upheld on appeal by the Judicial Commissioner. The plaintiff has now appealed to this Court.

The first point which is urged before us is that the learned Judicial Commissioner has approached the case from a wrong point of view, inasmuch as he has stated that the plaintiff asserts that previously the lands had been held by Churan Ram as a *raiyati* holding, whereas in fact the plaintiff's case was not that the lands had been held by Churan Ram as his *raiyati* holding, but that they had been held by Madho Ram. There is no doubt that the plaintiff's case originally was, that the land was held by Madho Ram as a *raiyati* holding and that the Court of first instance found that this was not so, but apparently the case which was placed before the learned Judicial Commissioner was that it was Churan Ram who held these lands as a *raiyati* holding. In any case, however, there is a distinct finding of fact by both the Courts that there was no *raiyati* holding at all and that the whole interest that the plaintiff or his predecessor had was that of a tenure-holder. It is, however, urged that even if this be so, the defendants are estopped from denying the plaintiff's *raiyati* interest inasmuch as they executed *kabuliyats* in the year 1895, 1900 and 1906, in which the lands in suit are described as the *raiyati* lands of plaintiff. The section of the Evidence Act which refers to estoppel of a tenant is section 116, which runs as follows:—

"No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of such tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given."

Now the defendants have never denied the plaintiff's title, but it has been strenuously urged by Mr. Sushil Madhab Mullick on behalf of the appellant that not only does the section include denial of title but denial of status. He admits, however, that he can find no authority in support of his contention and, in my opinion, it is untenable. All that the section refers to is the title of the landlord and not his status, and it is impossible in my opinion to read more into the section. If then there is no estoppel, the whole case is concluded by the finding of fact which has been arrived at by both the Courts below, that neither the plaintiff nor his predecessor had any *raiyati* interest. Under these circumstances I would dismiss this appeal with costs.

DAS, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 835 OF 1917.

October 11, 1918.

Present:—Mr. Justice Oldfield.

VALLIAMMAI NADATHI—PLAINTIFF—PETITIONER

versus

ASEERVADA NADAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLVII, rr 1, 7—Provincial Small Cause Courts Act (IX of 1887), s. 25—Review, grant of—Sufficient cause—Fresh evidence, discovery of, effect of—Appeal or revision, interference in—Revision in small cause matters—Discretion of Court, exercise of.

Where a review is granted for sufficient cause, the control to be exercised by an Appellate or Revisional Court need not be strict and when the Court has applied its mind to the circumstances, such control

may be exercised with reference to every presumption in favour of its having done so correctly. [p 45, col 2.]

The simple fact that fresh evidence will alter or is expected to alter a decision already arrived at is ordinarily not a sufficient cause for granting a review. [p 46, col. 1.]

Although Order XLVII, rule 7, Civil Procedure Code, is not applicable to Small Cause Courts, its provisions do not limit the discretion which the High Court possesses under section 25 of the Provincial Small Cause Courts Act and should not be used except for substantial reasons [p. 45, col. 2; p. 46, col. 1]

Meduru Brahmayya v. *Vedula Yellamma*, 36 Ind. Cas. 437; 31 M. L. J. 509; (1916) 2 M. W. N. 278; 4 L. W. 408 and *Bhagela Kuer* v. *Abdul Rahman*, 40 Ind. Cas. 79, explained and distinguished.

Petition under section 25 of Act IX of 1887, praying the High Court to revise the order and revised decree of the Court of the Subordinate Judge, Tuticorin, in Miscellaneous Petition No 69 of 1917 and Small Cause Suit No. 961 of 1916.

FACTS appear from the judgment.

Mr. *M. D. Devadoss*, for the Petitioner — There were no good grounds for granting the review. The lower Court finds by implication that the defendant was not diligent in securing new evidence and his costs have not been allowed. The fact that the original decision was in fact altered by the new evidence will not justify the granting of the review.

The order can be revised by the High Court, as it is evident that the Court did not apply its mind to the facts stated in the defendant's affidavit.

Mr. *T. V. Venkatrama Ayyar*, for the Respondent – It is not necessary that the Court should have acted on the circumstances disclosed in the defendant's affidavit. It must be presumed that it had independent reasons for granting the review. Such a presumption is obligatory. See *Meduru Brahmayya* v. *Vedulu Yellamma* (1).

The lower Court has stated that the granting of the review did in fact alter its decision. That is 'sufficient cause.' See *Bhagela Kuer* v. *Abdul Rahman* (2).

JUDGMENT.—The facts in this case were of an ordinary character. Defendant's defence was not established, because his evidence on certain points was deficient. On this account the lower Court at the first trial found against him. He afterwards applied for a review on the ground of discovery of fresh documentary evidence. The present petition is against the order granting it and the decision passed on that evidence in his favour.

The only ground on which the review was asked for, was that the fresh evidence could not be discovered earlier in spite of the use of due diligence. The lower Court did not find directly whether this was so. But, as in dealing with costs it said that defendant had not used due diligence, it presumably intended to find against him; and, as he adduced nothing on the point except a general assertion in his affidavit, there is no reason for rejecting this finding. It has mentioned no other reason for allowing the review.

I am asked, however, with reference to *Meduru Brahmayya* v. *Vedulu Yellamma* (1), to assume that the lower Court had sufficient reason independently of anything on which defendant relied before it; and it is argued that, as such assumption is obligatory with reference to the authority cited, there can be no question of revision in connection with this or any other case, in which the review has not been granted in consequence of a discovery of fresh evidence or contravention of rule 2. It may be conceded that with reference to a review granted for sufficient cause, the control to be exercised by an Appellate or Revisional Court need not be strict and, when the lower Court has evidently applied its mind to the circumstances, may be exercised with reference to every presumption in favour of its having done so correctly. But I do not think that the learned Judges meant more in the case cited for, if their decision is to justify defendant's contention here, it must mean that any Court is at liberty arbitrarily to hold a new trial of a case, which it has decided, or that its action cannot be scrutinized by superior authority, whether it has or has not considered whether such sufficient cause is available, since it is a presumption of law that it has done so. I cannot think that the learned Judges contemplated any such result. It may be observed that in any case their decision was given on Order XLVII, rule 7, Civil Procedure Code, which is not applicable to Small Cause Courts and, though I should be inclined to follow the principles of that rule generally in deal.

(1) 36 Ind. Cas. 437; 31 M. L. J. 509; (1916) 2 M. W. N. 278; 4 L. W. 408.

(2) 40 Ind. Cas. 79.

ing with Small Cause Court revision work, I do not think that they can be relied on as limiting the discretion, which the High Court possesses under section 25, Act IX of 1887, and which should not, in my opinion, be used except for substantial reason. Lastly, it is urged that the lower Court did in fact allege sufficient cause, when it observed that its decision was altered by the evidence newly admitted; and *Bhagela Kuer* v. *Abdul Rahman* (2) is relied on. I am not prepared to dissent from that decision. But the principle involved must, in my opinion, be applied with reference to the circumstances of the case, the gravity of the consequence of not applying it and the character of the party's default. For otherwise it would mean that review could be claimed in every case, since *ex hypothesi* the new evidence will alter or is expected to alter the result; and there would be no sort of finality in litigation. The present case presents, as I have said, no special features; and, in their absence, the lower Court, in my opinion, committed a material irregularity in allowing a review in the present case, simply because the fresh evidence would result in altering its decision, if that in fact was its reason.

The lower Court rejected the reason, for which the defendant asked for a review, and granted one either without any sufficient reason or, if it had one, without exercising any judicial discretion in respect of it. Its order, in these circumstances, cannot be sustained and must be set aside, its decree, dated 15th December 19 6, being restored with costs throughout, including those in the revision petition.

M.C.P.

Petition allowed.

CALCUTTA HIGH COURT.
CIVIL SUIT No. 183 OF 1916.
November 26, 1918.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

SOVA CHAND BHUTORIA—
DEFENDANT—APPELLANT
versus
HURRY BUX DEORA AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 12, Sch. I Art. 158—Award, filing of, what amounts to—"Court," meaning of—Application to set aside award—Limitation—Time spent in obtaining copy of award, exclusion of.

The word "Court" in Article 158 of Schedule I to the Limitation Act means the Court, and not the chief ministerial officer of the Court, such as, in the case of a High Court, the Registrar. And "submission" in that article means submission to the Court and not to such officer. [p 47, col 1.]

In computing the period prescribed for an application to set aside an award the time requisite for obtaining a copy of the award should be excluded. [p. 47, col. 2.]

Appeal preferred from the judgment of Greaves, J., dated the 5th April 1918.

Mr. *N. Sirkar* (with him Mr. *S. C. Bose*), for the Appellant.

Mr. *S. R. Das* (with him Mr. *H. D. Bose*), for the Respondents.

JUDGMENT.

WOODROFFE, J.—The facts are fully set forth in the judgment of Greaves, J., which I need not repeat. It is sufficient to say that there was an award in an arbitration made in a suit and that this award was set aside by the Court. When it was set aside, Counsel for the party now appellant stated at the Bar that having considered the materials before him, he could not resist the order which the plaintiff sought and which was in fact made. A review of this order was then asked for by the appellant on the ground that the application to set aside the award was barred by limitation under Article 158 of the Indian Limitation Act (1908), more than 10 days having elapsed since the date when the award was submitted to the Court. This involves a consideration of the question of the meaning of the words "submission" and "Court".

In the appeal it is contended on the authority of the decision of Harington, J., in the case reported as *Nobin Kally Dabee* v. *Ambica Churn Banerjee* (1) that the time from which limitation runs is the date on which the award is received by the Registrar (in this case the 10th October 1917), and not the date on which the award is filed (in this case the 22nd November). Assuming that this decision is correct, it is not established that the application to set aside the award was

(1) 5 C. W. N. 813.

barred, for the respondent is entitled to exclude the time requisite for obtaining a copy of the award. An application for copy was made on 3rd September. This application was premature in that no award had then been received. When, however, it was received on the 10th of October, the application still subsisting took effect and in fact it is found that it was on the strength of this application that a copy was subsequently given. The question then is what was the time "requisite." From the 10th October to the 17th November the Court was closed and on the 22nd November the award was filed.

A copy could not under the rules be given of the award until it was filed and from 22nd to 27th November was taken up in supplying a copy of the award previously filed. There is no difficulty here, unless it is shown that it was the duty of the respondent to file the award and that he could and should have done so between the 17th and 22nd November. But the duty of the respondent in this respect is not, I think, made out. No provision to that effect has been shown us and on the contrary rule 10, Schedule II, of the Civil Procedure Code provides that the arbitrator should cause the award to be filed and notice of the filing shall be given to the parties. It cannot be said, therefore, there was any laches and the time during the period 10th October and 27th November should be excluded. It is not, as the learned Judge holds, that time commenced to run from the 27th November, but it commenced to run (on this hypothesis) from the 10th October but the time requisite for obtaining a copy must be excluded.

I am not, however, at present satisfied that the decision of Harington, J, is correct.

Having regard to the aforegoing facts it is not necessary finally to decide the matter, but it seems to me that the word "Court" in Article 158 of the Limitation Act means "Court" and not its Registrar, and "submission" means submission to the Court, which again according to Schedule II, section 10, of the Civil Procedure Code is to be done by filing the award in Court. I feel a difficulty in holding with Harington, J., in *Nobin Kally Dabee* v. *Ambica Churn Banerjee* (1) that time runs not from the time the award is filed in Court but from the time it arrives at the Registrar's Office. If time ran from the 22nd November, five days must be excluded for the obtaining of a copy. Copy was not obtainable on the application of the 3rd September till the 27th November so that these five days must be excluded and, therefore, the application of the 6th December was in time. Though the result at which I have arrived is the same, I do not agree with the opinion expressed in the judgment under appeal that time commenced to run from the 27th November when a copy of the award was first obtainable. Time on this hypothesis commenced to run on the 22nd November when the award was filed, but under section 12 of the Limitation Act in computing the period of limitation prescribed for an application to set aside an award the time requisite for obtaining a copy of the award shall be excluded.

Rule 1, Chapter XXIII, appears to have been passed after Harington, J.'s judgment and from its wording seems to have been based on that decision. Rule 10 of Schedule II of the Code was section 516 of the earlier Code in force prior to the judgment of Harington, J. This rule 1 does not appear to be in conformity with the provisions of rule 10, Schedule II of the Code, which provides for the arbitrator causing the award to be filed and for notice being given to the parties. It does not say anything about submission to the Registrar for the purpose of being filed, notice by the Registrar and so forth. If then time commenced to run either on the 10th October or 22nd November, it does not appear that the application was barred. As regards the contention that if the argument as to limitation fails the Court should have allowed the evidence of the arbitrator to be given when the application to set aside the award was made, Counsel for the defendant said that having considered the materials before him he could not resist the order which the plaintiff sought. This case, therefore, is not one upon which the appellant should be allowed at this stage further enquiry on the facts as to the merits of the case. The allegations as to the alleged misconduct on the part of the arbitrator are not satisfactorily answered in the affidavits filed on behalf of the appellant and in my opinion the appeal fails and should be dismissed with costs.

SANDERSON, C. J.—I agree.

Appeal dismissed.

ABDUL JALIL KHAN *v.* MAN SINGH.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 33 OF 1918-19.

June 11, 1919.

Present:—Mr. Ferard, S. M., and Mr. Hopkins, J.-M.

Kuar ABDUL JALIL KHAN—APPELLANT

versus

MAN SINGH—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 11 (a)—"Lease for a term of not less than seven years," meaning of—Lease reserving right of re-entry, whether covered by section - Occupancy rights, accrual of.

The intention and meaning of "lease for a term of not less than 7 years" in section 11 (*a*) of the Agra Tenancy Act is that from the commencement of the period the tenant shall have a certainty of freedom of disturbance for 7 years with a *quid pro quo* to the landlord in the provision that the tenant shall not count the period towards accrual of occupancy rights. A condition in the lease giving a power of re-entry to the landlord within the 7 years cuts at the very root of the principle which the law is intended to cover. [p 48, col. 2]

Where under a lease purporting to be for seven years, the landlord retains the power of re-entry on the whole or any unspecified part of a holding within the seven years, the lease cannot be regarded as one "for a term of not less than seven years" under proviso (*a*) to section 11 of the Agra Tenancy Act so as to preclude the tenant from counting the seven years towards accrual of occupancy rights. [p. 48, col. 2.]

Second appeal from the order of the Commissioner, Meerut Division, dated the 9th January 1919, in the case of ejectment.

JUDGMENT.

FERARD, S. M.—There is only one point in dispute in this appeal. Shib Singh, respondent, held for the years 1315 to 1321 under a lease. It, or rather the counterpart, is on record. It purports at the outset to be a 7 years' lease, but it contains a condition, among others, which have not been and need not be discussed, that if the landlord specially requires part of the land (*kisi qadr juz*) for "planting a grove or building a house or well, etc.," the tenant shall give it up on a proportionate reduction from the rent. He is also under clause 7 of the lease to be liable for ejectment for breach of any of its conditions, which covers this condition. The Commissioner holds that the effect of this condition is that the lease is not one "for a term of not less than 7 years" within the meaning of section 11 (*a*), Tenancy Act, and the tenant can, therefore, count the 7 years towards accrual of occupancy right. This view is, I consider, correct. It is quite immaterial that the landlord did not try to exercise his right of re entry on any part of the holding during the seven years. The intention and meaning of "lease for a term of not less than 7 years" in section 11 (*a*) is that from the commencement of the period the tenant shall have a certainty of freedom of disturbance for the 7 years, with a *quid pro quo* to the landlord in the provision that the tenant shall not count the period towards accrual of occupancy rights. The condition in the lease giving a power of re-entry to the landlord within the seven years cuts at the very root of the principle which the law is intended to cover, for the tenant cannot know whether in one year the landlord may not require him to vacate some part of the holding—it may be worst or it may be the best—he has not complete stability of tenure for 7 years over any part of his holding, and is proportionately discouraged from putting money into improving his land. I must agree, therefore, with the Commissioner that when the landlord retains under a lease the power of re-entry on the whole or any unspecified part of a holding within the seven years, the lease cannot be regarded as one "for a term of *not less* than seven years" under section 11 (*a*). The appellant urges that in petition No. 45 of 1917-18 my predecessor took a different view. I have read this decision, it was not a considered decision on this point—the appellant not having based his case upon it originally. The Board's decision in Petition No. 37 of 1917-18, *Nanpat* v. *Asghar Ali*, deals with the same point and adopts the view which I hold in the present case. The appellant further suggests in his third ground of appeal that the re-entry condition should be disregarded altogether, because it is inconsistent with the provisions of the Act and the landlord could not have enforced it if he had tried; that he could not have brought a suit to eject under section 57 (*c*) successfully if the tenant had refused to vacate any required portion. He cannot, however, indicate precisely with what provision of the Act the condition is inconsistent. He alludes vaguely to section 3. Now section 3 (*c*) certainly says a land-holder shall not eject otherwise than in accordance with the provisions of the Act, but he does not point out nor do I see myself any provision

of the Act which bars a condition in a lease that the landlord shall have power of partial re-entry within the seven years' term, and when the tenant has accepted the condition there seems no reason why a suit under section 57 (*c*) should not lie for breach of the condition by the tenant. But the condition takes the whole lease out of the category of leases "for a term of not less than seven years" in the complete sense in which that term is intended in section 11 (*a*), and I would dismiss the appeal with costs. This governs cognate Appeals Nos. 34, 35, 36, 37 and 38.

As the point involved is of some importance, the judgment will go to my colleague for concurrence.

HOPKINS, J. M.—I concur. A land holder is entitled under section 11 (*a*) of the Tenancy Act to prevent the acquisition of a right of occupancy in any land by granting the tenant of it a registered lease for a term of not less than seven years The object of the lease is that the tenant should have security of tenure. If the tenant is liable to be called upon to surrender some unspecified portion of the land at the pleasure of the land-holder, he has no security as regards any part of it. If he is liable to surrender the whole, he is clearly in no better position than a tenant at-will.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 3423 OF 1910.

February 10, 1913.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

NAJABAT ALI—PETITIONER

versus

BIBI KADIRAN—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Objection abandoned by Pleader Subsequent objection by successor of pleader, whether can be entertained—Irregularity—Revision—Bengal Land Registration Act (VII B. C of 1876), s. 78, scope of—Tenant, whether can waive provisions of section—Suit for arrears of rent assigned to plaintiff—Registration, whether necessary.

Where an objection, taken by the Pleader for the defendant, is abandoned, the Court acts with material irregularity in the exercise of its jurisdiction in entertaining such objection raised at a subsequent stage of the proceedings by the successor of the Pleader who originally abandoned it. [p. 50, col. 1.]

The provisions of section 78 of the Bengal Land Registration Act were framed for the protection of the tenant, and he is free to waive that benefit. If he does waive it, he cannot be permitted at his choice to resile from the position deliberately adopted by him. [p. 50, col 1.]

Where the purchaser of the interest of a landlord as well as the back rents, sues to recover these rents as well as the rent due since his purchase, it is sufficient for him to prove during the trial that his name was registered subsequent to the institution of the suit. [p 50, col. 2.]

Civil Rule against the decision of the District Judge, Bhagalpur, dated the 28th February 1910, affirming that of the Munsif, Bhagalpur, dated the 20th November 1909.

Moulvi *Muhammad Mustafa Khan*, for the Petitioner.

JUDGMENT.—We are invited in this Rule to set aside a decree of dismissal in a suit for rent, in which the value of the claim was under Rs. 100. On the 2nd July 1903 the plaintiff purchased the interest of the landlord as well as the back rent due. On the 5th February 1909 he instituted this suit for recovery of arrears for 1905, 1907, 1908 and two instalments of 1909. The claim in respect of the years 1905, 1907, 1908 was for back rent to which he had acquired title by purchase. The remainder of the claim has accrued due since his purchase. The defendant resisted the claim on the ground, among others, that the plaintiff had not registered his name under the Land Registration Act of 1876, and was consequently not competent to sue in view of the provisions of section 78. It is stated on behalf of the plaintiff in this Court, and not denied on the part of the defendant, that this objection was abandoned by the Pleader for the defendant, in the Court of first instance. The plaintiff, however, applied to the Revenue Authorities for a copy of the land registration decree. When the case came on for trial, a new Pleader appeared for the defendant and was allowed to press this point, although it had been abandoned by the Pleader who originally appeared for the defendant. The plaintiff was taken by surprise, and as he was not ready with the copy of the land registration decree, the suit was dismissed. He subsequently appli-

ed for review of judgment. Notice was thereupon issued to the defendant and although the copy of the land registration decree was produced, the application for review of judgment was ultimately dismissed. An appeal against the original decree was then lodged before the District Judge, and was sought to be supported on the ground that it was not obligatory upon the plaintiff to have his name registered under section 78 of the Land Registration Act in respect of the back rent. It does not appear, however, whether the copy of the land registration decree, which had been filed in the Court of first instance along with the application for review of judgment, was produced before the District Judge. With regard to the back rent, the District Judge held that the plaintiff was bound to have his name registered precisely in the same way as for rent which had accrued due in his time. We are now invited to set aside the order of the Court of first instance which has thus been affirmed by the District Judge. In our opinion the Court of first instance acted with material irregularity in the exercise of its jurisdiction.

After the objection, which was of an entirely technical and, as is plain on the facts of the present case, an unsubstantial character, had been abandoned, it should not have been allowed to be revived at the hearing to the detriment of the plaintiff. The provisions of section 78 of the Land Registration Act were framed for the protection of the tenant, and the tenant is free to waive that benefit. It is also indispensable that if he does waive them, he cannot be permitted at his choice to resile from the position deliberately adopted by him. If this view were not taken, the gravest injury might be done to the plaintiff, as is illustrated by the very case now before us. The copy of the land registration decree has been produced before this Court, and there is no room for dispute that the plaintiff has complied with the requirements of the law. But with regard to the back rent the District Judge has taken an obviously erroneous view. The case of *Syed Serapat Hossein* v. *Tarini Prosad Dobey* (1) shows that the provisions of section 78 of the Land Registration Act have no application to the case of a person to whom rent has been assigned by a proprietor whose name has not been registered under the Statute. In the case before us, the name of the vendor of the plaintiff was registered under the Land Registration Act. The plaintiff could not very well have been invited to do what was impossible, namely, to have his name registered in respect of the period during which he had no title and for which the name of his predecessor in-interest was registered in accordance with law. We must consequently hold that the suit should not have been dismissed for the reasons stated by the Court below. We may further point out, as has been repeatedly laid down [*Alimuddin Khan* v. *Hira Lall Sen* (2), *Belchambers* v. *Nawab Sir Syed Hussain Ali Mirza Bahadur* (3) and *Abul Khair* v. *Meher Ali* (4)], that it would have been sufficient for the plaintiff to prove during the trial that his name was registered subsequent to the institution of the suit. In the present case, his name was registered before the institution of the suit.

The result is that this Rule is made absolute, the decree of the Court below set aside and the case remanded to the Court of first instance for re trial in the presence of both the parties. As the Rule has not been opposed, we make no order as to costs.

Rule made absolute; Case remanded.

(1) 11 C. W. N. 141.

(2) 23 C. 87; 12 Ind. Dec. (N. S.) 59 (F. B.).
(3) 2 C. W. N. 493.
(4) 26 C. 712; 13 Ind. Dec. (N. S.) 1055.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 39 OF 1919.

May 16, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

MRS. H. ALBERT—DEFENDANT APPLICANT

versus

SINGER SEWING MACHINE COMPANY—PLAINTIFF AND ANOTHER—DEFENDANT—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 108, Excep. (1)—Possession required by—Exception, nature of—Custody—Hire-purchase system—Possession of hirer, nature of—

ALBERT v. SINGER SEWING MACHINE COMPANY.

Bona fides *of transferee—Owner, whether can recover article from transferee.*

The possession referred to in Exception (1) to section 108 of the Contract Act is distinguishable from mere custody or possession held for a specific or limited purpose. It must be juridical possession or held under some right analogous to that of the owner or involving, expressly or impliedly, a power to sell, though the owner may have restricted the exercise of that right in a particular manner. [p. 51, col. 2]

A person who obtains an article under the hire-purchase system does not become the owner thereof till a payment is made in full in pursuance of the agreement. Till such payment is made, he is only entitled to the use of the article in terms of the agreement and subject to the control of the owner. [p 52, col. 1.]

Where a person holds a certain article on hire with an option to purchase, the nature of the possession and the powers of the person having it are determined by the contract of hire When in such a case the hirer sells the article hired to another person, the owner is entitled to recover the same from the purchaser though the latter may have acted in good faith. [p. 51, col. 2.]

Application against the decree of the Judge, Small Cause Court, Lucknow, dated the 11th March, 1919.

Mr. *Jeban Krishna Banerji*, for the Applicant.

Mr. *Ganga Dayal*, for Opposite Party No. 1.

Mr. *B. B. Chandra*, for Opposite Party No. 2.

JUDGMENT.—On the 1st August 1916 Mrs. Hill took a sewing machine on hire from the Singer Sewing Machine Company. The agreement was that she was to pay Rs. 5 per mensem as hire and to keep the machine in her custody but not to sell or dispose of it, and that if the rent was not regularly paid the Company would have the right to take back the machine. There was a further covenant that the hirer might at any time during the hire become the purchaser of the machine on payment of Rs. 95 in cash, provided the payments of hire were regularly made. Mrs. Hill did not pay the hire regularly. She owed some money to Mrs. Albert for board and messing charges. In lieu of the money so due she delivered the sewing machine to Mrs. Albert. The Singer Sewing Machine Company sued Mrs. Hill and Mrs. Albert for the recovery of the machine or the value thereof and for the balance of the hire. The Court below decreed the claim for the recovery of the arrears of hire against Mrs. Hill and directed Mrs. Albert to return the machine with its accessories within a week or to pay Rs. 95, its value.

On behalf of Mrs. Albert it is urged that she had purchased the machine in good faith and was protected by section 103, Exception 1, of the Indian Contract Act (IX of 1872), from being required to return the machine or pay its value. The Court below finds that Mrs. Albert acted in good faith in purchasing the machine in lieu of money due to her. The possession referred to in that exception is, however, distinguishable from mere custody or possession held for a specific or limited purpose. It must be juridical or held under some right analogous to that of the owner or involving, expressly or impliedly, a power to sell, though the owner may have restricted the exercise of that right in a particular manner. A hirer of goods holds the goods hired in his custody so long as he pays the hire. The person who gives the goods on hire remains in juridical possession thereof through the hirer. His consent is limited to their use. A person who gives his rifle to another for cleaning it does not consent to his keeping it in his possession. He only consents to his cleaning it. Similarly a person who gives his horse to another for the purpose of training it does not consent to the latter keeping the horse in his possession. He merely consents to his training it. The possession of a hirer is in no sense better. In *Greenwood* v. *Holquette* (1) it was held that where a person holds a certain article on hire with an option to purchase, the nature of the possession and the powers of the person having it are determined by the contract of hire. When in such a case the hirer sells the article hired to another person, the owner is entitled to recover the same from the purchaser though the latter may have acted in good faith. In *Shankar Murlidhar* v *Mohanlal Jaduram* (2), where the plaintiff left a buffalo and a calf with a third person to be taken care of by him during his absence from home and the latter sold the animals to the defendants, it was held that the plaintiff could recover them from the defendant. There West, J.,

(1) 20 W. R. 467; 12 B. L. R. 42.
(2) 11 B 704; 6 Ind. Dec. (N. s.) 463.

pointed out that Exception 1 to section 108 had a particular relation to cases of persons allowed by owners to have the *indicia* of the property or possession under such circumstances as might naturally induce others to regard them as owners and constitute some degree of negligence or defect of precaution imputable to the true owners. Where, however, the detention of the chattel was allowed for a particular limited purpose, there was not such possession as was contemplated by that exception. In *J. W. Seager* v. *Hukma Kessa* (3) a distinction was drawn between juridical possession and mere custody, and a wife who held charge of a jewel case containing the ornaments belonging to her husband subject to his directions and control was held to have acquired no such possession as would validate a pledge thereof made by her without his knowledge or consent. In *Biddomoye Dabee* v. *Sittaram* (4) the custody of a servant was similarly held to be insufficient to validate a pledge made by him of articles left in his charge as such servant. As pointed out in *Balasundaram* v. *Krishna Aiyar* (5), a person who obtains an article under the hire purchase system does not become the owner thereof till a payment is made in full in pursuance of the agreement. Till such payment is made, he is only entitled to the use of the article in terms of the agreement and subject to the control of the owner. In *Nandlal* v. *Bank of Bombay* (6) the view taken by Beaman, J., was that where possession was held by the consent of the owner, whether the consent was conditional or otherwise, the person who was allowed the possession might give a good title, but on appeal [*Nandlal* v. *Bank of Bombay* (7)] it was held that the possession referred to in section 178 was lawful juridical possession unconnected with and independent of any interest in the property possessed or such possession as a factor had, in other words, such possession as was had by an agent entrusted as such and ordinarily having as such agent the power of sale or pledge. In *Seshappier* v *Subramania Chettiar* (8) a similar view was taken. In *Naganada Davay* v. *Bappu Chettiar* (9) the pledge of a jewel by the hirer was held to be unenforceable against the owner. The possession of Mrs. Hill was, therefore, not such possession as is contemplated by section 108, Exception 1, of the Indian Contract Act. She had no power of sale. The application is, therefore, dismissed with costs.

Application dismissed.

(3) 24 B. 458; 2 Bom. L. R. 403; 12 Ind. Dec. (N. S.) 837.
(4) 4 C. 497; 3 C. L. R. 398; 2 Ind. Dec. (N. S.) 316
(5) 28 Ind. Cas 633; 2 L. W. 239.
(6) 4 Ind Cas 652; 11 Bom. L. R. 926 at p. 975
(7) 5 Ind. Cas. 457; 12 Bom. L. R. 316.
(8) 34 Ind. Cas. 751; 30 M. L. J. 587; 19 M. L. T. 386; 40 M. 678.
(9) 27 M. 424; 14 M. L. J. 69.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 294 OF 1918.

May 28, 1919.

Present :—Mr. Justice Newbould.

Rani ABHOYESWARI DEBI—PLAINTIFF—APPELLANT

versus

BANGSHIRAM RAJBANSHI—DEFENDANT—RESPONDENT.

Bengal Landlord and Tenant Procedure Act (VIII B. C. of 1869), ss. 14, 29—Notice of enhancement of rent, period of operation of—Suit to recover rent at enhanced rate when maintainable.

What section 14 of the Bengal Landlord and Tenant Procedure Act of 1869 requires is that not less than three months' notice should be given if the landlord intends to enhance the rent of an under-tenant or a *raiyat*. It cannot be held that a notice which gives over nine months is a notice which fails to comply with the provisions of that section. [p. 53, col 2.]

The object of section 14 of the Bengal Landlord and Tenant Procedure Act of 1869 is that a suit for enhancement should not be brought without previous due notice But it does not follow that when a notice under that section is once given, the suit for enhancement of rent cannot be brought two or three years afterwards. [p. 53, col. 2.]

Appeal against the decree of the Special Subordinate Judge, Assam Valley Districts, dated the 26th November 1917, modifying that of the Munsif, Goalpara, dated the 22nd September, 1916.

FACTS appear from the judgment.

Babu *Ram Charan Mitter* (with him Babus *Purno Chandra Roy* and *Brojolal Chakravarty*),

for the Appellant —The Court of Appeal below has erred in law in dismissing the suit for recovery of rent at an enhanced rate on the ground that the notice under section 14 of Act VIII (B. C.) of 1869 was not duly served. The notice served in Chaitra 1320 was rightly treated by the plaintiff as a notice for enhancement of rent from the year 1322 B S., and, therefore, the present suit for recovery of rent at an enhanced rate was maintainable. Refers to sections 14 and 29 of Act VIII (B C.) of 1869. See also *Shahzada Mahomed Rohimmooddeen* v. *Radha Mohun Mondul* (1).

Babu *Probodh Chandra Roy*, for the Respondent, contended that under Act VIII (B. C.) of 1869 a suit for enhancement of rent was not competent without a due notice under section 14 of the Act. In this case the notice contemplated enhancement of rent from 1321, but as the notice had not been served until 6th Chaitra 1320, the plaintiff treated the notice as one for enhancement of rent from the year 1322. But he could not do so because the notice had no legal effect after 1321. The case in *Shahzada Mahomed Rohimmooddeen* v. *Radha Mohun Mondul* (1) is distinguishable from this case.

Babu *Ram Charan Mitter* briefly replied.

JUDGMENT.—The plaintiff in this suit sought to recover arrears of rent for the year 1321 B. S. at the rate on which the defendant had been paying for the previous years and for the year 1322 B. S. at an enhanced rate. There was also a prayer for ejectment, but it is not now pressed. The claim for enhanced rent was based on section 14 of Act VIII (B. C.) of 1869, which is the rent law in force in the district of Goalpara. The learned Subordinate Judge on appeal dismissed the claim for enhancement of rent on the ground that the notice had not been duly served under that section. It appears from the notice that the plaintiff originally intended to give notice of enhancement which would take effect from 1321 B. S. The notice was filed in the Collector's Office on the 27th Pous 1320. If it could have been served before the end of that month, it would have been effective to enable the plaintiff to sue for enhancement of rent for the year 1321. But, as a matter of fact, the notice was not served until 6th Chaitra 1320, that is, more than two months later. Accordingly the plaintiff treated it as a notice for enhancement commencing with the year 1322 and has brought this suit within three months of the termination of that year in compliance with the provisions of section 29 of the Act. The lower Appellate Court held that this notice was not in accordance with section 14 of the Act. It held that when the notice for enhancement of rent was for the year 1321 only and not being served so as to give effect during that year, the notice was spent and had no legal effect thereafter. I am unable to agree with this decision. What section 14 requires is that not less than three months' notice should be given if the landlord intends to enhance the rent of the under tenant or the *raiyat*. I cannot say that the notice which gives over nine months is a notice which fails to comply with the provisions of that section. The view I take is also confirmed by the decision of this Court in the case of *Shahzada Mahamed Rohimmooddeen* v. *Radha Mohun Mondul* (1). That was a decision under section 13 of Act X of 1859, corresponding to section 14 of Act VIII of 1869, and their Lordships remarked that the object of section 13 was that a suit for enhancement should not be brought without previous due notice. "But it does not follow that when a notice under that section is once given, the suit for enhancement of rent for the next year should be brought within the same year and that the suit for enhancement of rent cannot be brought 2 or 3 years afterwards." In that case the notice was served at the end of the year 1267 and the enhancement of rent was claimed for the year 1270. In the lower Appellate Court, the appeal was decreed on this preliminary ground only. As I differ from the learned Subordinate Judge, his judgment and decree are reversed and the case is remanded for re-hearing of the appeal on the other points that arose in the appeal before him.

Costs will abide the result.

Case remanded.

(1) 6 W. R. Act X Rulings, 96.

MUHAMMAD MAHBUB ALI KHAN *v.* BHARAT INDU.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

July 26, 1918.

Present:—Lord Shaw, Lord Phillimore and Sir John Edge.

Hakim Maulvi MUHAMMAD MAHBUB ALI KHAN—APPELLANT

versus

BHARAT INDU AND OTHERS—RESPONDENTS.

Benami *transaction—Burden of proof—Court, duty of.*

In matters of *benami* transactions, it is essential for Courts of law to take care that their decisions rest not upon suspicion, but upon legal grounds established by legal testimony. At the same time, the Courts ought not to approach such transactions with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest possible evidence that the *ex facie* owner of property is a trustee for or holds the same for the interest of another. Even a silght quantity of evidence will suffice for the purpose of showing that the transaction was a sham. The person who impugns the apparent character of a transfer must, however, show something or other to establish that it is a *benami* or sham transaction. [p. 56, col. 1.]

W. hypothecated among other properties, a share in a certain *mauza*. The mortgagee obtained a decree on the bond against *W.* and some of the mortgaged properties were sold, including the share in the *mauza*, which was purchased by *B.*, the wife of *W.* who obtained possession and continued to receive the rents and the profits up to the time of her death. Shortly before her death she bequeathed this property to *M.*, the appellant, and he obtained possession of it. After the deaths of *B.* and the mortgagee, the present suit was brought for a declaration that the share in the *mauza* never belonged to *B.*, but remained *W.'s*, *B.'s* purchase being a simulate transaction, and that the property was held in her name *benami* for *W.* The High Court decreed the claim and *M*, the devisee of *B.*, appealed to the Privy Council:

Held, that plaintiff had entirely failed to prove that *B's.* ownership was *benami* for *W* and that the fact of the action having been brought after years of possession and when the principal parties to the transaction challenged and also the mortgagee were dead was a circumstance not without weight in such cases and involved a certain addition to that duty or onus of proof which in *benami* cases undoubtedly rested upon the assertor. [p. 56, cols. 1 & 2.]

Appeal from a judgment and decree of the Allahabad High Court (Sir Henry Richards, C. J., and Rafique, J.), dated the 11th November 1915, reversing that of the Subordinate Judge, Bareily.

Messrs. *DeGruyther, K. C., & Dube*, for the Appellant.

Messrs. *Dunne, K. C.*, and *Sanders*, for the Respondents.

JUDGMENT.

LORD SHAW.—This is an appeal from a judgment and decree of the High Court of Judicature for the North-Western Provinces, Allahabad, which reversed a judgment and decree of the Subordinate Judge of Bareilly.

The principal object of the suit is to obtain a declaration that the defendant No. 1 has no right or share in a 15-*biswa* and 8-*biswansi* Zemindari share in Mouza Tigra Khanpur, and that that share is saleable in satisfaction of a balance of debt, still unpaid, by Wilayat Ali Khan.

Wilayat was the husband of *Musammat* Bigga Begam. He was indebted to Durga Parshad in a considerable sum of money, which he had borrowed under a bond, dated the 5th February 1878, hypothecating, among other properties, the share in Mouza Tigra Khanpur just mentioned. The mortgagee obtained a decree on the bond against the mortgagor on the 26th March 1886 and that decree was made absolute in the following December. Some of the mortgaged properties were then sold. Among others the share in Mauza Tigra Khanpur was sold in execution of the mortgage decree, and, on the 20th July 1898, was purchased by *Musammat* Bigga Begam, Wilayat's wife, and Hakim Ahsan Ali Khan for 10,000 rupees. There is nothing surprising in the transaction. Wilayat and his wife seem to have been persons in good position, and the purchase by her and the co-purchaser named Hakim Ahsan appears to have been considered by the family and all concerned as quite natural. This was in the year 1898. On the 20th December 1899 Hakim Ahsan Ali Khan executed a deed relinquishing all his rights to the property. Bigga Begam obtained possession. Her name was duly recorded in the revenue papers, and a great quantity of receipts and documents of that kind has been produced showing that she duly received the rents and produce of the property up to the time of her death. This event occurred on the 21st October 1908.

About a fortnight before, namely, on the 9th October, she executed a Will in favour of the appellant. Her husband, Willayat, and her nephews Iqbal Husain *alias* Kalan, Aulad Husain and Hamid Husain,

consented to the testamentary disposition of her entire estate. It cannot be denied that they did so both during her life and after her death. The Will bears the husband's attestation, and it is proved that husband and nephews were informed by her of her testamentary intentions and consented thereto. On the 4th December 1908 the husband and the nephews executed deeds of relinquishment of the shares, ratifying their consent, and on the 20th January 1909 two applications were made by the husband and the nephews respectively for mutation of names in favour of the appellant.

The appellant, having thus inherited the property in dispute, obtained possession thereof, his name was duly recorded in the revenue papers, and he has been in actual possession ever since.

It will be observed accordingly that for about ten years the share in this *mauza* had passed out of the possession of Wilayat and into the possession of his wife and thereafter of her devisee. This unquestionably must have been to the knowledge of Durga Prashad.

When, however, in October 1908, Bigga Begam died, it appears then to have occurred to Durga Prashad that he might attach and realise under his judgment decree the interest which Wilayat would have under the Muhammadan Law in the property of Bigga Begam, his wife, notwithstanding her Will. By the Muhammadan Law, explained in the Hedaya, Hamilton's Edition, IV, 469, and founded upon a declaration of the Prophet, the power of a testator to leave his property by Will is limited to a one-third share. By the same law the husband would have been entitled to another third and the nephews to the remaining third. Durga Parshad was advised at this period by one Ramji Mal, who was his general attorney and is now the general attorney of his sons, and who is the principal witness in the present case for them as plaintiffs. His evidence is not believed by either of the Courts below, but this much is corroborated by the recorded proceedings, namely: "On the death of Bigga Begam I informed my master and told him that half of her estate in the Tigra Khanpur property devolved on Wilayat Ali Khan and I made an application to the Court for the attachment of the same." The proceedings were grounded on the acknowledgment by Durga Parshad, advised by Ramji Mal, of the fundamental fact that Bigga Begam when she died was the owner of the shares in this *mauza*, and that by reason of her death Wilayat succeeded by force of law to a certain portion thereof.

These proceedings ended in failure. Possibly it was then demonstrated that Wilayat and the nephews had consented, and did consent, to the Will and that accordingly nothing passed to them but that the Will should have effect in its entirety. This is in complete accord with the Muhammadan Law [see, for instance, *Cherachom Vittil Ayisha Kutti Umah* v. *Valia Pudiakel Biathu Umah* (1) and *Daulat Ram* v. *Abdul Kayum* (2) and section 270 of Sir R. K. Wilson's "Digest of Muhammadan Law."]

So matters stood until the 28th September 1910, when the present suit was instituted. Its foundation in law is section 90 of Act IV of 1882, which provides for the event of the proceeds of anterior sales or realisations having failed to satisfy the full decretal amount due by the judgment-debtor. Its foundation in fact is that the share in the *mauza* never belonged to Bigga Begam at all but remained Wilayat's and that, in short, the purchase by Bigga Begam was a simulate transaction, and that the property was held in her name *benami* for Wilayat. This allegation is made, and this totally new attitude is assumed, after the lady is dead, and after Durga Parshad is dead. It is of course inconsistent with Durga Parshad's prior allegation, in which the property was admitted to be that of Bigga Begam and Wilayat was alleged to have succeeded to her as one of her heirs. Their Lordships do not enter into a consideration of the evidence. Having perused it, they are of opinion that the Subordinate Judge has come to a correct conclusion as set forth in his careful judgment. He does not credit the story.

The learned Judges of the High Court do not differ from the Subordinate Judge in disbelieving the plaintiff's witnesses. In the opinion of the Board they have not attached due significance to, indeed they have ignored, an important and crucial ele-

(1) 2 M. H. C. R. 350.
(2) 26 B. 497; 4 Bom. L. R. 132.

ment in the case, *viz*, the position taken up during the life of Durga Parshad, the mortgagee in the litigation already alluded to. They have thus failed to reach a correct conclusion upon any balancing of evidence that might be required. They proceed apparently on the view of the improbability of Bigga Begam having 10,000 rupees to spare for the purchase of the share in this village. In their Lordships' opinion, whether the conjectures which they make upon that topic be or be not correct, they are mere conjectures. Lord Westbury observed in the *benami* case of *Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty* (3), "Undoubtedly there are, in the evidence, circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description, it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds established by legal testimony." Their Lordships are far from agreeing that any circumstances of suspicion have been established in the present case; and the observations of Lord Westbury are accordingly *a fortiori*.

On the other hand, in regard to *benami* transactions, Courts of law should not approach them with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for or holds the same for the interest of another. *Benami* transactions are very familiar in Indian practice, and as Lod Hobhouse said in *Uman Parshad* v. *Gandharp Singh* (4), "Even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose." The learned Judge, however, added, "still, such a transfer cannot be considered as nothing; the person who impugns its apparent character must show something or other to establish that it is a *benami* or sham transaction" This brings the legal situation into line with the general doctrine already cited from Lord Westbury.

It is, however, in the present case their Lordships' opinion that proof that Bigga Begam's ownership was *benami* for Wilayat has entirely failed. The action is brought after years of possession, and when the principal parties to the transaction challenged and also the mortgagee himself are dead. This is a circumstance not without weight in such cases, and it involves a certain addition to that duty or onus of proof which, in *benami* cases, does undoubtedly rest upon the asserter.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the Subordinate Judge should be reverted to, and that the appellant be found entitled to costs from the date thereof, namely, the 16th September 1912, and to the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Mr. *Douglas Grant.*

Solicitors for the Respondents: Messrs. *Barrow, Rogers & Nevill.*

(3) 11 M. I. A 28 at p. 43; 7 W. R. 19 (P C.); 2 Sar. P. C. J. 215; 1 Suth P. C. J. 651; 20 E R. 11.

(4) 18 I A. 107 (P C.); 15 C. 24; 5 Sar. P C J. 71; Rafique & Jackson's P. C. No. 93; 11 Ind. Jur. 214; 7 Ind. Dec. (N. s.) 599.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1102 OF 1918.

March 14, 1919.

Present :—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

ANANTHARAJU SHETTY—PETITIONER

versus

APPU HEGADE—RESPONDENT.

Religious Endowments Act (XX of 1863), s. 10, order under Review, whether permissible—Inherent power of Court - Civil Procedure Code (Act V of 1908), ss. 141, 151.

Inasmuch as there is no explicit provision in the Religious Endowments Act for a review, a District Judge has no power, under that Act, to review an order passed by him under section 10 of the Act, nor has he any such power under section 141 of the Civil Procedure Code. [p. 57, col 2; p. 58, cols. 1 & 2.]

The power to review is not inherent in a Court, and can only be exercised if it is permitted by Statute. [p. 58, cols 1 & 2.]

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court, South Canara, dated the 29th July 918, in I. A. No. 32 of 1918, in Original Petition No. 8 of 918.

FACTS appear from the judgment

Mr. *A Narayanaswami Aiyar* for Mr. *K N. Aiya Aiyar*, for the Petitioner.—An order

under section 10 of the Religious Endowments Act is a judicial order passed by a Civil Court. *Kalarishna Uliyar* v. *Vasudeva Aiyar* (1). Hence the Court that passed such an order can review it under section 114, Civil Procedure Code, or under section 151, Civil Procedure Code (inherent power). See also section 141. The provisions of the Code should be applied to all proceedings in Civil Courts.

Mr. *B. Sitarama Rao*, for the Respondent.—The right of review must be specially conferred by Statute and section 114, Civil Procedure Code, does not apply to this case. Section 141 applies only to procedure but review is a substantive right. *Damodara Menon* v. *Kittappa Menon* (2). Right of review is not inherent. *Brij Nath Ram Goenka* v. *Kumar Singh* (3). Statute alone can confer it. *Muthiah Chettiar* v. *Bawa Sahib* (4), *Damodara Nadar* v *Manicka Vachaka Dasika Pandara Sannadhi* (5), *Debi Bakhsh Singh* v. *Habib Shah* (6), *Vulcan Iron Works Co. Ltd.* v. *Biswambar Pershad* (7), *Drew* v. *Willis* (8), *Lala Pryag Lal* v. *Jai Narayan Singh* (9).

The provisions of the Code do not apply to Revenue Courts. See also *Baijnath Ram Goenka* v. *Nand Kumar Singh* (10); *The Bolivar* (11).

Further, section 9 of the Religious Endowments Act makes a special provision for similar cases and so the Civil Procedure Code cannot apply.

JUDGMENT.

OLDFIELD, J.—The only question we have to decide is whether a District Judge can, at the instance of a party, review an order passed by him under section 10 of Act XX of 863.

The Act contains no explicit provision for a review and petitioner has accordingly supported his claim to one with reference to (1) the Code of Civil Procedure, (2) the inherent power of the Court.

As regards the Code there is nothing in the Act to apply its provisions and they can be applicable, if at all, only with reference to section 141 of the Code itself. That section, however, does no more than provide for the procedure to be adopted by Courts of civil jurisdiction in dealing with matters before them. It does not authorize an appeal, since that would not be a mere matter of procedure, but the recognition of a substantive right, which must be conferred in explicit terms. *Damodara Menon* v. *Kittappa Menon* (2). And similarly it confers no right to a review. For we have not been shown how the one right stands on a different footing from the other.

To turn to the alternative ground for petitioner's claim, that the power or duty to review an erroneous decision is inherent in the Court, he has supported it mainly with reference to *Syud Tuffuzzool Hossein Khan* v *Rughoonath Pershad* (12). I referred to the material *dicta* in that case in my judgment in *Muthiah Chettiar* v. *Bawa Sahib* (4) and I am still of opinion that the Court's action, which the Judicial Committee then approved, consisted merely in the recognition that previous proceedings authorised by it were void. I may now add that the case can be regarded on the widest construction only as authorising the Court to repudiate its previous proceedings on the ground that they were without jurisdiction, *Debi Bakhsh Singh* v. *Habib Shah* (6) being similarly decided in very similar circumstances, or alternatively on the ground referred to in the judgment that a mistake had been made through inadvertence. Again in *Mahomad Kala Mea* v. *Harperink* (13) the right to review was recognised, because the proceedings

(1) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur L T. 4?; 44 I. A. 261 (P. C.).

(2) 10 Ind Cas. 879; 36 M. 16; 21 M. L. J. 613; (1911) 2 M. W. N. 13.

(3) 18 Ind. Cas 956; 40 C. 552; 17 C. W. N. 485; 17 C. L. J. 483; 13 M L T. 487; 15 Bom. L. R. 500; (1913; M. W. N. 554; 40 I. A. 54 (P. C.)

(4) 28 Ind. Cas. 46; 37 M. L. J. 405; 1 L. W. 969.

(5) 3 Ind Cas. 4?2; 33 M. 65; 19 M. L. J. 725; 6 M. L. T. 177.

(6) 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 62?; 18 C. L. J. 9; 15 Bom. L. R. 640; 25 M. L J. 148; 14 M L. T. 33; (1913) M. W. N. 566; 16 O. C. 194; 40 I. A 1?0 P. C.).

(7) 1 Ind. Cas 927; 36 C. 233; 8 C. W. N. 346.

(8) (1891) 1 Q. B. 450; 60 L J. Q. B. 264; 64 L. T. 760; 39 W R 310, 55 J P 373,

(9) 22 C. 419 11 Ind. Dec. (N s.) 280.

(10) 34 C 677; 1 C W. N. 803; 6 C L. J. 84

(11) (1914) 2 A C. 203; 85 L. J. P. 193; 2 P. Cas. 175; 114 L. T. 1005.

(12) 14 M. I. A 40 7 B L R 186 (P. C.); 2 Suth. P C J. 434; 2 Sar P. C. J. 656; 20 E. R. 761.

(13) 11 Ind. Cas. 122; 36 C 423; 6 A. L. J 34; 13 C. W. N. 249; 5 M. L. T. 126; 9 C L. J. 165; 1 Bom. L. R. 227; 19 M. L. J. 115; 5 L. B. R. 25; 36 I. A. 32 (P. C.).

were vitiated by the fraud or misrepresentation of an officer of the Court.

These cases, however, merely constitute exceptions to a rule which is otherwise well established, and the facts in none of them in any degree resemble those alleged before us. For the rule that a Court cannot review its own decision except so far as it is permitted to do so by Statute, is of general authority, since it is recognised alike in England, for instance in *Drew* v. *Wilis* (8) and in India in *Damodara Nadar* v. *Manicka Vachaka Dasika Pandara Sannadhi* (5), *Lala Fryag Lal* v. *Jai Narayan Singh* (9) and *Baij Nath Ram Goenka* v. *Nand Kumar Singh* (3). And here the petitioner has alleged only that, if he had had a better opportunity of laying his case before the lower Court, he would have been able to adduce evidence, which would have resulted in a different decision.

In these circumstances there was no ground on which the lower Court could be asked to review its order. The civil revision petition must, therefore, be dismissed with costs.

SESHAGIRI AIYAR, J.—I am of the same opinion.

The question raised in the order of the learned District Judge is a very important one and I shall, therefore, say a few words. The ground has been cleared considerably after hearing the very able arguments of Mr. Sitarama Rao who appeared for the counter-petitioner.

It was argued by the learned Vakil for the petitioner that, as under the ruling of the Judicial Committee in *Balakrishna Udayar* v *Vasudeva Aiyar* (1) the District Judge in filling up a vacancy under section 10 of Act XX of 1863 is acting judicially, his orders are clothed with all the rights and are subject to all the disabilities which attach to his judgments in an ordinary civil action. I do not think this result follows from the judgment of the Privy Council. District Judges in this Presidency have jurisdiction to hear and determine cases under special acts. In some of them, the procedure to be followed is prescribed. In others, the Civil Procedure Code is referred to as regulating procedure. Where neither of these provisions exist, the District Judge if he is asked to deal with the subject judicially, should act on the principle of *audi alteram partem*, take such evidence as may be tendered and decide the matter according to well-recognised principles of jurisprudence. Such a disposal does not necessitate the application of all the provisions of the Code of Civil Procedure to his procedure and conclusions.

It was next argued that section 141 of the Code of Civil Procedure is indicative of a general enunciation of principle by the Legislature that to all the judicial proceedings, the Civil Procedure Code is applicable. The section only empowers the Judge to regulate judicial trials by rules as to summoning of witnesses, etc., which are to be found in the Code and not that the Code is to be applied in its entirety to such proceedings, including power of appeal and of review.

The last argument related to the inherent power of a judicial officer to review his own judgment. It is settled law that a case is not open to appeal unless the Statute gives such a right. The power to review must also be given by the Statute. *Prima facie* a party who has obtained a decision is entitled to keep it unassailed, unless the Legislature has indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. There is at least as good reason for saying that such power should not be exercised unless the Statute gives it, as for saying that another tribunal should not hear an appeal from the trial Court unless such a power is given to it by Statute. This was the view taken by Lord Esher in *Drew* v. *Willis* (8) In *Charles Bright & Co. Ltd.* v. *Sellar* (14) and in *Hession* v. *Jones* (15) the same principle was enunciated. The decision in *The Bolivar* (11) as pointed out by Mr. B. Sitarama Rao, proceeds on the ground that no party should be condemned unheard and when such a procedure has been adopted, the Court has inherent power to reconsider its decision.

The course of decisions in this country has followed the same line. In *Damodara Nadar* v. *Manicka Vachaka Desika*

(14) (1904) 1 K. B. 6; 72 L.J K B. 921; 89 L. T. 431; 52 W. R. 118; 20 T. L. R. 12.

(15) (1914) 2 K. B. 421; 83 L. J. K. B. 810; 110 L. T. 773; 30 T. L. R. 229.

Pandara Sannadhi (5) in which the question was whether a Collector can review his order under the Revenue Recovery Act, this Court following, *Drew* v. *Willis* (8), held that the right to review is not an inherent power. *Lala Fryog Lal* v. *Jai Narayan Singh* (9) is to the same effect. In *Baijnath Ram Goenka* v. *Nand Kumar Singh* (10) a similar view was taken. When that case was taken before the Privy Council, Lord Atkinson, in the course of the argument and in the short judgment that he delivered on behalf of the Board, declared in explicit terms that the power to review is not inherent in a Court. Mr. Sitarama Rao with characteristic frankness drew our attention to *Syud Tuffuzzool Hossein Khan* v. *Rughoenath Pershad* (12) as sounding the other way. After reading that judgment I am convinced the Judicial Committee did not intend to lay down that a Court has power to review its own judgment even though there is no law empowering it to do so. It was pointed out in that case that the order was an invalid one; that is to say, it was an order which the Court had no jurisdiction to pass. That decision is of the same class to which *The Bolivar* (11) belongs. Another Privy Council case in *Debi Bakhsh Singh* v. *Habib Shah* (6) proceeds on the ground that a Court has power to correct mistakes into which it has been led by inadvertence. In *Mahomed Kala Mea* v. *Harperink* (13) the auction purchaser was misled by the misrepresentation of the Court officers. The Judicial Committee held that a Court should be careful to see that it does not contribute to the inflicting of injuries on persons who come before it, believing that the Court and its officers would act honestly. These cases do not affect the present question.

In a review, in short, a party generally claims a re-consideration of the decision on the ground either there is some fresh evidence or a new pronouncement of law or some new matter which, if taken into account, would have affected the attitude of the Court regarding the matter in dispute. Such a consideration is analogous to what happens on the hearing of an appeal and is not analogous to proceedings in which for fraud or inadvertence, the Court is permitted to set aside its order. I am, therefore, of opinion that a District Judge has no power to review his own decision passed under section 10 of the Religious Endowments Act. It is unnecessary to consider the further argument of Mr. Sitarama Rao whether section 9 of Act XX of 1863 is applicable to orders passed by the District Judge under section 10 of the same Act.

I agree that the petition should be dismissed with costs.

M. C. P.

Petition dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES
NOS. 258 AND 303 OF 1915.
March 25, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

IN No. 258 OF 1915

SURENDRO NATH MITRA—DEFENDANT No. 3—APPELLANT

versus

KSHITINDRA MOHUN MITRA—PLAINTIFF AND OTHERS—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

IN No. 303 OF 1915

SATISH CHANDRA SINHA AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

KSHITINDRA MOHUN MITRA—PLAINTIFF AND ANOTHER—DEFENDANT No. 3—RESPONDENTS.

Mortgage - Mortgagee, whether can question title of mortgagor—Benamidar, *whether can sue on mortgage*—*Usufructuary mortgagee, liability of, to render accounts* — *Estoppel*—*Evidence Act (I of 1872), s* 116.

A mortgagee who accepts a mortgage from a person cannot question his title to redeem the property upon payment of such sum as may be found due by the Court. [p. 61, col 1.]

A suit for foreclosure, sale or redemption can be maintained by the person named in the mortgage-deed as mortgagee or mortgagor, as the case may be. [p. 60, col. 2.]

A usufructuary mortgagee was placed in possession of a property of which the area and the income were liable to variation. It was stated in the deed that the net profit of the property would be Rs. 110, out of which Rs. 80 would be set off against interest and the balance against the principal:

Held, that the parties did not intend to have their rights and liabilities adjusted on the basis of

the actual figures mentioned in the mortgage-deed and that, therefore, the mortgagee was not exonerated from his ordinary liability to render an account. [p. 61, col. 2; p 62, col. 1]

Appeals against the decision of the District Judge, Burdwan, dated the 25th January 1915, modifying that of the Additional Subordinate Judge, Burdwan, dated the 25th March 1914.

Sir *Rash Behary Ghose* and Babu *Kalikinkar Chuckerbutty*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty* and *Jyotish Chandra Hazra*, for the Respondents.

JUDGMENT.— On the 24th March 1901 the plaintiff executed a usufructuary mortgage of land in favour of the first defendant for the benefit of the latter and his father, the second defendant. The defendants went into possession but defaulted to pay rent to the superior landlord, who had the property sold under Regulation VIII of 1819. The third defendant became the purchaser at this sale. The Courts below have concurrently found, contrary to the allegation of the defendants, that the sale was brought about by the fraud of the first two defendants, that the purchase was made by them in the name of their relation, the third defendant, and, that their possession of the property has been in no way affected by the proceedings in Court. On the 10th September 1912 the plaintiff commenced this suit for redemption of the mortgage and obtained a decree in the trial Court. Three appeals were thereupon preferred, one by the first two defendants, a second by the third defendant, and the third by the plaintiff. The District Judge dismissed the appeal of the third defendant, and modified the decree of the Court of first instance on the appeals of the plaintiff and the first two defendants. This decree has been assailed before us in two separate appeals, one by the first two defendants, the other by the third defendant. On the elaborate arguments advanced by both sides in this Court, two substantial points emerge for consideration, namely, *first*, should the trial Court have framed an issue to determine whether the plaintiff was the real owner of the property as alleged by him or a *benamidar* for his father and other members of the joint family, as asserted by the defendants; and, *secondly*, whether the mortgage accounts have been taken on an erroneous principle.

As regards the first point, the Courts below have found that at the date of the mortgage the plaintiff was in possession and that the deed was executed in his name. The District Judge, in concurrence with the Subordinate Judge, has held that as the mortgagees took the mortgage from the plaintiff and obtained possession from him, they could not be permitted to question his title, in view of the rule of estoppel enunciated in section 116 of the Indian Evidence Act. This view is clearly well-founded. As explained in the case of *Bhuiganti Bewa* v. *Himmat Bidyakar* (1) enjoyment by permission is the foundation of this doctrine. Two conditions are essential to the existence of the estoppel, namely, first, possession, secondly, permission; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues. Apart from this, the contention of the appellant that a redemption suit cannot be maintained except by the real owner, is too broadly formulated and is against the balance of judicial authority. The better opinion seems to be that a suit for foreclosure, sale or redemption can be maintained by the person named in the deed as mortgagee or mortgagor, as the case may be: *Sachitananda Mohapatra* v. *Balram Gorain* (2), *Dagdu* v. *Balvant Ramchandra Natu* (3), *Ravji Appaji Kulkarni* v *Mahadev Bapuji Kulkarni* (4), *Yad Ram* v. *Umrao Singh* (5), *Ramanujachariar* v. *Srinivasachariar* (6), *Alikjan Bibi* v. *Rambaran Shah* (7), *Sreenath Nag* v. *Chundernath Ghose* (8), *Bhoobunessur Roy* v. *Juggessuree Chowdhrain* (9), *Hara Gobinda Saha* v. *Purna Chandra Saha* (10), *Kirtibash Das* v. *Gopal Jeo* (11). A similar principle has been applied to leases: *Bipeen Beharee Chowdhry* v. *Ram Chunder Roy* (12),

(1) 35 Ind. Cas. 7; 24 C. L. J. 103; 20 C. W. N. 1335.
(2) 34 C. 644; 12 Ind Dec (N. S.) 1099.
(3) 22 B. 810; 11 Ind. Dec. (N. S.) 1130.
(4) 22 B. 672; 11 Ind Dec. (N. S.) 1030.
(5) 21 A. 380; A. W. N. (1899) 180; 9 Ind. Dec. (N. S.) 951.
(6) 9 M. L J. 103.
(7) 7 Ind. Cas 166; 12 C. L. J. 357.
(8) 17 W. R. 192.
(9) 22 W. R. 413.
(10) 1 Ind Cas. 522; 11 C. L. J. 47.
(11) 20 Ind. Cas. 490; 19 C. L. J. 193; 18 C. W. N. 814.
(12) 14 W. R. 12.

Donzelle v. *Kedarnath* (13). *Kedarnath Chucker-butty* v. *Ben amin Donzelle* (14), *Inderbuttee Kooer* v. *Shaikh Muhboob Ali* (15), *Jainarayan Bose* v. *Kadimbini Dasi* (16), *Purnia* v. *Torab* (17), which are mentioned in the case of *Atrabannessa* v. *Safatullah* (18). We are of opinion that the first question must be answered against the defendants; they accepted the mortgage from the plaintiff and cannot now question his title to redeem the property upon payment of such sum as may be found due by the Court This view is in harmony with the observations of the Judicial Committee in *Muhammad Mahbub Ali Khan* v. *Bharat Indu* (19) on the nature of *benami* transactions.

As regards the second point, the Courts below have held that the first two defendants are bound to render an account as mortgagees in possession. They do not repudiate their liability to account, but contend that the accounts should be taken on the basis of the sums mentioned in the mortgage bond irrespective of the actual profits of the property. The controversy has thus centered round the question, whether the rights and obligations of the parties in this respect are governed by section 76, clauses (*g*) and (*h*), or by section 77, of the Transfer of Property Act. Under the former section, the mortgagee in possession is liable to keep and give accounts. This is the general rule, subject to the exception formulated in section 77, which provides that nothing in section 76, clauses (*b*), (*d*), (*g*) and (*h*) applies to cases, where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of such interest and defined portions of the principal. Now, under section 58, clause (*d*), a mortgage is usufructuary where the mortgagee receives the rents and profits either (*i*) in lieu of interest only, or (*ii*) in payment of the mortgage money, or (*iii*) partly in lieu of interest and partly in payment of the mortgage money. Section 77 consequently protects usufructuary mortgages of the first category as also such usufructuary mortgages of the third category as are entitled to take the profits in lieu of interest and defined portions of the principal. The Courts below have concurrently held that the mortgage before us falls within the general rule; in other words, that it is not of either of the two types just mentioned. The bond states that the mortgagor took a loan of Rs. 1,600, which carried interest at 5 per cent. per annum, and then proceeds to describe the scheme for repayment of the debt. It sets out the annual profit according to the rent-roll, allows a remission for establishment charges and makes a deduction for the rent and cesses. This, it is stated, shall leave a net profit of Rs. 110, out of which Rs. 80 would be set off against interest and the balance against the principal. It is plain that if the actual income from the property were assumed to be that mentioned in the rent roll, the amounts stated as payable on account of interest and in reduction of the principal could hold good only during the first year. During the second year, the interest would run on a reduced principal, and, at the end of that year, a larger sum than that available in the first year would be set off against the principal. This process would continue from year, to year—each successive year a decreasing amount would be due for interest and an increasing amount set off against the principal. This militates against the theory that the parties intended to have their rights and liabilities adjusted on the basis of the actual figures mentioned in the document. This view is supported by a significant circumstance. The *hastabud* or rent roll would presumably show only the rent payable by the tenants, but there were, as the Courts below have concurrently found, other sources of income, for instance that derived from the Mana of the river Damodar and the Jalkar. Finally, the mortgagees were placed in possession of the alluviated and diluviated lands, whereof the area and income would vary from time to time; it is improbable that the mortgagor should have intended to make a present to the mortgagees of the income which might accrue from accreted lands, or that the mortgagees

(13) 16 W. R. 186; 7 B. L. R. 720.
(14) 20 W. R. 352.
(15) 24 W. R. 44.
(16) 7 B. L. R. 723 (*note*).
(17) (1865) Wyman 4.
(18) 31 Ind Cas. 189; 23 C. L. J. 259; 43 C 504.
(19) 53 Ind. Cas. 54; 23 C. W. N. 321; (1919) M. W. N. 507 (P. C.).

should have undertaken, in the event of diluvion, to give the mortgagor credit at all hazards for a definite sum. On an examination of all the provisions of the deed, we are of opinion that the Courts below have correctly held that it does not exonerate the mortgagees from their ordinary liability to render an account.

The result is that the decree of the District Judge is affirmed and these appeals dismissed with costs.

Appeals dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 313-B OF 1917.

July 31, 1919.

Present:—Mr. Mitra, A J. C.

RAMCHANDRA KANIRAM MARWADI—DEFENDANT No. 1—APPELLANT

versus

LAXMAN AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Berar Land Revenue Code, s. 79—Landlord and tenant—Notice to quit—Mode of service—Refusal of post card, whether sufficient service—Evidence Act (I of 1872), s. 114, Ill. (f)—Presumption of fact—Appeal, second—Interference, whether permissible.

Section 79 of the Berar Land Revenue Code does not lay down any specific mode for the service upon a tenant of a notice to quit. A notice, therefore, sent to a tenant by means of a registered post card the acceptance of which, upon being tendered by the Postal authorities, is refused by him, constitutes a proper service. [p. 62, col. 2; p. 63, col. 1.]

Where, upon the evidence, a presumption of fact under section 114, illustration (*f*), of the Evidence Act is drawn by an Appellate Court, such presumption is binding upon a Court of Second Appeal. [p. 63, col. 1.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 38 of 1916, decided on the 30th April 1917, arising out of Civil Suit No. 217 of 1915, in the Court of the Munsif, Bassim, decided on 24th July 1916.

Mr. *M. V. Joshi*, for the Appellant.

The Hon'ble Sir *B. K. Bose* and Mr. *V. Bose*, for the Respondents.

JUDGMENT.—The defendant-appellant claims to be a permanent tenant on the basis of a contract. The Courts below have found the contract not proved. The finding is attacked on the ground that after the learned Additional District Judge recorded it, he proceeded to discuss the law as to whether an *izaradar* holding a lease from the Government for thirty years could grant a permanent sub-lease. In this he may be right or he may be wrong, but this does not affect his appreciation of the oral and documentary evidence regarding the alleged contract. I must, therefore, accept the finding that the appellant has failed to prove that he is not a tenant from year to year.

The next question that arises is whether the tenancy has been determined by a notice to quit as required by section 79 of the Berar Land Revenue Code. This section, unlike section 106 of the Transfer of Property Act, does not lay down the mode in which the notice to quit has to be served upon the tenant.

In the plaint the plaintiff alleged that he sent a registered post card to the defendant, that the defendant refused to accept it and that the registered post card came back to the plaintiff through the Post Office with an endorsement that the addressee refused to accept it, and hence it was returned to the sender. The defendant denied that he refused to accept the post card or that it was tendered to him. There was a further allegation in the plaint to the effect that after the post card was returned to the plaintiff, he affixed similar notices, one on the house and another on the field of the defendant. The latter allegation was not denied in the pleadings. It is unnecessary to say if this was good service of the notice under the Berar Land Revenue Code. There is a witness on behalf of the plaintiff who proves that the post card was posted and registered and the post card has now been produced in Court by the plaintiff. It clearly is a proper notice to quit. The only question is whether it was tendered to the defendant or not. The defendant has not gone into the witness-box to deny that it was tendered to him. The lower Appellate Court points out that it is not possible in a small village where the

defendant resides that a person in his position could not be found. I may note that the address given in the post card was a correct. Having regard to the usual course of business in the Post Office, there are two reasonable presumptions to be drawn when a registered post card is returned to the sender; one is that the addressee could not be found and the other is that the addressee has refused to accept it. The first of the presumptions has been held inapplicable in the present case, and the lower Appellate Court was, therefore, justified in resorting to the second presumption. This obviates the necessity of relying upon the endorsement on the post card purporting to be made by some officer of the Post Office. The lower Courts were also justified in rejecting the further possibility that the postman did not go at all to deliver the registered postcard and in assuming that the usual course of business was followed. There is thus legally sufficient evidence to warrant the finding that the post card was tendered to the defendant and refused by him. The presumptions referred to above are presumptions of fact under section 114, illustration *(f)*, of the Evidence Act and it was for the Courts below to say whether the presumption is to be drawn in this case or not.

On behalf of the appellant reliance is placed on *Gobinda Chandra Saha* v. *Dwarka Nath Patita* (1). That was a first appeal in which the learned Judges declined, in view of the sworn testimony of the defendant, to draw the presumption that the registered notice was tendered and refused by him on a particular date, which happened to be the last day when the notice could be legally served. The date of the tender was sought to be proved by the endorsement purporting to be made by the postman. The postman was not called as witness and it was held that sufficient foundation had not been laid for letting in the statement as relevant under section 32 (2) of the Evidence Act. The learned Judges at page 497* cite illustration (*b*) to section 16, which is to the following effect: "The question is, whether a particular letter reached A. The facts that it was posted in due course and was not returned through the Dead Letter Office are relevant." They then proceed: "This is very different from the assertion that if the letter is returned with a note thereon by the peon that it had been tendered to and refused by the addressee, the inference follows that it was so actually tendered and refused." As I have already said, unless the endorsement is proved, two reasonable inferences are possible from the return of the registered article. At page 498* the judgment says: "Proof of the fact that a letter correctly addressed has been posted and has not been received back though the Dead Letter Office may justify the presumption that it had been delivered in due course of mail to the addressee, but proof of the fact that a letter has been duly posted and has been returned by the Postal authorities does not justify the presumption that it has been so returned because it has been refused by the addressee, for it may well be that it has been returned because the addressee has not been found; much less is there a presumption that the cover has been tendered to the addressee on a particular date." I do not find anything in the judgment opposed to the view taken by me.

The recent Privy Council case relied on by the respondent *Harihar Banerji* v. *Ramsashi Roy* (2) is not directly in point.

I am bound to accept the finding of the lower Courts in second appeal, I, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 26 Ind. Cas. 962: 19 C. W. N. 489; 20 C. L. J. 455.

*Page of 19 C. W. N.—*Ed.*

(2) 48 Ind. Cas. 277; 46 C. 458; 23 C. W. N. 77; 16 A. L. J. 969; 35 M. L. J. 707; 29 C. L. J. 117; 9 L. W. 148; 25 M. L. T. 159; 21 Bom. L. R. 524; (1919) M. W. N. 471; 1 U. P. L. R (H. C.) 56; 45 I A. 222 (P. C.).

*Page of 19 C. W. N.—*Ed.*

KRISTO DAS LAW v. BYOMKESH CHUCKERBUTTY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1530 OF 1917.

May 2, 1919.

Present:—Mr. Justice Newbould.

Raja KRISTO DAS LAW AND OTHERS —PLAINTIFFS—APPELLANTS

versus

BYOMKESH CHUCKERBUTTY AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 153—Rent suit valued at less than Rs 100—Appeal, second, whether lies.

No second appeal lies against a decree passed in a suit for rent in which the amount claimed does not exceed a hundred rupees, and in which no question of title has been decided

Dhanukdhari Lal v *Baburam Ahir*, 4 Ind. Cas. 745, 10 C. L. J. 629, distinguished.

Appeal against the decree of the Additional District Judge, Jessore, dated the 9th of May 1917, affirming that of the Munsif, 3rd Court at that place, dated the 18th of May 1916.

FACTS appear from the judgment.

Babu *Amarendra Nath Bose*, for the Respondent.—I take a preliminary objection to the hearing of this appeal, which arises out of a suit for rent which has been dismissed by the Court of Appeal below. The appeal is valued at Rs. 3-0-0. My submission is that section 153, Bengal Tenancy Act, operates as a bar. My second point is that the appeal has abated as one of the respondents is dead. The substitution petition did not mention the date of his death. Hence the order was made subject to objection.

Babu *Narendra Chandra Bose* (with him Babu *Nalin Chandra Paul*), for the Appellants.—As regards the maintainability of the appeal, I would submit that the appeal is competent. Refers to *Dhanukdhari Lal* v. *Baburam Ahir* (1). As regards the substitution proceedings, the application was in order. We came to know of the respondent's death when the notice was returned unserved. Under Order XXII, rules 3 and 4, I am entitled to have six months from the date of my knowledge. There is nothing on the record to show that he died more than six months before the date of my knowledge.

Babu *Amarendra Nath Bose*, for the Respondent.—I would draw your Lordship's attention to section 153. This is a case for rent pure and simple. There was no prayer for assessment or settlement of rent The Appellate Court did not consider the question of title. It did not enter into the merits at all. Under Order XXII, rule 6, an application for substitution must be made within the period allowed by Article 177 of the Limitation Act. The appeal will abate *ipso facto* on the expiration of six months. Time could not be extended under Order XXII, rule 9

JUDGMENT.—This is an appeal against a decree dismissing a suit for rent in which the amount claimed is only Rs. 3-10-0.

A preliminary objection has been taken that no appeal lies.

For the appellant reliance is placed on the case of *Dhanukdhari Lal* v. *Baburam Ahir* (1), in which it was held that a suit for arrears of rent or, in the alternative, for assessment of fair rent on the basis of a partition proceeding was outside the provisions of section 153 of the Bengal Tenancy Act. But it appears that that decision does not apply to this case, as there is no prayer except one for recovery of arrears of rent.

It appears to me doubtful whether the case is not to be taken out of the provisions of section 153 of the Bengal Tenancy Act owing to there having been a decision and a decree on a question relating to title to land. But, as the respondent in whose favour the decree was passed has now pleaded that no question has been decided, it must be held, if there is any future litigation, that the question of the plaintiffs' title is not effected by the decision in this suit. I, therefore, hold that no question of title has been decided between the parties and the suit being one instituted by the landlord for recovery of rent for a sum not exceeding Rs. 100, no appeal lies to this Court.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 4 Ind. Cas. 745; 10 C. L. J. 629.

MULIABAI v. GARUD.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No, 392 OF 1913.

June 17, 1919.

Present:—Mr. Findlay, A. J. C.

Musammat MULIABAI—DEFENDANT—APPELLANT

versus

GARUD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872) s. 11—Specific Relief Act (I of 1877) s. 38—Contract with minor, validity of—Minor, whether can be required to make compensation.

A contract entered into with a minor is not a voidable contract, but is simply a *nudum pactum ab initio* void, and completely outside the scope of Chapter IV and section 38 of the Specific Relief Act. [p. 67, col. 1.]

Appeal against the decree of the District Judge, Raipur, in Civil Appeal No. 9 of 1918, dated the 10th May 1918, arising out of Civil Suit No. 164 of 1917, in the Court of the First Munsif, Raipur, decided on the 30th January 1918.

Dr. *Gour* (with him Mr. *Ravishankar Shukla*), for the Appellant.

Messrs. *Mohiuddin* and *J. C. Ghosh*, for the Respondents.

JUDGMENT.—The plaintiffs-respondents Garud, Anandram, Dular Singh and Balchand sued the present appellant defendant Muliyabai in the Court of the 1st Munsif, Raipur, for a decree for Rs. 1,800 under the following circumstances :—

They alleged that the deceased son Bhagwat Prashad of Muliyabai had obtained two decrees against the plaintiffs on the 27th July 1914 in the Court of the Subordinate Judge, Raipur. At that time all the plaintiffs were joint and one Mangsai, nephew of the first plaintiff, the elder brother of the second and third plaintiffs and the father of the fourth plaintiff, was the manager of the family. The deceased Bhagwat Prashad was the absolute owner of his village and used to manage it himself ; and it was alleged that, having represented himself as manager to Nangsai, he received Rs. 1,800, being the amount of the said decrees, less Rs. 200 remitted, and passed a receipt therefor on the 26th February 1915. Shortly after the said payment both Bhagwat Prashad and Nangsai died. Thereafter the defendant Muliyabai took out execution of the two decrees but the objections filed in the execution proceedings by the plaintiffs were dismissed, the Subordinate Judge concerned holding that, Bhagwat Prashad having been a minor, the payment of Rs. 1,800 made to him could not be appropriated towards the said decrees. It was further alleged that Bhagwat Prashad had fraudulently represented himself to be a major and in the circumstances repayment of the amount of Rs. 1,800 was claimed from his estate which is now in possession of the defendant Muliyabai.

The first Court held that Nangsai did not make the payment of Rs. 1,800 in question and that the receipt (Exhibit P-1) had not been proved. On these and connected findings plaintiffs' suit was dismissed. On appeal to the Court of the District Judge, Raipur, the lower Court's decree was reversed and instead a decree was passed ordering the present appellant to pay Rs. 1,800 from the assets of Bhagwat Prashad in her hand in satisfaction of the claim referred to. In this connection the learned District Judge held that the receipt (Exhibit P-1), as well as the payment specified in it, had been proved. Bhagwat Prashad, however, having been a minor at the time, had no power to compromise the two decrees referred to and the adjustment effected by him was, therefore, void. The learned District Judge further found that there was no proof that Bhagwat Prashad had falsely represented himself to be of age when he took the payment from Nangsai. The allegation of fraud, therefore, even on the finding of the District Judge, failed. The lower Appellate Court, however, held that section 38 of the Specific Relief Act applied to the case and that the present respondents were entitled to its benefit. The District Judge accordingly passed a decree as already mentioned.

The defendant Muliyabai has appealed to this Court and reliance has been mainly placed on an important question of law which arises in connection with the case. It has up to the present been held by the Indian Courts that on the authority of section 115 of the Indian Evidence Act no one can be allowed to profit by his own fraud. It would appear, however, that the position in this connection in the law of India would require some reconsideration in view of the decision of the Privy Council in

Mahomed Syedol Ariffin v. *Yeoh Ooi Gark* (1). It is true that the decision in question related to a case from the Straits Settlements, but the law in force there corresponds closely to that with which we are concerned in the present case, the Straits Settlements Evidence Ordinance being closely modelled on the terms of the Indian Evidence Act. In the case in question their Lordships wrote as follows :—

"A case of fraud by the appellant on the subject of his age was set up, but it cannot be doubted that the principle recently given effect to in the case of *Leslie Limited* v. *Shiell* (2) would apply, and such a case would fail."

Now, the decision in the King's Bench case just quoted concerned an infant who had fraudulently represented that he was of full age and had induced the plaintiffs to lend him two sums of £200 each. To an action by the plaintiffs to recover the amount of the advances on the ground that they had been obtained by fraudulent misrepresentation, or in the alternative for money had and received by the defendant to the use of the plaintiffs, the defendant pleaded infancy. The Court of Appeal held that the cause of action was in substance *ex contractu*, that the plea of infancy was a good answer to the action and that the defendant was under no equitable liability to the plaintiffs. In the case quoted the learned Justice remarked as follows :—

"In the present case there is clearly no accounting. There is no fiduciary relation : the money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so, and I think that no ground can be found for the present judgment, which would be an answer to the Infants' Relief Act."

It is true that there is no Infants' Relief Act as such in force in India, but the principles underlying this judgment appear to me to also apply to the present case. In the present case, moreover, there is on the finding of the learned District Judge no case of fraud, for the lower Appellate Court has in paragraph 7 of its judgment held that Bhagwat Prashad made no representation at all about his age.

A distinction must be drawn, of course, between a case like the present where cash passed and a case in which particular property, *e.g.*, a horse or a motor car passes to a minor. In the latter class of cases, where restitution is possible, it can, of course, be decreed by the Court. But the position is entirely different when mere money passes. In the 2 King's Bench case [*Leslie Limited* v. *Shiell* (2)] just referred to Kennedy, L. J., remarked as follows :—

"In the first place, it appears to me that whilst Courts of Equity have interfered to make an infant restore property found in his possession which he had obtained by fraudulent misrepresentation, as, *e. g.*, the promissory-note in the old case of *Clarke* v. *Cobley* (3); to compel the recognition, in regard to property in his possession, of rights and interests of persons whom he has misled into entering into transactions in regard to it [*cf. Watts* v. *Cresswell* (4)]; and to prevent the payment over again to the infant of moneys of which he has procured the payment already by a representation of full age, as in *Cory* v. *Gertcken* (5); there is no case in which I can find that a Court of Equity has given judgment against an infant in circumstances like the present, that is to say, in which it has interfered on the ground of the fraud of the infant, whereby he induced the making of the contract of loan, to order the infant to pay the plaintiff a sum equal to the sum borrowed under the void contract, and so, in effect, to the amount of the principal lent, to give validity as against the infant to a void contract."

It is obvious, therefore, that, a considerable gulf has to be bridged before relief can be

(1) 39 Ind. Cas. 401; 21 C. W. N. 257; (1917) M. W. N. 162; 19 Bom. L. R. 157 (P. C.); (1916) 2 A. C. 575; 86 L. J. P. C. 15; 43 I. A. 256; 115 L. T. 564; 32 T. L. R. 673.

(2) (1914) 3 K. B. 607; 83 L. J. K. B. 1145; 11 L. T. 106; 58 S. J. 453; 30 T. L. R. 460.

(3) (1789) 2 Cox 173; 2 R. R. 25; 30 E. R. 80.

(4) 9 Vin. Abr. 415; 2 Eq. Abr. 515.

(5) (1816) 2 Madd. 40; 17 R. R. 180; 56 E. R. 250.

given in a case like the present as compared with the case where restitution of the actual property received by the minor is possible.

The learned District Judge in the view he has taken of the case, *vide* paragraph 9 of his judgment, has relied on *Mohori Bibee* v. *Dharmodas Ghose* (6), *Datta Ram* v. *Vinayak* (7), and *Kamta Prasad* v. *Sheo Gopal Lal* (8). As was pointed out in *Datta Ram* v. *Vinayak* (7), the decision in *Mohori Bibi* v. *Dharmodas Ghose* (6) was to the effect that a contract by a minor, such as a mortgage, is void and that a money-lender who has advanced money to the minor on the security of the mortgage is not entitled to the payment of the money on decree being made declaring the mortgage invalid. The decision, however, is also an authority for the proposition that the circumstances of a particular case may be such that, having regard to section 41 of the Specific Relief Act, the Court may, in adjudging of the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require. We are, however, here not concerned with section 41 of the Specific Relief Act but with section 38 under which the learned District Judge has held that the plaintiffs are entitled to the decree he has given them. Now, in my opinion, Chapter 4 of the Specific Relief Act has no application whatever in the present instance. That chapter relates to the rescission of contracts and the circumstances under which rescission may be adjudged are clear from section 35 of the same Act. The present contract having been made with a minor was not a voidable one but simply a *nudum pactum ab initio* void; while Chapter 4 of the Specific Relief Act really deals with the case of persons who are competent to contract. It, therefore, seems to me that section 38 of the Specific Relief Act has no application to the present case and that the lower Appellate Court has erred in giving the relief it did on the strength of this provision.

As I have already shown, the respondents can derive no benefit from the provisions of section 115 of the Indian Evidence Act in view of the decisions in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (1) and in *Leslie Limited* v. *Shiell* (2) and it follows, therefore, on the above findings that the present appeal must succeed. The judgment and decree appealed against are accordingly reversed and instead a decree will issue dismissing the plaintiffs' suit. As regards costs I think a fair order will be that the respondents should bear appellant's costs in this Court as well as their own and the costs in the two lower Courts should be borne by the parties incurring them.

Appeal decreed.

(6) 30 C. (P. C.) 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374.
(7) 28 B. 181; 5 Bom. L. R. 916.
(8) 26 A. 34

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 100 OF 1917.

June 13, 1919.

Present :—Mr. Justice Chatterjea and Mr. Justice Duval.

KAMINI KUMAR SAHA CHAUDHURY AND ANOTHER—DECREES-HOLDERS—APPELLANTS

versus

ABDUL RAHIM AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908) s. 47, O. XXI r. 2—Execution of decree—Satisfaction of decree, allegation of, whether can be investigated—Certification, absence of, effect of.

Where in execution of a decree the judgment-debtor alleges that the decree has been satisfied and that the decree-holder has failed fraudulently to certify the satisfaction to the Court, the Court has power under section 47 of the Civil Procedure Code to investigate the allegation. [p. 68, col. 2.]

Appeal against the order of the District Judge, Chittagong, dated the 21st December 1916, affirming that of the Munsif, Fatickcheri, dated the 9th September 1916.

FACTS appear from the judgment.

Babu *Sib Chandra Palit* (with him Babu *Bhagirath Chandra Das*), for the Appellant.—This appeal arises out of an application for execution of a mortgage-decree. The decree-holders are the appellants. In another execution case a petition was put in by the judgment-debtor for satisfaction of the mortgage decree. The present application was made on 5th March 1916. The case of the judgment-debtor was, not that he paid the money to my agent, but that he paid only Rs. 250 out of Rs. 500 due in respect of two

decrees. The question, therefore, is whether an executing Court can take any notice of any uncertified payment in satisfaction of a decree. My submission is that it cannot. Refers to *Bireswar Mookerjee* v. *Ambika Charan Bhattacharjee* (1). *Jogendra Nath Sarcar* v. *Probhat Nath Chatterjee* (2). Certification was prayed for only in respect of the later decree and not in respect of the mortgage decree.

Babu *Biraj Mohan Mazumdar*, for the minor Respondent (with him Babu *Chandra Sekhar Sen*, for other Respondents).—The cases cited are clearly distinguishable, as in fact there was no fraud on the part of the decree holder as in the present case. Refers to *Gadadhar Panda* v. *Shyam Churn Naik* (3).

Babu *Sib Chandra Palit*, in reply.—There is absolutely no evidence with regard to fraud. Under the authorities cited the Court cannot take cognisance of such payment.

JUDGMENT.—This appeal arises out of an application for execution of a decree. The judgment-debtor objected to the execution on the ground that the decree had been satisfied, and the Courts below have given effect to that objection.

The decree holder has appealed to this Court and it has been contended on his behalf that the satisfaction or adjustment of the decree had not been certified to the Court as aid down by law.

It appears that a petition was put in on behalf of the agent of the decree-holder in another execution case certifying satisfaction of the decree in that case, and it was recited in that petition that nothing further remained due to the decree holder on account of any other decree.

No application was put in in the execution case in which the decree now in question was being executed at that time. It appears that the agent of the decree holder promised to certify the satisfaction of this decree also.

Some evidence was taken in this case and the learned Munsif came to the finding that "the judgment-debtor has proved the payment in satisfaction of the decree and judgment debtor has been fraudulently kept out of all means of exercising his right to apply in Court." The learned District Judge, however, has not gone into this question, which can be investigated under section 47 of the Code [see *Gadadhar Panda* v. *Shyam Churn Naik* (3)].

We think, therefore, that the case should go back to the lower Appellate Court in order that the question may be inquired into and the case disposed of according to law. Both parties will be entitled to adduce evidence. The lower Appellate Court may direct the Court of first instance to take the evidence required and send it up to that Court.

Costs one gold *mohur* to abide the result.

Case remanded.

(1) 42 Ind. Cas 472; 45 C. 630
(2) 21 Ind Cas 926; 19 C. L. J. 126 at p. 128; 19 C. W. N. 650.
(3) 12 C. W. N. 485.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 230 OF 1919.

June 6, 1919.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

Musammat RAJ KARNI, *alias Musammat* PREM KAUR, WIDOW AND LEGAL REPRESENTATIVE OF THANDI SHAH, DECEASED—DECREE-HOLDER—APPELLANT

versus

KARAM ELAHI—JUDGMENT DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 104 (h), O. XXI, r. 40—Execution of decree—Order dismissing application for judgment-debtor's arrest, nature of—Appeal, whether lies.

An order under Order XXI, rule 40, of the Civil Procedure Code dismissing the application of a decree-holder for the arrest and imprisonment of the judgment-debtor relates to the execution of a decree and as such comes under section 47 of the Code and is appealable [p. 69, col 2.]

The concluding words of section 104, clause (*h*), of the Civil Procedure Code indicate that where an order directing the arrest or detention of the judgment-debtor is made in execution of a decree, it is to be treated as an order coming under section 47. [p. 69, col. 2.]

Miscellaneous second appeal from the order of the District Judge, Jhelum, dated the 8th October 1917, affirming that of the Senior Subordinate Judge, Jhelum, dated the 14th July 1917, dismissing the decree-holder's application for the arrest and im-

prisonment of the judgment-debtor for default of payment of instalment in execution of a decree.

Bakhshi *Tek Chand*, for the Appellant.

JUDGMENT.—The facts out of which this miscellaneous appeal has arisen are simple and the point for decision is a short one.

One Thandi Shah held two money decrees against Karam Ilahi. Execution proceedings were taken as to one of the decrees. A house was sold upon which the parties entered into a compromise. One of the terms of the compromise was that the amount of the decree would be payable by instalments and in case of default of any instalment the decree-holder would have the power to recover the whole amount by executing the decree against the person and property of the judgment-debtor. A default having taken place, the decree-holder applied for the arrest and imprisonment of Karam Ilahi. Therefore the judgment-debtor was called upon to show cause why he should not be arrested and imprisoned. Several objections were urged by him, which are given in detail in the judgment of the executing Court. That Court accepted the objections and dismissed the application of the decree-holder for the arrest and imprisonment of the judgment-debtor. This order was made under rule 40, Order XXI, Civil Procedure Code. The decree-holder preferred an appeal to the District Judge of Jhelum. This appeal was dismissed by the learned District Judge, on the ground that an order made under the above-mentioned rule was not appealable. He was of opinion that the order was neither appealable as an order under Order XLIII, nor as a decree under section 47, Civil Procedure Code. The decree-holder has come up in appeal to this Court, and it is argued on his behalf that the order appealed against related to the execution of a decree, and as such came under section 47 of the Code.

Reliance is placed on the provisions of clause (*h*) of section 104 in support of this contention. Under the said clause an appeal is allowed from "an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in civil prison of any person except where such arrest or detention is in execution of a decree."

It is contended that the concluding words of the clause indicate that where an order directing the arrest or detention is made in execution of a decree, it is to be treated as an order coming under section 47.

In our opinion there is force in this contention which is supported by authorities. In a decision of the Punjab Chief Court reported as *Bishna* v. *Banta* (1) it was decided that an order made under section 337 (*a*) was appealable as a decree as it came within the purview of section 244 (*c*) of the old Code. A similar view was taken by the Madras High Court in a case reported as *Abdul Rahiman* v. *Mahomed Kassim* (2). The cases reported as *Nayana Naickan* v. *Gulam Ghowse* (3) and *Subbarama Ayyar* v. *Arunachellam Chettiar* (4) also go to support the contention. In the face of these authorities the decision of the lower Appellate Court cannot be supported.

We, therefore, set aside the judgment and decree of the lower Appellate Court on this preliminary point and remand the case to that Court under Order XLI, rule 23, to be re-admitted under its original number in the register of pending appeals and to be disposed of according to law. Costs will abide the result.

Case remanded.

(1) 69 P. R. 1905; 183 P. L. R. 1905.
(2) 21 M. 29; 7 Ind. Dec. (N. S.) 377.
(3) 5 Ind. Cas. 909; 20 M. L. J. 136; 8 M. L. T. 122.
(4) 32 Ind. Cas. 731; 3 L. W. 35.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REFERENCE No. 56 OF 1918-19.

June 4, 1919.

Present :—Mr. Ferard, S. M.

SALAMATULLAH—PLAINTIFF

versus

SAHU MAKHANLAL—DEFENDANT.

Agra Tenancy Act (II of 1901), ss. 177, 185—Civil Procedure Code (Act V of 1908) O. IX r. 8—Order appealable to District Judge—Revision by Board of Revenue, whether competent—Suit dismissed for default—Restoration, order of, interference with.

KASIREDDI CHINNAREDDI *v.* PATCHIPULUSU VENKATASWAMI.

Where, under section 177 of the Agra Tenancy Act, an order in certain suits is appealable to the District Judge, such suits are, by the terms of section 185 of the Act, outside the revisional jurisdiction of the Board of Revenue, and it is not within the competence of the Board to interfere with an order under rule 9, Order IX, Civil Procedure Code, restoring such a suit dismissed for default.

Reference made by the Commissioner, Rohilkhand Division.

ORDER.—This is a reference by the Collector of Moradabad through the Commissioner recommending that the order of Mr. Bealty, Assistant Collector, 1st class, dated 9th January 1919, by which he restored the profit suit of *Sahu Makhanlal, plaintiff* v. *Salamatallah Khan, defendant*, for Rs. 971, be set aside under section 185, Tenancy Act.

The order in point was: "Case may be restored and will be taken up on 4th February 1919." The suit had been originally once before Mr. Bealty's predecessor, who had dismissed it under rule 8, Order IX, Civil Procedure Code, for default of plaintiff at first hearing on 16th January 1918, and for the same reason had refused the applications for restoration on 26th February 1918 and 30th May 1918. Mr. Bealty's order of 4th February 1919 was on an application by plaintiff that he had not been able to appear because his Pleader had missed the train and he himself was ill. Now although Order IX, rule 9, Civil Procedure Code, does not expressly say that Courts restoring cases must record their reasons for doing so, the omission cannot be taken to override the common principle of law that orders must be based on sufficient reason, and I consider that Mr. Bealty's restoration of the case after the plaintiff had absented himself on three occasions (the original hearing and when his two applications for restoration came on for hearing) was, in the absence of recorded reasons for this extreme indulgence, material irregularity. Judging from telegrams of 26th February 1918 and 30th May 1918 which I see on the record, the absence on two occasions was because plaintiff's *mukhtar* missed the train. Plaintiffs cannot expect indulgence if they do not come to Court themselves and employ *mukhtars* who repeatedly miss trains. Even if this be passed over, the non-appearance at the first hearing on 16th January 1918 remains unaccounted or, and the most favourable order to the plaintiff that the Board could pass on this record would, I think, be to accept the Collector's recommendation and set aside the Assistant Collector's order of 4th January 1919, and direct him to call on the plaintiff to justify his absence on all three occasions and restore the case only if he adequately justifies them all recording his reasons for doing so fully.

But a legal difficulty presents itself against this course. A profit suit for Rs. 971 is a suit appealable to the District Judge under section 177 and such suits are placed outside the Board's revisional jurisdiction by the terms of section 185, Tenancy Act, and it is in my opinion not within the Board's competence to interfere with an order under rule 9, Order IX, Civil Procedure Code, restoring a suit dismissed for default under rule 8 of that Order.

I notice that the Commissioner has passed the Collector's report on to the Board without comment, but rule 7 (2), Circular 9-11, does not impose any legal obligation on the Commissioner other than that of a post office.

The order, therefore, is that the record be returned.

Record returned.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 976 OF 1917.

May 2, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KASIREDDI CHENNA REDDI—DEFENDANT—APPELLANT

versus

PATCHIPULUSU VENKATASWAMI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Malicious prosecution, damages for, suit for—'Malice' 'reasonable and probable cause' proof of, requisites of—Finding as to want of reasonable and probable cause, nature of.

So far as the Courts in India are concerned, a finding as to want of reasonable and probable cause in an action for malicious prosecution is a finding of fact and not of law. [p. 74, col. 1.]

Pestonji Muncherji Mody v. *Queen Insurance Company*, 25 B. 332; 2 Bom. L. R. 938; 4 C. W. N. 781 (P. C.), explained.

Shama Bibi v. *Chairman of Baranagore Municipality*, 6 Ind. Cas. 675; 12 C. L. J. 410, not approved.

KASIREDDI CHINNAREDDI *v.* PATCHIPULUSU VENKATASWAMI.

The expressions 'reasonable cause' and 'probable cause' are synonymous. Any distinction that is sought to be made, that in any particular case there might be probable cause but not reasonable cause and that there should be an absence both of probable and reasonable cause to sustain an action for malicious prosecution as if the two could be distinguished, is opposed to the rules laid down on this branch of the Law of Torts. [p. 72, col. 1]

Whether it is called 'reasonable *and* probable cause' or 'reasonable *or* probable' cause, the meaning is reasonably probable cause, *i.e.*, a cause which an ordinarily reasonable man, having knowledge of facts and the belief (arrived at in a reasonable manner) as to facts which the defendant then had, would be justified in considering as affording a fair basis for the opinion that a criminal offence has been committed by the plaintiff and hence as being a probable cause for the institution of criminal proceedings against the plaintiff. [p. 72, col. 2.]

The fact that a civil suit for damages was a better or more appropriate remedy has little relevancy on the question of want of reasonable and probable cause. A man is entitled to pursue any of the legal remedies in any order he likes [p. 72, col. 2.]

There is no real distinction between legal malice and malice in fact If a man has been reckless, whether the charge be true or false, that might amount to malice, but not recklessness in coming to the conclusion that there is reasonable and probable cause. [p. 73, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cuddapah, in Appeal Suit No. 350 of 1916, (Appeal Suit No. 63 of 1915, on the file of the District Court, Cuddapah), preferred against the decree of the Court of the District Munsif, Nandalur, in Original Suit No. 35 of 1914.

This second appeal came on for hearing on the 16th and 20th August 1918.

Mr. *N. Chandrasekhara Aiyar*, for the Appellants.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant is the appellant. The suit was brought for damages for malicious prosecution claiming Rs. 400 as damages. The District Munsif dismissed the suit on the grounds (*a*) that the defendant *bona fide* believed himself to be the owner of the house in reference to which he launched the prosecution and had a probable and reasonable cause for prosecuting the plaintiffs; and (*b*) that even if the defendant had no reasonable and probable cause, the defendant had no personal spite against the plaintiffs and no malice was, therefore, made out.

The Subordinate Judge on appeal arrived at certain findings in a rather confused manner. He begins by saying that the District Munsif "complicated" the case by entering into the question as to who was the owner of the whole house which the defendant claimed by purchase and that in his (Subordinate Judge's) opinion, it was "a needless question to go into." Then he says, "For the purposes of the present enquiry we must assume that the defendant is the owner of the northern house marked Y in the plan given in the judgment." Then he says that the complaint of criminal trespass brought by the defendant against the plaintiff was not sustainable, because though it was found in another civil suit between the parties, which was instituted during the pendency of the criminal complaint by the defendant against the plaintiff, that the plaintiff did commit a civil trespass by building on a joint wall without the defendant's consent and though the plaintiff was directed to pay damages to the defendant, the defendant ought to have treated the matter as a pure civil trespass and ought not to have rushed to the criminal Court. Then the Subordinate Judge says (paragraph 4 of his judgment) that the truth or falsehood of the defendant's criminal complaint should not be mixed up with the want of reasonable and probable cause and that the defendant's belief in the truth of his complaint should not have led him to suppose that there was a criminal trespass. Then in the course of another confused paragraph (5), occur the following sentences: "I do not believe, therefore, that the defendant had a reasonable and probable cause to go to the Magistrate under these circumstances. But it is the plaintiffs' duty nevertheless to show want of reasonable and probable cause. Their acts as described by the District Munsif would have given to the defendant only the probable cause but not at all the reasonable cause. Reasonable and probable cause means ordinarily what a prudent and careful man might or even ought to do under particular circumstances. The fact that he had immediately filed a civil suit on the heels of the criminal case shows that he had only a probable cause but not a reasonable cause to go to a Magistrate." I must confess that I find myself unable to understand this finding.

Then in the 6th paragraph the learned Subordinate Judge says: "I should think

legal malice is made not from the want of reasonable cause. The wrong motive with the defendant was to coerce the plaintiffs to recognise his title. That is legal malice." Finally the Subordinate Judge awarded Rs. 30 as damages.

In *Quartz Hill Gold Mining Company* v. *Eyre* (1) Brett, M. R., says at page 687: "Whenever.....the Judge holds that there is a want of reasonable *and* probable cause, there is evidence to go to the jury of malice. When there is no other evidence of malice except what the Judge has stated to be in his opinion a want of reasonable *or* probable cause, I incline to agree with Huddleston, B., and Hawkins, J., in *Hicks* v. *Faulkner* (2), that upon the question of malice the jury are not bound by the holding of the Judge as to the absence of *reasonable cause*, but they may consider whether in their own view there was a want of reasonable *or* probable cause" (The italics are mine.) Thus it is clear that the want of reasonable or probable cause is not conclusive on the question of malice, though it is one of the elements to be considered in arriving at a conclusion on the question of malice. In the same page 687 from which I have made the above quotation from Brett, M. R., the learned Judge first uses the expression 'want of reasonable *and* probable cause,' then he uses the expression 'want of reasonable *or* probable cause', then he uses the expression 'absence of reasonable cause' alone and lastly the expression 'want of reasonable *or* probable cause.' So also Bowen, L. J., at page 693 uses the expression 'want of reasonable *or* probable cause' and says that *both* 'want of reasonable or probable cause' and 'malice' must be proved by the plaintiff. At page 694, he uses the expression 'absence of reasonable *and* probable cause' in two places. The distinction made by the Subordinate Judge, therefore, that in any particular case, there might be probable cause but there may not be reasonable cause and that there should be both probable and reasonable cause as if the two could be distingnished is, in my opinion, opposed to the rules laid down by eminent Judges on this branch of the Law of Torts. Whether it is called 'probable *and* reasonable cause' or 'reasonable *or* probable cause,' I think the meaning is "reasonably probable" cause, that is, a cause which an ordinarily reasonable man, having knowledge of facts and the belief (arrived at in a reasonable manner) as to facts which the defendant then had, would be justified in considering as affording a fair basis for the opinion that a criminal offence had been committed by the plaintiff and hence as being a probable cause for the institution of criminal proceedings against the plaintiff. The fact that a civil suit for damages was a better or more appropriate remedy has very little relevancy on this question of want of reasonable and probable cause. A man is entitled to pursue any of the legal remedies which he considers to be in his own interest to adopt in any order he likes.

In *Corea* v. *Peiris* (3) the following passages are found in the judgment of their Lordships of the Privy Council:— "It is clear upon the above evidence that the real charge which the prosecutor wished to have preferred against the appellant was that of criminal trespass, since he looked upon the trespass as an act directed against his title to and ownership of these and possibly other lands in the district" (I may add that the prosecution in that case was for theft of goods also along with criminal trespass). "In the result, therefore, the respondent proved that he believed the story his old and trusted servants had told him; that he consulted his legal advisers at every step; and that he took action in defence of his title to his property, in the *bona fide* belief that the appellant had trespassed on his land and forcibly removed his goods. The case made against him is that he could not have believed, or should not have believed, without much stronger proof, that Mr. Corea was capable of committing a theft, and that he acted recklessly in accusing him of having committed theft." At page 552, their Lordships use the expression 'reasonable and probable cause' and at page 555, merely 'absence of reasonable cause' (without adding the word 'probable' to "reasonable" separated by either 'and' or 'or'). Then they say: "The crucial questions for consideration are:—Did the prosecutor believe the story upon which he acted? Was his conduct in believing it, and acting on it, that of a

(1) (1893) 11 Q. B. D. 674; 52 L. J. Q. B. 434; 49 L. T. 249; 31 W. R. 678.

(2) (1882) 8 Q. B. D. 167; 51 L. J. Q. B. 263; 30 W. R. 545.

(3) (1909) A. C. 549; 78 L. J. P. C. 25; 100 L. T. 790; 25 T. L. R. 631.

reasonable man of ordinary prudence? Had he any indirect motive in making the charge?" Thus their Lordships use the words 'reasonable cause' as synonymous with "reasonable and probable cause" and "reasonable or probable cause." I am, therefore, clear that the Subordinate Judge misdirected himself on the question of law] in respect of what facts should be proved to justify a Court in finding want of reasonable and probable cause. His statement that there was probable cause but not reasonable cause is almost unmeaning.

As regards the question of malice also the use of the expression "legal malice" as distinguished from "malice in fact" is misleading in actions for malicious prosecution. In *Vaidinadier* v. *Krishnasami Iyer* (4) (decided by Sundara Aiyar, J., and Spencer, J.), the lower Appellate Court in its judgment said that "the degree of caution expected of a man who wants to set the criminal law in motion is that he should reflect like a man of ordinary prudence as to what chances there were of conviction against the person whom he accuses and how far his conduct would amount to an offence. Every man is supposed to know the law." Upon this the learned Judges of this Court remark: "This cannot be accepted as correct. All that the defendant had to be satisfied about was that there was reasonable and probable cause for the charge, that is reasonable grounds for believing that the plaintiff was guilty of abetment and not reasonable grounds for coming to the conclusion that the Court would convict him of it." Then the learned Judges say at the end: "Carelessness on the part of the defendant in deciding whether there was reasonable and probable cause would not amount to malice and both malice and absence of reasonable and probable cause had to be proved. It has no doubt been decided that if a man has been reckless, whether the charge be true or false, that might amount to malice, but no recklessness in coming to the conclusion that there was reasonable and probable cause." On the question of malice, therefore, also, the Subordinate Judge has misdirected himself in the case before us.

The appellant's learned Vakil (Mr. Chandrasekara Aiyar) argued that if we come to the conclusion that the Subordinate Judge's finding on the question of reasonable and probable cause could not be accepted, we should ourselves consider the evidence and the facts and come to our own finding on the question of reasonable and probable cause, or, at any rate, taking the preliminary facts as found by the lower Appellate Court, give a finding ourselves on the question of reasonable and probable cause. He argued that a finding on the question of reasonable and probable cause is a finding on a question of law and not of fact. He relied on the decision of the Calcutta High Court in *Shama Bibi* v. *Chairman of Baranagore Municipality* (5). Mookerjee, J., says at page 418*: "In so far as the facts have been found by the Court of appeal below, they are binding upon this Court, but whether from the facts so found, absence of reasonable and probable cause or presence of malice can be inferred is a question of law for determination by the Court alone. *Hailes* v. *Marks* (6), *Broughton* v. *Jackson* (7), and *Lister* v. *Perryman* (8)." The learned Judge admits, however, that there are passages in the decision of their Lordships of the Privy Council in *Pestonji Muncherji Mody* v. *Queen Insurance Company* (9) which lay down that in Indian Courts a finding as to reasonable and probable cause in an action for malicious prosecution is a question of fact, though according to English law, it is a question left for the Judge to determine. But Mr. Justice Mookerjee thinks that the sentence in the judgment of their Lordships of the Privy Council, "There is really nothing but a question of *fact* and a question of *fact* to be determined by one and the same person," is a mistake for "there is really nothing but a question of $\frac{\text{law}}{\text{fact}}$ and a question of $\frac{\text{fact}}{\text{or law}}$ to be determined by one and the same person." Having read the judgment of their Lordships of the Privy Council carefully, I am with the greatest

(4) 19 Ind. Cas. 665; 36 M. 375; 24 M. L. J. 515.

(5) 6 Ind. Cas. 675; 12 C. L. J. 410.

(6) (1861) 7 H. & N. 56; 30 L. J. Ex. 389; 7 Jur. (N. S.) 851; 4 L. T. 505; 9 W. R. 808; 158 E. R. 391; 126 R. R. 329.

(7) (1852) 18 Q. B. 378; 21 L. J. Q. B. 265; 16 Jur. 886; 118 E. R. 141.

(8) (1870) 4 H. L. 521; 39 L. J. Ex. 177; 23 L. T. 269; 19 W. R. 9.

(9) 25 B. 332; 2 Bom. L. R. 938; 4 C. W. N. 781 (P. C.).

*Page of 12 C. L. J.—*Ed.*

respect unable to agree with Mr. Justice Mookerjee that there is any such clerical mistake in the report of the judgment of their Lordships of the Privy Council. Their Lordships have, on the other hand, clearly laid down that a finding as to want of reasonable and probable cause is a finding of fact and not a finding of law so far as the Indian Courts are concerned. (I may add that Mr. Justice Mookerjee's statement that the finding as to existence of malice is also for the Court opposed to even the English decisions).

In my above view that the Subordinate Judge in arriving at his findings of fact has materially misdirected himself, I would remand the case for fresh findings from the lower Appellate Court on the two connected questions of want of reasonable and probable cause and of the existence of malice. Time four weeks from the receipt of records and ten days for objections. No fresh evidence.

NAPIER, J.—I entirely agree.

In compliance with the order contained in the above judgment, the District Judge of Cuddapah submitted the following

FINDING.—I am to submit findings on the two following issues:—

1. Whether defendant had no reasonable and probable cause for making the complaint?
2. Whether there was malice on the part of the defendant?

2. The ownership of the suit house still seems to be not settled finally. Meda Narsayya has been in possession and has been claiming to be the owner. But the defendant has got title-deeds and, moreover, has got a decree for rent against Meda Narsayya, and there is no proper evidence in this suit that the sale-deeds on which defendant relies are nominal transactions as alleged by Meda Narsayya. I think, therefore, it is quite clear that defendant has a *bona fide* claim to the house which justified him in taking steps to prevent encroachment on the property.

3. With regard to the alleged acts of mischief and trespass complained of by the defendant before the Magistrate, the encroachment on the backyard seems to be doubtful (*vide* Exhibit I); but it is easy for the defendant to be under a misapprehension in regard to that matter, for the space is small and he might have really considered that the wall had been shifted.

4. With regard, however, to the raising of the joint wall, this is admitted by P.W. No. 1 who is the first plaintiff; and it seems to me that this act would naturally cause annoyance to the defendant. The distinction between criminal trespass and civil trespass is sometimes rather fine and it is quite possible the defendant *bona fide* thought the best and quickest course would be to go to the Magistrate's Court. He does not seem to have acted in an unreasonable hurry, for the evidence of D. Ws. Nos. 4 and 5 shows that the defendant took respectable persons to the site, showed them the work that was going on and they advised 3rd plaintiff to stop the work till the dispute was settled. The defendant thought the best plan of stopping the annoyance was to go to a Magistrate's Court.

5. Then it is argued that the evidence of defendant only shows that 3rd plaintiff was engaged in constructing the wall. But the 1st plaintiff himself admits that he was also constructing the wall and the three plaintiffs are brothers and defendant might have thought they were acting jointly.

6. My finding on the 1st issue sent to me is that it is not proved that defendant had no reasonable and probable cause for making the complaint.

7. With regard to the second issue sent to me, the matter is quite clear. There was no enmity between plaintiffs and defendant; the only thing that sent defendant into Court was the trespass on the joint wall. The idea of plaintiffs that the defendant wanted to coerce Meda Narsayya and plaintiffs by filing the criminal case is pure speculation.

8. I find on the second issue that there was no malice on the part of the defendant.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding, and reversing the lower Appellate Court's decision restore the Munsif's decree with costs here and in the lower Appellate Court.

Appeal allowed.

M. C. P.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 113 OF 1916.

November 1, 1918.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.

Kunwar PARTAB SINGH—DEFENDANT—APPELLANT

versus

Kunwar KHURRAM SINGH—PLAINTIFF—RESPONDENT.

Guardian and ward—Agreement by guardian to pay stipulated sum as profits of estate, effect of—Accounts, liability of guardian to render—Minor, whether can question accounts passed by Court—Guardians and Wards Act (VIII of 1890), s. 34.

Where the guardian of a ward, to save himself the cost of appraising rents, agrees to pay a stipulated sum annually as the profits of the estate, he is bound to take good years with bad, and if, in any year, the collections are less, the loss is his, and not the ward's. [p. 75, col. 2.]

An agreement entered into by a guardian with the mother and uncle of his ward that, in consideration of the ward being allowed to manage the estate himself, the guardian would be indemnified against any suit for rendition of accounts which might be brought against him by the ward on attaining majority is not binding on the ward. [p. 75, col. 2.]

The filing of accounts by a guardian does not relieve him of responsibility for their correctness, nor does the passing of such accounts by the District Judge relieve him of the liability of accounting to his ward.[p. 76, col. 1.]

Appeal from the decree of the Subordinate Judge, Sitapur, dated the 24th July 1916.

The Hon'ble Syed *Wazir Hasan*, for the Appellant.

Messrs. *A. P. Sen*, *Chand Narain Harkauli* and *Tinkori Ghosh*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit by Kunwar Khurram Singh, who has now attained majority, against his late guardian Kunwar Partab Singh for three items alleged to be due by the latter on account of profits of the estate during the period of his guardianship. The defendant was appointed guardian in July 1903 and the plaintiff came of age in 1916. The suit has been decreed in regard to two of the items and in respect of these the defendant appeals. The plaintiff files a cross-objection respecting the third item which has been disallowed.

Prior to the defendant being appointed guardian by the Court one Dalipat Singh was guardian, and during the last three years of the latter's guardianship the plaintiff's property was leased to the defendant at an annual rental of Rs. 6,000 per annum. On the defendant being appointed guardian he applied to the District Judge in order, as he said, to save the plaintiff the costs of appraisement of rents, to fix a round figure of Rs. 5,725 as the annual profits of the estate without regard to the actual figures of collections and income for each year. The District Judge raised the amount payable to Rs. 6,000 and with this modification sanctioned the proposal and the defendant thereafter filed his accounts on this basis.

In his accounts for *fasli* 1312 the defendant for the first time claimed a deduction of Rs 2,916-12-0 on account of alleged short collections in *fasli* 1315, which was a dry year, and this is the first of the items in dispute in the appeal. Having agreed to pay a round sum of Rs. 6,000 every year, the defendant was clearly bound to take the good years with the bad and if he collected less in any particular year, the loss was his and not that of his ward. If the good years and the bad are reckoned together, there is, as the learned Judge has shown, every reason to believe that he has made a considerable profit by the arrangement. The other item in dispute is a sum of Rs. 2,348-7-0 said to have been given as advances to tenants. As the learned Judge has shown, the defendant himself in a previous suit admitted that these advances were made on his own behalf and not on that of his ward. It was sought to charge the ward with these items on the strength of an agreement dated the 26th of April 1912 (Exhibit A97) made between the defendant and the mother and uncle of the plaintiff, in which they agreed, in consideration of the ward being allowed to manage the estate for himself (this was two years only before he attained majority), to indemnify the defendant against any suit for rendition of accounts which might be brought against him by the ward after attaining majority. It was admitted, and could not but be admitted, in this Court that this agreement could not in any way bind the ward.

On the merits, therefore, the appellant has absolutely no case. He falls back on a legal plea based on section 43 of the Guardians and Wards Act and suggests that because the annual accounts in which these items were claimed, were passed by the Judge, therefore, the correctness of his

accounts cannot now be questioned. But an order to which section 48 applies must be an order passed under some provision of the Act. All that the Act provides is that the guardian shall, when so required, exhibit accounts [section 34 (*c*)]. The Act nowhere makes the Judge responsible for the correctness of those accounts. It is obvious that he is not in a position effectively to audit them. He may refuse to accept them if they contain manifest errors, but if they are on the face of them in order he simply directs them to be filed, leaving the ward to pursue his remedy against the guardian. That remedy is expressly reserved by sections 35 to 37 of the Act, the last of which in the broadest terms recognises the right of a ward or his representative to any remedy which is available to a beneficiary or his representative against his trustee. The relation of guardian and ward has been expressly declared in section 20 of the Act to be fiduciary relation. If there is one right which more than any other is inherent in the relation of trustee and beneficiary, it is the right of the beneficiary to sue his trustee for sums wrongfully appropriated or withheld by the latter. If the Court had passed an order under section 41 (4) discharging the guardian from all liability except in respect of fraud, there might have been force in the appellant's plea, but this the District Judge refrained from passing expressly in order that the plaintiff might have an opportunity of suing the defendant in respect of this item (Exhibit 17).

The item of Rs. 2,500, which the learned Judge has disallowed and in respect of which a cross-objection is filed, stands on a different footing from the others in that the defendant obtained an express order of the District Judge sanctioning the remission of this amount. The item related to the Fasli year 1312 corresponding to 1905. That was a year in which a severe frost occurred and remissions of rent and revenue were granted under the orders of Government. The remission of rent amounted to 25 per cent., and it would seem that in obtaining a concession of Rs. 2,500 the appellant obtained more than the circumstances of the village justified. His actual collections in that year, according to the *jamabandi*, were Rs. 4,141 11-3 on account of current demand and Rs. 1,406-15 3 on account of previous years giving a total or Rs. 5,548-10-6. The question is whether section 48 applies to the order of the District Judge sanctioning the remission so as to prevent that order being questioned in the present suit.

If we regard the District Judge's order as one authorizing the guardian to withhold a part of the profits which he had collected and which properly belonged to the minor, it is difficult to see how it can be justified; and indeed the whole arrangement by which the income was settled at a fixed sum has the appearance of being somewhat irregular. But in substance the arrangement was probably equivalent to a continuance of the *theka* which the defendant had held during the guardianship of Dalipat Singh, and probably the District Judge thought that it would in the long run be in the minor's interest to give the guardian an interest in the prosperity of the estate by entrusting the management to him on these terms. The arrangement at any rate was and is accepted by both the parties. But if the District Judge had power to make an arrangement of this sort, he had equally the power to modify it in a particular year in which the circumstances were abnormal. Regarding the order from this point of view there is no adequate ground why this Court should attempt to go behind it after the lapse of some thirteen years.

The result is that the appeal and cross-objection are both dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION PETITION No. 114 OF 1917-18.

March 22, 1919.

Present:—Mr. Ferard, S. M.

NIADAR SINGH—APPLICANT

versus

GHASI—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 131, 194 (1), (3)—Partition—Co-sharer, whether can sue to eject tenants before confirmation of partition.

Where a holding is allotted to a co-sharer in a joint *mahal* on partition, he cannot, as sole proprietor, sue to eject the tenants of the holding until the

partition is confirmed by the Commissioner under section 131 of the Agra Tenancy Act, and his status as sole proprietor is thereby established.

Application for revision of the order of the Commissioner, Rohilkhand Division, dated the 27th April 1918, in the case of ejectment.

JUDGMENT.—The respondent, Ghasi, was in his eleventh year of tenancy when his holding was allotted by the *amin* in partition to the plaintiff-applicant's *kura* on 29th January 1917—1324 Fasli. He had begun his twelfth year when plaintiff-applicant filed a suit to eject him on 11th September 1917, which was before the Collector confirmed the partition on 18th October 1917.

Plaintiff-applicant's case is that if he had not filed the suit in advance of the Collector's order of confirmation, he would not, under section 63, Tenancy Act, have been able to file it before 1st July 1918, by which time the tenant-respondent would have completed his twelfth year and would have acquired occupancy rights. He also urges, reasonably, that the other co-sharers in the joint *mahal* would not join him in filing the suit in 1917 because they had no interest in a holding, which they expected as a result of the *amin's* allotment would be going shortly into applicant's *mahal*. Respondent's Counsel suggests that applicant might have joined them as parties under Order I, rule 3, Civil Procedure Code, but this has no force in view of section 194 (1) and (3), Tenancy Act. It is only in money suits, and not in ejectment suits, that a co sharer can join other co sharers as parties against their wish.

The Commissioner in his judgment refers to the principle of *Swami Mukand Lal* v. *Ram Sarup* (1). That refers to *khudkasht* land under section 127, Land Revenue Act, and has no bearing on tenant land. In *Gopi Nath* v. *Abdul Aziz* (2) it has been held that a co-sharer can file suits in his new capacity of proprietor of his lot in partition directly the Collector confirms the partition under the first part of section 131, Land Revenue Act, even though under the second part of that section the partition does not take effect till the subsequent July 1st. There, is, however, no legal warranty for putting the date further back and holding that he can file suits as soon as the *amin* has made out the lots. The suggestion cannot be brought within the wording of section 131.

I, therefore, hold with the lower Court that a co-sharer in a joint *mahal* cannot as sole proprietor sue to eject the tenants of his new lot until his status as sole proprietor of the latter is established by Collector's confirmation of the partition under section 131. If other co-sharers will not join him, he cannot sue at all. Applicant's suit to eject respondent was premature. It is a hard case, though probably exceptional. The effect is likely to be that respondent will get occupancy rights by a bit of good luck. I, therefore, reject the application, but without costs.

Application rejected.

(1) 9 Sel. Dec. 1909.
(2) 10 Sel. Dec. 1910.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 370 OF 1918.

March 10, 1919.

Present:—Mr. Justice Kumaraswami Sastri.

KOPPANA CHELAMIAH—PETITIONER—PLAINTIFF

versus

Sree Raja DATLA SURYANARAYANA JAGAPATHI RAJU BAHADUR GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Contribution, suit for—Judgment on which suit is based, admissibility of - Trespass by plaintiff and defendant—Joint tort-feasors—Right of plaintiff to contribution.

Where the basis of a suit for contribution is a judgment in a suit between the same parties, that judgment is admissible in evidence in the suit for contribution not for the purpose of impugning its propriety, but for the purpose of showing the joint liability of the defendant, even though it may not be a judgment *in rem* or operate as *res judicata*. [p. 78, col. 2; p. 79, col. 1.]

KOPPANNA CHELAMIAH v. DATLA SURYANARAYANA.

Tepu Khan v. *Rajani Mohun Das*, 25 C. 522 (F. B.); 2 C. W. N. 501; 13 Ind. Dec. (N. S.) 347 and *Lakshman Govind* v. *Amrit Gopal*, 24 B. 591; 2 Bom. L. R. 386; 12 Ind. Dec. (N. S.) 924, followed.

Gobind Chunder Nundy v. *Srigobind Chowdhry*, 24 C. 330; 1 C. W. N. 179; 12 Ind. Dec. (N. S.) 887, not followed.

The plaintiff, in a suit for contribution must show some equity in his favour. If he was a joint tort-feasor with the defendant, as where both trespassed on a third party's land, no right to contribution is created. [p. 79, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Cocanada, dated the 19th September 1917, in Small Cause Suit No. 116 of 1917.

Mr. *K. P. Shanmoogam Pillai*, for the Petitioner.—The lower Court based its finding on Exhibit I, the judgment in the case in which plaintiff and defendant were sued in ejectment as trespassers by a third party. That judgment is not admissible in evidence. See *Gobind Chunder Nundy* v. *Srigobind Chowdhry* (1).

Mr. *U. Rama Rao*, for the Respondents. —Exhibit I is admissible. That is the basis of the present suit. No other evidence has been adduced in this case. That judgment cannot be impugned by the parties thereto. It shows that plaintiff and defendant were joint tort-feasors and there is is no contribution as between them. See *Tepu Khan* v. *Rajani Mohun Das* (2), *Lakshman Govind* v. *Amrit Gopal* (3) and *Siva Panda* v. *Jujusti Panda* (4).

JUDGMENT.—The suit out of which this petition arises was for contribution in respect of costs awarded by the decree in Original Suit No. 41 of 1909 paid by the plaintiff. The sum paid by plaintiff was, according to the decree in Original Suit No. 41 of 1909, payable by plaintiff and defendants jointly. The suit was to recover possession of property which was trespassed upon by the defendants and a decree was passed in favour of plaintiff with costs. If the defendants were joint tort-feasors, there would *prima facie* be no liability for contribution. The Subordinate Judge framed a preliminary issue as to whether the plaintiff was in law entitled to recover any contribution for costs from the defendants. The judgment in Original Suit No. 41 of 1909 was filed as Exhibit I without any objection by the plaintiff. The Subordinate Judge states, and it is not disputed before me, that neither party let in any evidence though time was given to them to do so. Each party filed a document (plaintiff filing Exhibit A and defendants Exhibit I). The Subordinate Judge referred to the findings in the judgment Exhibit I, which show that the defendants in that suit not only trespassed but fabricated false documents to defeat the claim of the plaintiff in that suit and held that no suit for contribution would lie under the circumstances.

Objection is taken that the judgment in Original Suit No. 41 of 1909 is not admissible in evidence and reliance has been placed on *Gobind Chunder Nundy* v. *Srigobind Chowdhry* (1), which follows a decision in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (5).

I am of opinion that the judgment in a suit which is the basis of a suit for contribution is admissible in evidence in a suit for contribution. As pointed out in *Siva Panda* v. *Jujusti Panda* (4), it is not open to the parties to impugn the propriety of the judgment, though it will be open to the party from whom contribution is sought to show that "as between the joint debtors the plaintiff is solely liable to the debt or that he is not equally liable with the plaintiff or that both being joint tort feasors in a sense in which on public grounds the right of contribution is negatived, the suit is not maintainable." If it is not open to the parties to impugn the judgment, I do not see how it can be said that the judgment in a suit to which all the parties to the suit for contribution were parties is not admissible in evidence.

The decision in *Surender Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (5) has, as pointed out in *Tepu Khan* v. *Rajani Mohun Das* (2), been considerably shaken by the decisions of the Privy Council in *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (6) and *Bitto*

(1) 24 C. 330; 1 C. W. N. 179; 12 Ind. Dec. (N. S.) 887.

(2) 25 C. 522 (F. B.) 2 C. W. N. 501; 13 Ind. Dec. (N. S.) 347.

(3) 24 B. 591; 2 Bom. L. R. 386; 12 Ind. Dec. (N. S.) 924.

(4) 25 M. 599; 12 M. L. J. 13.

(5) 13 C. 352 (F. B.); 6 Ind. Dec. (N. S.) 735.

(6) 22 C. 533 (P. C.); 22 I. A. 60; 5 M. L. J. 7; 6 Sar. P. C. J. 530; 11 Ind. Dec. (N. S.) 355.

Kunwar v. *Kesho Prasad Misser* (7). The preponderance of authority is in favour of the view that in cases like the present the judgment to which the plaintiff and defendants were parties would be admissible even though it may not be a judgment *in rem* or operate as *res judicata* I need only refer to *Tepu Khan* v. *Rajani Mohun Das* (2) and *Lakshman Govind* v. *Amrit Gopal* (3).

As neither party adduced any evidence and as the judgment in the previous suit is admissible in evidence, I think the Subordinate Judge was right in basing his decision on the findings in the previous judgment, which show that the present plaintiff was a joint tort-feasor. In a suit for contribution the plaintiff must show some equity in his favour. There is none when two persons join together and trespass on the property of a third person.

The petition fails and is dismissed with costs.

Appeal dismissed.

M. C. P.

(7) 24 I. A. 10; 19 A. 277 (P. C.); 1 C. W. N. 265; 7 Sar. P. C. J. 131; 9 Ind. Dec. (N. S.) 181.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 30 OF 1917.

January 30, 1919.

Present :—Mr. Justice Roe and Mr Justice Atkinson.

NAGESHWAR PRASAD—APPELLANT

versus

BACHU SINGH—RESPONDENT.

Evidence Act (I of 1872), ss. 68, 70—Mortgage—Attestation, proof of—Scribe, whether witness—Burden of proof—Admission by mortgagor, whether binds third parties—Lien, proof of.

It is settled law for the province of Bihar and Orissa that a person who signs a document as a scribe must prove specifically that in signing as a scribe he intended to sign as a witness. [p. 80, col. 1.]

In order to prove the due execution of a document, proof of attestation is necessary. Where the only witness to a document is the scribe, who deliberately elects to affix the word 'scribe' to his name in preference to the word 'witness', in the absence of evidence that he signed as an attesting witness, the document is not admissible in evidence. [p. 80, col. 1.]

Where debts are incurred for family necessity by the execution of mortgage deeds, the signature of the managing member of the family, as the guardian of any member who might have been a minor at the time of execution, would be sufficient to bind that minor and create a lien upon the minor's property. But a lien can only be created by a registered instrument, and in order to prove that the original instrument is a mortgage document, it is necessary to observe the provisions of section 68 of the Evidence Act. [p. 80, col. 2; p. 81, col. 1.]

An extra-judicial admission by the managing member of the family may or may not render it necessary to prove the original documents against himself, but this would not relieve the mortgagee of the necessity to prove them as against the minor. [p. 81, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Monghyr, dated the 7th July 1916.

Messrs. *Kulwant Sahay, Rajendra Prasad* and *Sivesar Dayal*, for the Appellant.

Messrs. *Susil Madhab Mullick, Sailendra Nath Palit* and *Juggannath Prasad*, for the Respondent.

JUDGMENT.

ROE, J.—This appeal arises from a decree of the Additional Subordinate Judge of Monghyr upon twelve mortgage-bonds, details of which are given in the judgment, as against three members of a Mitakshara joint family—Adit Narain, Daroga and Nageshwar Prasad. Included among the defendants is the mother of Nageshwar, she being the widow and he the son of one Kuldip Sahai. Kuldip Sahai was, prior to his death in 1909, the managing member of the family, and at his decease Adit Narain became the managing member.

Up to 1907 Daroga Prasad was added as a party to the several deeds as a minor under the guardianship of Kuldip Sahai. From 1907 onwards the bonds were executed by Daroga Prasad himself as a major. The last two bonds are dated 1910 and were executed by Adit Narain for himself and for Nageshwar Prasad, a minor, and by Daroga Prasad for himself. Of the twelve bonds, seven, being Nos. 9, 11, 16 17, 18, 20, and 28 of the schedule attached to the judgment, were proved by Mohammad Wali, who had signed as scribe of these documents and no other attesting witness was called.

It was contended in the Court below that these documents could not be adduced in evidence without the calling of an attesting witness. This point was found against the defendants by the learned Subordinate Judge. It was also contended by Daroga Prasad that he was a minor at the time when these documents were executed,

and, further, that he did not execute them of his own free will but under coercion from his brother These points were also found against Daroga Prasad by the learned Subordinate Judge. It was further urged that there had been no proof of the passing of consideration; and that if consideration did pass, then it was not proved that that consideration was for a family necessity. These points were also found against the defendants. In appeal to this Court Mr. Kulwant Sahai argues the case again on the same basis.

With regard to the attestation of these documents, it is specifically admitted in the pleadings by Adit Narain and by Daroga Prasad that these documents were executed by them. Therefore, as against them, no proof of attestation was necessary. The plaintiffs have been put to proof as against Nageshwar Prasad of execution of these documents; and it is now settled law for this province that one who signs as a scribe must prove specifically that in signing as a scribe he intended to sign as a witness. The authority for this proposition is to be found in *Ram Bahadur Singh* v. *Ajodhya Singh* (1). It has been suggested that that was not a judgment of a Divisional Bench, inasmuch as Mr. Justice Jwala Prasad did not concur in the ruling of Chief Justice Chamier, but that matter has been set at rest by the decision of Miller, C. J., and Mullick, J., in Letters Patent Appeal No. 13 of 1917. A scribe who deliberately elects to affix the word 'scribe' to his name in preference to the word 'witness' places upon himself an almost insupportable burden of proof that he signed as a scribe and not as an attesting witness. In this case, moreover, it is not shown in a single line of the scribe's evidence that he signed as an attesting witness. I hold that he signed as a scribe only and that on his evidence alone the documents are not admissible in evidence.

The next point for consideration is the majority or minority of Daroga Prasad at the time when these documents were executed. Now as the learned Subordinate Judge has pointed out, there could be no motive whatever for any fraud on the part of the mortgagee in obtaining the signature of Daroga Prasad. The debts, as I shall presently show, were all incurred for family necessity and the signature of the managing member of the family, as the guardian of any member who might have been a minor at the time of execution, would be sufficient to bind that minor and create a lien upon the minor's property. The fact that mortgagors and mortgagees agreed that these documents should be executed by Daroga Prasad himself suggests strongly that at the time of the execution Daroga Prasad was a major. The evidence to the contrary is of the flimsiest character. A horoscope has been produced which has not impressed me in the least. A document which purports to be a copy of an extract from a school attendance register has also been produced, and in addition a certificate by the present headmaster of the school to the effect that when Daroga Prasad was admitted into the school, his age was such that he could not have been a major at the time of the execution of these documents.

Now with regard to the register itself it does not seem to me to be admissible in evidence at all, for the reason that it is an entry made by one Raj Kumar Lal, who is alive and within reach of the process of the Court. The certificate given by the headmaster is also a mere statement made upon hearsay and is peculiarly valueless as evidence, seeing that it is dated the 25th July 1914, and was obviously procured solely for the purpose of this case.

The learned Subordinate Judge accepted the oral evidence of the plaintiff's witness Nanak Prasad to the effect that Daroga was at the time, when the suit was brought, between 25 and 26 years of age: and it follows that if this evidence be believed, he was at the time of the execution of the documents of age. Upon this point I agree with the learned Subordinate Judge. The documents are, therefore, binding upon Daroga Prasad, unless he can show that he executed them in circumstances which would render his signature void. Such circumstances have not been shown, and indeed Mr. Kulwant Sahai has not made any attempt to support Daroga Prasad's allegation of coercion.

The third point for consideration is the passing of consideration. As the learned Sub-

(1) 34 Ind. Cas. 370; 1 P. L. J. 129; 20 C. W. N. 699; 3 P. L. W. 93.

ordinate Judge points out, the whole history of the case indicates clearly that consideration passed. Adit Narain, who is now, and has been since the death of Kuldip Sahai, the managing member, admits that consideration did pass. His efforts to obtain a settlement with the mortgagee through Mr. Finch indicate that he recognised that the debts were binding upon the family. I see no reason to differ from the learned Subordinate Judge's finding of fact that consideration did pass. I see also no reason to differ from his finding that the consideration was taken for purposes of the family. In each document this specific purpose was set out. The mortgagee gives evidence that on each occasion on which money was taken he made enquiries as to whether the necessity stated in the bond was an existing necessity. He was not cross-examined upon this point, and we must accept his evidence upon it as unrebutted.

The last question is one as against Nageshwar Prasad, raised through the respondents' Vakil, Mr. Sushil Madhab Mullick. The result of the failure of the plaintiff in the Court below to call an attesting witness to the documents is that a decree can be made only against the interests of Adit Narain and Daroga Prasad. But Mr. Mullick contends that inasmuch as the debts were for family necessity and were admitted by Kuldip Sahai in a subsequent mortgage document which has been legally proved, the nature of the debt relieves the mortgagee of the necessity for calling attesting witnesses to the original documents. This proposition I am unable to accept. I concede that the nature of the debt would render the minor liable to discharge it, but I cannot admit that the nature of the debt would create any lien upon the property. A lien can only be created by a registered instrument, and in order to prove that the original instrument is a mortgage document it is necessary that the provisions of section 68 of the Evidence Act be observed. The extra-judicial admission of Kuldip Sahai may or may not render it unnecessary to prove the original documents as against himself. It does not relieve the plaintiff of the necessity to prove them as against his son.

Nageshwar Prasad has not admitted the original documents. We have, therefore, no cognizance of any instrument creating a lien upon the property of the joint family as against Nageshwar Prasad. In my view, therefore, Nageshwar Prasad should be relieved from liability under the decree made. Upon the seven documents not legally proved, a decree should be made against Adit Narain and Daroga Prasad for the whole of the sums covered by these seven mortgages, and the right, title and interest of Adit Narain and Daroga Prasad brought to sale in execution of the decree so made.

Nageshwar Prasad has made no appeal with regard to the five documents not enumerated at an earlier stage of the judgment. He will, therefore, be bound by the decree made on these five documents. The amount due thereupon will be realised by the sale of the right, title and interest of the whole joint family in the property covered by these five documents. The period of grace in all cases will be six months from the date of this decree, and interest will run at the prescribed rate on the debt only up to the expiry of the period of grace, and thereafter at the Court rate on the whole decree, including costs.

I would make no order as to costs in this appeal. The plaintiff will have his costs in the lower Court in proportion to the amount decreed. The defendants will bear their own costs.

ATKINSON, J.—I frankly concur in the judgment of the Court which has been delivered by my learned brother. But having regard to the argument which has been addressed to us I desire to add a few brief observations on my own behalf.

I consider that the construction of section 70 of the Evidence Act of 1872 is accurately and clearly laid down in the considered judgment of Mr. Justice Woodroffe in *Satish Chandra Mitra* v. *Jogendra Nath* (2), and to the law laid down by the authority cited I beg most respectfully to subscribe.

Farther, I am of opinion that *Abdul Karim* v. *Salimun* (3) and *Rajmangal Misir* v. *Mathura Dubain* (4), which decide that an admission, under section 70 of the Evidence Act of 1872, to be admissible in evidence can only apply to an admission in fact made in the course of a legal proceeding then pending before a Court of Justice, cannot be supported

(2) 34 Ind. Cas. 862; 20 C. W. N. 1044; 24 C. L. J. 175; 44 C. 345.
(3) 27 C. 190; 14 Ind. Dec. (N. S.) 125.
(4) 30 Ind. Cas. 576; 38 A. 1; 13 A. L. J. 881.

on principle or authority. If authority were needed to refute such a proposition, I think authority may and can be found in the decision of their Lordships of the Privy Council in *Konwar Doorganath Roy* v. *Ram Chunder Sen* (5) and also in *Hamplen* v. *Wallis* (6) and also in *Gobardhan Das* v. *Hori Lal* (7).

In my opinion an admission under section 70 is admissible in evidence, even though it be an admission not made in the course of legal proceedings then pending before a Court of Justice, but which may be an admission made antecedent to the institution of legal proceedings. This construction of section 70 of the Evidence Act as to what constitutes an admission to be admissible in evidence is in harmony with the definition of an admission contained in sections 17 to 20 inclusive of the Evidence Act itself, and is in accordance with the general legal principle.

Decree modified.

(5) 4 I. A. 52; 2 C. 341; 3 Sar. P. C. J. 681; 1 Ind. Dec. (N. S.) 503 (P. C.).
(6) (1884) 27 Ch. D 251; 54 L. J. Ch. 1175; 51 L. T. 357; 32 W. R. 977.
(7) 19 Ind. Cas. 121; 35 A 364; 11 A. L. J. 379.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVISION PETITION No. 108 OF 1917-18.
March 22, 1919.

Present :—Mr. Ferard, S. M.

RAJA MISRA KALI CHARAN SAHEB—APPLICANT

versus

SITAL AND OTHERS—RESPONDENTS.

Agra Tenancy Act (II of 1901) ss. 95 (a), (b), 202—Civil Procedure Code (Act V of 1908) O. II, rr. 1, 2—Landlord and tenant—Ejectment, suit for—Plea of agricultural holding—Suit under s. 95 (b)—Refusal to have class determined, effect of—Procedure.

Where in a suit for ejectment in a Civil Court the respondents plead that they hold the land as an agricultural holding, and are referred to the Revenue Court under section 202 of the Agra Tenancy Act, and in their suit under section 95 (b) of that Act they apply that they do not want their class determined, this action, though not quite in accordance with the principle of rules 1 and 2 of Order II of the Civil Procedure Code, does not bar the Revenue Court from deciding their claim to be tenants under section 95 (*a*). [p. 82, col. 2.]

Application for revision of the order of the Commissioner, Rohilkhand Division, dated the 10th August 1918, in the case of declaration of rights.

JUDGMENT.—The applicant landholder, it seems, sued the respondents in the civil Court for ejectment from the land in suit. The Civil Court record is not before me, but applicant's Counsel tells me he sued them as lessees of pasture rights which under *Choudhri Muhammad Mahmud Khan* v. *Ganga Ram* (1) and the decision in *Abdul Qayum* v. *Fida Husain* (2) do not constitute an agricultural purpose. The respondent, it is said, pleaded that he held the land as an agricultural holding, and the Civil Court then, without apparently deciding the question as to whether the holding was an agricultural one or not, referred the respondents to the Revenue Court under section 202, Tenancy Act. Respondents then filed the present suit under section 95 (*b*), Tenancy Act, but afterwards on 14th June 1918 applied that they did not want their *class* determined, which evidently shows they are not themselves confident of their status. This action was not quite in accordance with the principle of rules 1 and 2, Order II, Civil Procedure Code, but the point was not taken in appeal to Commissioner and I am not prepared to hold that their withdrawal from their suit under section 95 (*b*) barred the Assistant Collector from deciding their claim to be tenants under section 95 (*a*).

Ever since 1307 the respondents have been holding the land, nearly 11 *bighas* in area, as recorded non-occupancy tenants at a rent of Rs. 11. Its class was shown as *qadim*—old fallow. In 1318 *urd*, a small millet capable of growth on inferior land, was grown and in 1321 the same crop was grown on a petty area of 6 *biswas*. In all other years there was no crop and it was evidently pasture. There is nothing to show for what purpose the land was originally let—it is clear that it was held for pastural purposes up to 1317—from that date they have been allowed to hold it for agricultural or pastural purposes indifferently; it is not alleged that the landholder-applicant refused rent or sued them for cultivating land let to them for

(1) Sel. Dec. No. 6 of 1910.
(2) 30 Ind. Cas. 551; 13 A. L. J. 854.

pasture only, [section 57 (*b*), Tenancy Act]. So without proving as to what their status has been up to 1318, the question which they themselves have avoided by their application of 14th June 1918 in the first Court, I must hold with the lower Courts that since then, at any rate, they are tenants within the meaning of section 4 (5) read with section 4 (2), Tenancy Act.

I, therefore, reject this application for revision but without costs. The respondents do not deserve costs at applicant's expense in view of their application of 14th June 1918, avoiding final settlement of their status as tenants.

Application rejected.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 1041 OF 1917.
January 31, 1919.
Present:—Mr. Justice Roe and
Mr. Justice Jwala Prasad.
RAMPAL RAM—APPELLANT
versus
SUBA SINGH—RESPONDENT.

Vendor and purchaser—Consideration, payment of—Suit to recover unpaid consideration—Burden of proof.

Where the plaintiff in a suit to recover the balance of consideration due on a sale sets up a definite agreement that the balance with interest was to be paid on a particular date, the burden of proving the alleged agreement rests upon the plaintiff. He must establish at least a *prima facie* title to the relief which he seeks, more specially where the vended property as well as the sale-deed have been given in possession to the defendant. Mere denial of the receipt of consideration is not sufficient to relieve the plaintiff and to shift the burden on to he vendee defendant. [p. 84, cols. 1 & 2.]

Appeal from a decision of the District Judge, Shahabad, dated the 22nd August 1917, reversing a decision of the Munsif, Arrah, dated the 25th September 1916.

Messrs. *Kulwant Sahay* and *Raghunath Singh*, for the Appellant.

Mr. *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.

JWALA PRASAD, J.—The plaintiff is the appellant. He executed a *kabala*, dated the 3rd February 1913, in favour of defendant No. 1 in the name of his son, defendant No. 2, purporting to sell 13 *bighas* 19 *kathas* of his *kasht* land in village Babira, *pargana* and *thana* Arrah, for Rs. 1,400. On 2nd February 1916, the plaintiff brought a suit out of which this appeal has arisen, in the Court of the Munsif of Arrah for recovery of Rs. 619 as part of the consideration money with interest due under the said *kabala*.

The plaintiff's case was that out of Rs. 1,400, the consideration money of the *kabala*, he had received Rs. 601 on different occasions and got receipts granted therefor, and as regards the balance of the consideration money the defendant had promised to pay with interest at one per cent. per month and that the possession of the land sold was made over to the defendant and that subsequently the sale deed was lost from the *basta* of one Munshi Brij Kishore Sahay, to whom it was handed over for preparing an *ekrarnama*, and that the plaintiff afterwards came to know that the defendant had got surreptitiously the possession of the said sale deed, and when the plaintiff demanded from the defendant the balance of the consideration money he (defendant) paid Rs. 180 by several instalments, but did not pay the rest. The cause of action mentioned in the plaint is 15th April 1915, when the date of payment expired. The defendant resisted the claim of the plaintiff, denying that anything was due to the plaintiff under the *kabala* and asserting that after the registration of the *kabala* the plaintiff brought it from the registration office, went to the defendant and made demand for the consideration money, and that the defendant then and there paid the entire consideration money to the plaintiff in one lump sum and the plaintiff made over the *kabala* to the defendant. The Munsif decreed the plaintiff's suit, holding that the full consideration of the *kabala* was not paid. On appeal the District Judge reversed the decree of the Munsif and dismissed the plaintiff's suit.

The learned District Judge disbelieved the account given by the plaintiff as to how the defendant came to be in possession of the sale-deed in question. The learned District Judge has held that the defendant-vendee was in possession of the land and had the sale certificate and the sale-deed. He has disbelieved the evidence on both sides

namely, the evidence given by the plaintiff as to his not having received the consideration money in full and that given by the defendant as to the entire amount having been paid in one lump sum. The learned Judge has dismissed the suit upon the ground that a strong presumption of the full price having been paid to the plaintiff may be raised from the fact that the defendant was in possession of the land and the title-deeds. The question in this appeal is whether the District Judge is wrong in law in raising the presumption that he has done. It is said that the learned Judge himself has destroyed the presumption by holding that two small payments were made—one on 11th March 1913 and the other on 26th March 1913—which negative the theory of the defendant of a single payment of Rs. 1,400 in a lump sum. No doubt upon the finding of the Judge the case of the defendant of having paid the entire amount of Rs. 1,400 in one lump sum as asserted in paragraph 13 of his written statement must fail. If, therefore, the onus lay upon the defendant to prove the payment made by him, the plaintiff is entitled to succeed, but the onus of proving the case, as set forth in the plaint, lay upon the plaintiff in this case. He definitely stated that there was an agreement entered into by the defendant to pay the balance of the consideration money, with interest at the rate of one per cent. per month, on a particular date, namely, the 15th April 1915, mentioned as the date on which the cause of action is said to have arisen, *vide* paragraph 8 of the plaint. The burden of proving the allegations must, on general grounds, rest upon the plaintiff. The sale deed is a registered document and recites that the consideration of the deed was paid. This, of course, does not help either side, because according to the case of both the parties at the time when the recital was made the consideration did not pass, and it was, of course, open to the plaintiff to show that the entire consideration money was not paid [*Sah Lal Chand* v. *Indarjit* (1)]. Even if the defendant had to prove the passing of the consideration, the subsequent events, namely, the vended property having been given in possession to the defendant as well as the sale certificate and the sale-deed in question, shifted the burden upon the plaintiff to show that he parted with the land and the title-deeds without having received the entire consideration money. The attempt of the plaintiff to show that the sale deed had passed surreptitiously to the defendant has failed, and hence no onus lay at any stage or was ever shifted, upon the defendant. From the case of *Kaleepershad Tewaree* v. *Rajah Sahib Pershad Sein* (2) it may be easily deduced that it is too wide to affirm that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying on the instrument the burden of proving the payment of that consideration, and that the plaintiff who wishes to set aside a contract under which there has been possession and enjoyment, and of which there has been performance, has the burden upon him of establishing at least a good *prima facie* title to the relief which he seeks. I, therefore, hold that the burden in this case of establishing the allegations set up in the plaint rested upon the plaintiff. According to the finding of the Judge the plaintiff has not proved his case.

As to the presumption raised by the Court, it was competent to the Court below to presume that the consideration money had been paid when the land was parted with and the title-deeds were made over to the defendant. This is a presumption arising from the ordinary course of human conduct in transacting worldly business. The question of presumption is a matter of inference from certain facts, and when once the Court draws a presumption it becomes a question of fact, and I do not think that it is competent for this Court to hold that the Judge was wrong in law in raising the presumption that he did in favour of the plaintiff.

The result is that the judgment of the Court below is upheld and the appeal is dismissed with costs.

ROE, J.—I agree.

Appeal dismissed.

(1) 22 A. 370; 4 C. W. N. 485; 2 Bom. L. R. 553; 27 I. A. 93; 7 Sar. P. C. J. 702; 9 Ind. Dec. (N. S.) 1281 (P. C.).

(2) 12 M. I. A. 282; 2 B. L. R. P. C. 111; 12 W. R. P. C. 6; 2 Sar. P. C. J. 429; 2 Suth. P. C. J. 225; 20 E. R. 345.

BUDHOO *v.* SATDEO TEWARI.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

SECOND APPEAL PETITION No. 102 OF 1917-18.

June 4 and 5, 1919.

Present :—Mr. Ferard, S. M. and Mr. Hopkins, J. M.

BUDHOO AND OTHERS—APPELLANTS

versus

SATDEO TEWARI—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22 (c)—N. W. P. Rent Act (XII of 1881), s. 9, proviso—Occupancy tenant, death of—Brother, right of succession of.

The brother of an occupancy tenant succeeds on the death of the latter's widow, irrespective of whether or not he shared in the cultivation of his brother who died while the Rent Act of 1881 was in force, the succession being determined by the law in force at the time the right vests.

Second appeal from the order of the Commissioner, Gorakhpur Division, dated the 19th March 1918, in the case of ejectment.

JUDGMENT.

FERARD, S. M.—The admitted facts are as follows :—

Sheo Bakhsh, occupancy tenant, died while the Rent Act XII of 1881 was in force, leaving a widow *Musammat* Rukminia and a brother, the appellant Budhoo. The former succeeded him as a Hindu widow with a life-estate. In her presence the question of Budhoo's succession did not arise, as he could hold no higher position than that of a reversioner with a contingent interest. The contingency has now arisen by the death of *Musammat* Rukminia under the Tenancy Act, II of 1901, and Budhoo claims the succession under section 22 (*c*). The first Court admitted his claim: the Commissioner, however, accepted the landholder-respondent's argument that although the succession of a brother under section 22 (*c*), Tenancy Act, is unconditional, it was subject under the proviso to section 9 of the Rent Act to the condition of co-sharing in cultivation with the deceased, and it is admitted that Budhoo did not co-share in cultivation with his brother Sheo Bakhsh. The Commissioner, therefore, reversed the Assistant Collector's decision. The point has previously come up before the Board in Petition No. 15 of 1914-15, *Mahtab Singh* v. *Ram Sarup*, and Petition No. 11 of 1914-15, *Ramanand Rai* v. *Muhammad Abdul Bashir*, and in both cases the principle of *Babu Banshidhar* v. *Musammat Kaj-*

KESHO PRASAD SINGH *v.* HARBANS LAL.

wantia (1), since affirmed in Selected Decision No. 2 of 1918, was followed and it was held that the brother succeeds on the death of the widow, whether he shared in the cultivation of his brother who deceased under the former Act or not. I have given the point much consideration and, though not without hesitation, think that the view then taken should be followed. There is, of course, no doubt that had there been no widow, Budhoo could not have inherited under the old Act, being barred by the proviso to section 9, Rent Act, and the holding would have lapsed to the landholder, but the intervention of the widow's life-estate has benefited him, the proviso has been swept away by the Tenancy Act and a brother succeeds whether he co-shared in cultivation with his deceased brother or not. I would, therefore, accept the appeal, set aside the Commissioner's appellate order and restore the order of the Assistant Collector with costs to appellant throughout.

HOPKINS, J. M.—I agree. The succession must be determined by the law in force at the time the right vested. In this case the right vested in the brother on the widow's death when the present Tenancy Act was in force, and it was not necessary that he should have shared in the cultivation of the deceased tenant.

Appeal allowed.

(1) Sel. Dec. No. 3 of 1907.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 2 OF 1919.

August 21, 1919.

Present.—Mr. Justice Jwala Prasad and Mr. Justice Adami.

Maharaja KESHO PRASAD SINGH BAHADUR—DECREE-HOLDER—APPELLANT

versus

HARBANS LAL AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree—Application, when can be regarded as in continuation of previous application—Limitation Act (IX of 1908), ss. 3, 15—Limitation, plea of, when can be raised—Stay of sale in execution at instance of decree-holder—Time, whether can be excluded.

KESHO PRASAD SINGH *v.* HARBANS LAL.

Where an application for execution is dismissed for no fault or *laches* on the part of the decree-holder in the prosecution of the execution, a subsequent application, in all respects similar in scope and character to the former application, is a continuation of that application. But where an application is dismissed on account of the default of the decree-holder in not taking any step to proceed with it, a subsequent application cannot be treated as a continuation or revival of the previous application. [p. 88, col 2.]

Where the stay of a sale in execution is due entirely to the decree-holder, such stay cannot be regarded as a legal stoppage of the execution proceedings, so as to entitle the decree-holder to the benefit of section 15 of the Limitation Act. [p. 89, col. 1.]

So long as an application for execution is pending, the judgment-debtor can at any time show that the application is barred and the Court has no option but to dismiss it under section 3 of the Limitation Act It is only when the point of limitation is concluded by proceedings in a previous execution, that the judgment-debtor is not allowed to take an objection on the score of limitation in a subsequent execution of the decree. [p. 89, col. 2.]

Appeal from a decision of the District Judge, Shahabad, dated the 14th June 1919, affirming the decision of the Subordinate Judge, Arrah, dated the 31st May 1919.

Mr. *Nirsu Narain Singh*, for the Appellant.

Messrs. *Fakhruddin* and *Parmeshwar Dayal*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—The appellant obtained a mortgage decree against one Debi Lal on 7th September 1905. He made several executions of the said decree but without being able to realise the decretal amount. We are concerned only with the execution of the decree taken out just previous to the present execution, namely, on the 9th April 1914, which was No. 143 of 1914. The original judgment-debtor Debi Lal was dead and this execution was, therefore, taken out against his heirs, Maluk Chand Lal, son of Lachhmi Lal, and Harbans Lal, Isri Lal and Bhagwan Lal, sons of Bahoran Lal. The decree-holder prayed for the realisation of the decretal amount by sale of 19 plots of land, 13 of which appertain to *khata* No. 151 and 7 to *khata* No. 152. Only three of these plots, namely, Nos. 3090 and 2074 of *khata* No. 151 and No. 2298 of *khata* No. 152 were the mortgaged properties.

Notice under Order XXI, rule 22, was issued upon the aforesaid judgment-debtors. This notice was served personally upon one of the judgment-debtors, Maluk Chand Lal, and as regards the other three the peon reported that they were not in the village and that he affixed the notice upon their houses.

On the 19th May 1914, the Court noted in the Order Sheet "Notice served," and directed the notice under Order XXI, rule 66, to issue. This notice was not served personally upon any of the judgment-debtors, and the peon who was entrusted with the service of this notice reported on the 28th May that he could not find any of the judgment-debtors and hence he posted the notice on their houses.

On remand the Courts below have held that the notice under Order XXI, rule 22, was served personally upon Maluk Chand Lal, but that it was not properly served upon the other three judgment-debtors, and hence, in spite of the note of the Court referred to above in the Order Sheet of the 19th May 1914, it must be accepted as a conclusive finding of fact that the notice under Order XXI, rule 22, was not properly served upon three of the judgment debtors, Harbans Lal, Isri Lal and Bhagwan Lal. This becomes important in view of the fact that Maluk Chand Lal is dead and the present execution is against the other judgment debtors Harbans Lal, Isri Lal and Bhagwan Lal.

On 25th June 1914 the decree-holder filed forms of sale proclamation, which was ordered to be issued fixing the 7th September 1914 for sale of the properties. On the 6th August 1914 Maluk Chand Lal filed a petition under section 47 of the Code of Civil Procedure objecting to the sale of the properties other than those mortgaged. This gave rise to Miscellaneous Case No. 115 of 1914, and it was fixed for hearing for the 4th September, with the object that it might be disposed of before the date fixed for the sale, namely, the 7th September.

On the 4th September, the decree-holder applied for time on the ground that the other objection cases were fixed for the 12th September and also on the ground that the agent of the decree-holder was busy in certain *tamadi*-cases, and the case was accordingly adjourned to the 12th September and was ordered to be "put up with claim cases."

On the 12th September apparently the other claim cases were adjourned and the Court passed the following order:—"Put up on 21st November 1914, for want of time, both Execution Case No. 143 of 1914

and Objection Case No. 115 of 1914 and Claim Cases Nos. 34 to 41 of 1914."

On 21st November 1914, the decree-holder put in a petition admitting the claim of the objectors-judgment-debtors and praying that only the mortgaged properties, namely the three plots mentioned above, be sold first. The Court accordingly allowed the objection and directed that the rest of the properties be released from the proceedings. This order of the Court is contained in Order No. 13 on the Order Sheet. Order No. 14 on the Order Sheet relates to the costs to be paid by the appellant to the judgment-debtor-objector. Order No. 15 on the Order Sheet of the same date relates to the Execution Case No. 143 and is in the following words.—"No steps taken by the decree-holder to-day. The case is dismissed for default."

The present application for execution was filed on the 3rd September 1917 and was numbered 156 of 1917, but as the copies of *khatian* and decree were not filed, the decree-holder was directed by an order on the back of the execution petition, dated the 3rd September, to file the same. The said copies were, however, filed on the 20th September and the application was registered on that date with an order to issue notice under Order XXI, rule 22, fixing the 13th November 1917. The execution was against Maluk Chand Lal and the aforesaid three persons Harbans Lal, Isri Lal and Bhagwan Lal. Maluk Chand Lal was reported to be dead, and as regards the others it was stated in the report of the peon that Harbans Lal and Bhagwan Lal took the notice but refused to give receipt for the same, and that Isri Lal was serving in Calcutta and hence his notice was given to his brother Bhagwan Lal, who refused to give receipt for the same. The decree-holder applied that Harbans Lal, Isri Lal and Bhagwan Lal be substituted in place of Maluk Chand Lal deceased as his heirs and legal representatives, and filed affidavit as to the service of notice upon the other judgment-debtors.

On the 15th December 1917, the Court made the following order: "Notice served and proved against all the judgment-debtors, save and except Maluk Chand Lal who is reported to be dead. On decree-holder's petition let Harbans Lal, Isri Lal and Bhagwan Lal be substituted in place of the deceased judgment debtor, amendment be made and notice be issued against them fixing 8th January 1918 to shew cause whether they have any objection to be made his heirs."

This notice was issued under Order XXI, rule 22, and the peon reported that he met Harbans Lal alone and that he handed all the three notices to him. An affidavit to that effect was also filed by a servant of the decree-holder. On 8th January 1918 the Court passed the following order:—"Notice served and proved. Process fee filed. Decree-holder to file forms duly filled up. Put up on 14th January."

On 14th January the Court made the following order:—"Forms filed. Issue attachment, fixing 12th February 1918."

On 12th February 1918 the Court passed the following order:—"Attachment served. Petition of no incumbrance along with process fee and forms filed. Issue notice under Order XXI, rule 66, fixing 14th March 1918."

In the meantime, on the 7th February, one of the judgment-debtors, Harbans Lal, filed an objection to the execution of the decree on, amongst others, the ground that it was barred by limitation. His petition was numbered 14 of 1918. The Subordinate Judge upheld the objection of the judgment-debtor on the ground that the last step taken by the decree-holder in aid of the execution was on June 25th, 1914, when he filed forms for the sale proclamation in Execution Case No. 143 of 1914. The present application filed on the 3rd September 1917 was out of time. The execution was accordingly dismissed. Against the said order the decree-holder appealed to the learned District Judge of Shahabad contending that the present execution was not barred by limitation. His contention was based on three grounds: (1) that the previous execution was dismissed on the 21st November 1914, and the present execution was in continuation of the previous one; (2) that the decree-holder is entitled to deduction of the time from the 12th September 1914, when the sale was stayed by the order of the Court pending the disposal of the objection filed by the judgment-debtors, up to the 24th November 1914, when the claim case of the judgment-debtors was disposed of, and (3) that the order of the

Court of the 14th January 1918 in the present execution, directing the attachment to issue, was a determination between the parties that the decree was capable of execution and that it was not barred by limitation and hence, upon the authority of the Privy Council in the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) and the subsequent authorities of the various High Courts, the said order operates as *res judicata* between the parties and cannot be now reopened. All these objections were decided by the Court below against the decree-holder. In appeal the same points have been raised. There does not appear to be any substance in any of these contentions.

As to the first contention, the present application for execution on the 3rd September 1917 cannot in any way be said to be one in continuation of the previous application which was dismissed on the 21st November 1914. Reliance has been placed upon the case of *Madhab Moni Dasi* v. *Pamela Lambert* (2). In that case it was held that when the sale was subsequently set aside, the parties were restored to the position which they would have occupied if the sale had never taken place, and the order of the 17th December dismissing the application of the decree-holder for an order absolute was proved by the subsequent events to be erroneous. The subsequent applications in 1909 and 1910 of the decree-holder for an order absolute must be considered to be a continuation or revival of the previous application of the 19th December 1908. It was further observed in that case that the subsequent application may be treated as a continuation or revival, "the consideration of which has been interrupted by the intervention of objections and claim subsequently proved to be groundless or has been suspended by reason of an injunction or like obstruction". This ruling has no application to the present case where the objection of the judgment-debtor in the previous Execution Case No. 143 of 1914, that the decree-holder was not entitled to proceed with the properties other than the mortgaged properties, was upheld and the execution case was dismissed on account of the default of the decree-holder in not taking any step to proceed against the mortgaged properties. A subsequent application for execution can only be regarded as a continuation of the former one when the latter is dismissed without any fault or laches on the part of the decree holder in the prosecution of the execution, and the subsequent application is in all respects similar in scope and character to that of the former one. The previous application of the decree-holder of 1914 having been dismissed on account of his failure to proceed with the mortgaged properties and on account of his not taking any step in the prosecution of the said execution, the present application of the 3rd September 1917 is not a continuation of the former one. The relief sought in the present application to sell the mortgaged properties is not the same as in the former application where the prayer was to sell the other properties as well as the mortgaged properties: *Krishna Dayal Gir* v. *Sakina Bibi* (3). This contention of the decree-holder must, therefore, be overruled.

The next contention of the decree-holder is that he is entitled to a deduction of the time from the 12th September 1914, when the Court ordered the sale to be stayed, up to the 24th November 1914, when the claim case of the judgment-debtors was disposed of. This contention is raised upon section 15 of the Limitation Act. Under that section a decree holder is entitled to a deduction of the time during which *the execution of his decree is stayed by an injunction or an order*. In the first place, the execution of the decree in the present case was not at all stayed by any order of the Court. There was no claim with respect to the mortgaged properties by the judgment-debtors and, as a matter of fact, the decree-holder on the 21st November 1914 admitted the claim of the judgment-debtors and prayed for the sale only of the mortgaged properties. This he could have done long before and the sale would not have been stayed. The Court had fixed the 4th of September for disposal of the claim of the judgment-debtors with respect to the properties other than the mortgaged properties expressly with the object of disposing of the objection before the 7th September, the date fixed

(1) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(2) 6 Ind. Cas. 537; 37 C. 796; 12 C. L. J. 328; 15 C. W. N. 337.

(3) 34 Ind. Cas, 27; 1 P. L. J. 214; 20 C. W. N. 952; 2 P. L. W. 370.

for the sale. The disposal of the objection was, on the 4th September, adjourned upon the application of the decree-holder and it was at his request that the claim case in that execution was made analogous with the other claim cases. On the 12th September the other claim cases were not disposed of and the Court was, therefore, bound to postpone the hearing of the claim case till then, and in the meantime to stay the sale. The stay of the sale of the mortgaged properties was, therefore, due entirely to the decree-holder and the order of the 12th September staying the sale cannot, therefore, be considered to be a legal stoppage of the execution proceedings. The decree-holder is not, therefore, entitled to a deduction of the time between the stay of the sale and the disposal of the claim case: *Narayana Nambi* v. *Pappi Brahmani* (4). This contention must, therefore, also be overruled.

The last contention of the decree-holder is that the order of the Court in the present execution of the 14th January 1918 directing the attachment to issue was a determination between the parties, that the decree was capable of execution and that it was not barred by limitation, and hence the judgment-debtors are debarred from reopening the question and contending that the execution of the decree was barred by time. In the case of *Mungul Pershad Dichit* v. *Girja Kant Lahiri* (1) and in all subsequent cases the objection of the decree being debarred by time was taken in subsequent executions of the decree when in the previous executions of the same decree the Court had, upon notice being served upon the judgment-debtor under Order XXI, rule 22, ordered the execution to proceed, but in none of those cases was it held that the objection on the score of limitation cannot be entertained when it is taken at the subsequent stage of the same pending execution. On the other hand, in the case of *Sardar* v. *Fatteh Chand* (5) it was expressly held that the judgment-debtor can raise the said objection to the execution of the decree at a later stage of the same execution proceedings when his objection was disallowed or not pressed at the earlier stage of the execution. That case was referred to with approval in the case of *Bisheswar Dayal* v. *Rup Kishore* (6) (Miscellaneous Appeal No. 332 of 1916), though it could not be applied to the facts of the latter case.

Thus, even if the order of the Court of the 8th January be considered to be a determination that the execution was valid and not barred by time, it was open to the judgment-debtors to object to the execution being time-barred on the 14th January 1918. This is so because the order passed under Order XXI, rule 22, is not appealable. The Court's duty was at any stage of the execution proceeding to dismiss the execution on the ground that it was barred by limitation. This duty is imposed by section 3 of the Limitation Act even when the ground is not taken by the judgment-debtor. It is only when the point of limitation is concluded by proceedings in a previous execution, that the judgment-debtor is not allowed to take the objection of limitation in a subsequent execution of the decree. But so long as an execution application is pending, the judgment-debtor can show at any stage that the application is barred and the Court will have no option but to dismiss the application under section 3 of the Limitation Act. I, therefore, hold that the objection of the judgment-debtors of the 14th January was fit to be entertained.

It is also doubtful, as observed by the learned Judge, whether the order of the 8th January directing the decree-holder to file process of attachment can "amount to a judicial finding that everything about the execution proceeding is in order."

Agreeing, therefore, with the views taken by the Courts below, we dismiss the appeal with costs throughout.

ADAMI, J.—I agree.

Appeal dismissed.

(4) 10 M. 22; 3 Ind. Dec. (N. S.) 766.

(5) 89 P. R. 1894.

(6) 41 Ind. Cas. 675; 3 P. L. W. 13.

UMESH CHANDRA DE *v.* JAKHOMAL MEHERA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3157 OF 1912.

May 13, 1913.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

UMESH CHANDRA DE—PLAINTIFF—APPELLANT

versus

JAKHOMAL MEHERA—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 69—Payment made by dar-putnidar *on behalf of* putnidar*—Amount paid, whether can be recovered*—Dar-putnidar, *whether can be ordered to account for period during which he has been in possession—Limitation.*

A *dar-putnidar* paying up the arrears of rent due by the *putnidar* to the *zemindar* came into possession of the *putni* under clause (4) of section 13 of the Putni Regulation of 1819 on the 17th of November 1862. He continued in possession for many years. It was not till the 7th August 1899 that his possession was formally terminated. On the 1st February 1901 the *putnidar* instituted a suit for rent against the *dar-putnidar* for the period between May 1895 and January 1901. During the pendency of this litigation the *putnidar* repeatedly made defaults in payment of rent and the *dar-putnidar* had to satisfy the demand of the superior landlord on seven successive occasions from 4th November 1905 to the 15th November 1908. The *dar-putnidar* then brought a suit to realise these sums after allowing the defendant *putnidar* credit for the rents payable by him as *dar-putnidar* during the period:

Held, (1) that as the payments made by the plaintiff benefited the defendant, the plaintiff was entitled to a decree; [p. 91, col. 1.]

(2) that the claim of the plaintiff could not be postponed merely because accounts had not been taken of the possession of the plaintiff from the 17th November 1862, inasmuch as if a claim were now put forward for an account of this period, it would be successfully met by the plea of limitation. [p. 91, col. 1.]

Appeal against the decision of the District Judge, Burdwan, dated the 9th August 1912, reversing that of the Subordinate Judge, Burdwan, dated the 15th December 1910.

Babus *Mahendra Nath Ray* and *Hira Lal Sanyal*, for the Appellant.

Babus *Ram Chandra Mojumdar* and *Nagendra Nath Sen*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of money paid by him for the benefit of the defendants. The circumstances under which the payments have been made are not disputed. The defendants on the 6th May 1895 acquired a *putni taluk* created on the 17th February 1811. The plaintiff is the owner of a *dar-putni* of four out of the five villages comprised in the *putni*. This *dar putni* was created on the 16th May 1862. Shortly after the creation of the *dar putni* the *putnidar* made default in the payment of rent to the superior landlord. The *dar putnidar* thereupon paid up the arrears and on the 17th November 1862 came into possession under clause (4) of section 13 of the Putni Regulation of 1819. The *dar-putnidar* continued in possession for many years. Indeed, it was not till the 7th August 1899 that his possession was formally terminated. On the 1st February 1901 the *putnidar* instituted a suit for rent against the *dar putnidar* for the period between May 1995 and January 1901. It was stated in the plaint of this suit that possession of the *dar putnidar* as usufructuary lien-holder under the Regulation had terminated on the 7th August 1899. It is clear, however, that as rent was claimed from 1895, the case for the *putnidar* must have been that the lien had ceased to exist at least from that date. On any other theory it would be impossible to substantiate the claim for rent from the *dar-putnidar*, because it has not been and cannot be disputed that so long as the *dar-putnidar* lawfully remained in possession as lien-holder, he was not liable to pay rent to the *putnidar*. This suit was decreed by the Subordinate Judge in part and that decree was ultimately affirmed on appeal by this Court on the 7th April 1908: *Jakhomull* v. *Saroda Prosad Dey* (1). During the pendency of this litigation the *putnidar* repeatedly made default in payment of rent. The consequence was that the present plaintiff (the *dar-putnidar*) was driven to satisfy the demand of the superior landlord on seven successive occasions from the 4th November 1905 to the 15th November 1908. The plaintiff now seeks to realise these sums; but he has very properly allowed the defendants credit for the rent payable by him as *dar putnidar* during this period. The Court of first instance decreed the claim in part. Upon appeal the District Judge has reversed that decision. He has held, first, that the plaintiff claims to be in possession during these years as usufructuary lien-holder and he must consequently be deemed to have made the payments for the protection of his alleged lien; and secondly, that if accounts are taken from the 17th November 1862

(1) 7 C. L. J. 604.

when the *dar-putnidar* came into possession upon payment of the dues of the superior landlord up to the date when his possession actually terminated, a large sum would probably be found to be due to the *putnidar*, and that till this account has been taken the plaintiff should not be allowed to recover sums paid by him to save the *putni*. In our opinion, there is no foundation for either of these propositions.

In so far as the first ground is concerned, it is clear that the plaintiff did not claim to be in occupation as usufructuary lien-holder during the years 1905 to 1908. As already stated, the case for the *putnidar* in the previous suit for rent was that possession of the *dar putnidar* as lien-holder had ceased on the 7th August 1899. In fact, the suit was founded on the theory that possession had been terminated at least as early as 1895. That allegation was not repudiated by the defendant. The defendant stated that a large sum of money was due to him on account of the payment made by him to the superior landlord on the 17th November 1862, and he made a grievance that as this large sum was still due to him, he could not be held responsible for the payment of rent. But there was no allegation on his part that he was actually in occupation as a lien-holder. Under these circumstances it is impossible for us to hold that the present plaintiff may regularly be deemed to have made successive payments to the superior landlord for the protection of his alleged lien. Consequently the principle of the decision in the case of *Jinnat Ali* v. *Fateh Ali* (2), upon which the District Judge relies, cannot apply. The payments were made by the plaintiff in his character as *dar putnidar* and there is no question that the defendant as *putnidar* has profited by the payments.

In so far as the second ground is concerned, it is clear that the claim of the plaintiff cannot be postponed merely because accounts have not been taken of the possession of the plaintiff from the 17th November 1862. It is plain that if a claim were now to be put forward for an account of this period, it would be successfully met by the plea of limitation. It is also clear that during this long series of years the *putnidar* has not put forward a claim for recovery of any excess amount which might have been realised by the *dar putnidar*. The grounds assigned by the District Judge in support of his judgment, therefore, cannot be supported.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Courts below.

Appeal allowed.

(2) 9 Ind. Cas. 219; 13 C. L. J. 646; 15 C. W. N. 332.

PATNA HIGH COURT.

MISCELLANEOUS APPEAL No. 186 OF 1918.

December 9, 1918.

Present:—Mr Justice Atkinson and Mr. Justice Manuk.

RAM DHYAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

PARDIP SINGH—AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 148A—Co-sharer, suit by, for arrears of rent—Form of suit.

The essential principles underlying section 148 A of the Bengal Tenancy Act are (1) that the suit should, in form, be for the whole rent and in substance for the separate share of rent in arrears, (2) that the whole body of landlords are impleaded, with the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former. In such cases the whole rent *due* must, in the nature of things, be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire rent due and ask the Court to decide on the accuracy of that belief, if and when the impleaded co-sharers appear and claim any arrears as due to themselves. If his belief is accurate, the Court will give him a decree for his share of the rent only as being the entire rent due, if inaccurate, the Court will investigate and decree the arrears due to the impleaded co-sharers as well. [p. 93, col. 2.]

Miscellaneous appeal from an order of the District Judge, Gaya, dated the 24th June 1918, reversing an order of the Subordinate Judge, Gaya, dated the 18th February 1918.

Mr. *Harihar Prasad Sinha*, for the Appellants.

Mr. *Shivanandan Rai* for the Respondents.

RAM DHYAN SINGH v. PARDIP SINGH.

JUDGMENT.

MANUK, J,—This appeal comes before us against a judgment and decree of the District Judge of Gaya, reversing the decree passed by the Subordinate Judge of the First Court of Gaya whereby the latter dismissed the plaintiffs-repondents' suit for arrears of rent against the contesting defendants, now represented by the appellants before us, and against the respondents second party as *pro forma* defendants.

The facts of the case, so far as we are concerned with them, are that at the time of the suit the superior interest *qua mukarrari* or sub-*mokarrari* grants in the property was held as to ten annas by the plaintiffs, as to four annas by the contesting defendants Nos. 1 to 16, and as to two annas by the *pro forma* defendants Nos. 17 to 20. Apart from their *mokarrari* interest the contesting defendants Nos. 1 to 16 held the whole of this property on a *thika* acquired from the original proprietors. In the year 1917 the plaintiffs, as ten-anna *mokararidars*, instituted a suit for recovery of arrears of *thika* rent due to them for the years 1324 and 1325 *Fasli*. The plaint on the record is silent as to whether the plaintiffs collected their rent separately from or jointly with the other co-sharers. They framed their suit as one under section 148A of the Bengal Tenancy Act. In paragraph 7 of their plaint they alleged that the contesting defendants Nos. 1 to 16 were in collusion with the *pro forma* defendants; that the latter had refused to join in the institution of the suit; that, though enquiry was made, both sets of defendants had refused to let the plaintiffs know whether the *thikadar* defendants had paid all or any portion of the proportionate share of the rent due to the *pro forma* defendants. The plaintiffs were, therefore, driven to declare in their plaint that their proportionate share alone, as in arrears on the date of suit, was the entire amount of rent due, and that they, therefore, instituted the suit under section 148A of the Bengal Tenancy Act. They prayed for a decree for the amount due them together with costs and interest, and in the alternative they prayed that

"If the *pro forma* defendants also state that any rent is due to them and wish to join in the suit as plaintiffs, then they may be ordered to join in this suit on payment of Court-fees."

The *thikadars*, defendants Nos. 1 to 16, alone appeared in the first Court, and in their written statement they ignored the allegations contained in paragraph 7 of the plaint, whereby the plaintiff had sought to bring his suit under the provisions of section 148A of the Bengal Tenancy Act. They were silent as to whether they had paid any rent for the years in suit to the *pro forma* defendants, nor did they take any objection that the suit, as framed, did not fall under section 148A of the Bengal Tenancy Act.

The learned Subordinate Judge, in a very short judgment, held that *Baikantha Nath Sen* v. *Ramapati Chatterjee* (1) applied to the facts of the case and that, therefore, the suit was not maintainable under section 148A of the Bengal Tenancy Act. He accordingly dismissed the suit with costs.

On appeal the learned District Judge distinguished *Baikantha Nath Sen* v. *Ramapati Chatterjee* (1), and holding that *Nunda Lal* v. *Kala Chand* (2) was more appropriate in its application to the facts of the present case, decreed the plaintiffs' suit with costs. It is, as I have said, against this order, that this appeal has been made to us.

Now sections 145A and 158B of the Bengal Tenancy Act were added to that Act in 1907 in order to set at rest the vexed questions arising out of suits brought by a co-sharer landlord suing alone for his share of the rent if there was no arrangement to collect separately, or for the entire rent if the collections had been joint. The Calcutta High Court had held that the Bengal Tenancy Act did not apply to a suit for recovery of rent by one or more co sharer landlords as distinguished from the whole body of them [see *Jogendra Nath Ghosh* v. *Paban Chandra Ghosh* (3) decided in 1904, and the cases cited therein]. That Court had also held that the tenure or holding does not pass to the purchaser at a sale in execution of such

(1) 45 Ind. Cas. 767; 27 C. L. J. 101.
(2) 8 Ind Cas. 50; 15 C. W. N. 820.
(3) 8 C. W. N. 472.

a decree [*Narain Uddin* v. *Srimanta Ghose* (4)]. Those decisions were mainly arrived at by interpreting the words "anything which the landlord under this Act is required or authorised to do" in section 188, Bengal Tenancy Act, as including the bringing of a suit for arrears of rent. A perusal of the judgments of Ghose, J., and Geidt, J., in dissension as set out in the report of the Privy Council decision in *Pramada Nath Roy* v. *Ramani Kanta Roy* (5), will suffice to show the views then prevalent. It is interesting to observe that shortly before that decision by their Lordships of the Privy Council, which was based on the Bengal Tenancy Act as it stood before its amendment in 1907, the Indian Legislature had intervened to set the questions at rest. The suit in the last mentioned case before the Privy Council was instituted by a co-sharer landlord for the entire rent against the tenant and the other co-sharer landlords, the latter having refused to join him in that suit. The Judicial Committee held that section 188 of the Bengal Tenancy Act was not a bar to such a suit, as the filing of a suit is not a thing which the landlord is under the Act required or authorised to do. Their Lordships further held that under the general principles of legal procedure, quite apart from the Bengal Tenancy Act, a sharer whose co sharers refuse to join as plaintiffs, can bring them into the suit as defendants and sue for the whole rent due, and could do so in spite of an arrangement previously prevailing whereby the co-sharers collected their rent separately. Such an arrangement, their Lordships say, merely affected the right to sue separately, that is without joining the other co sharers, but in no other respect modified the terms of the holding. It followed, therefore, that the right to bring the tenure to sale remained intact.

In my opinion it follows *a fortiori* from that decision that under the law, as it then stood, a co sharer could bring a similar suit even though the collection had been joint.

Meanwhile, as I have said, the Indian Legislature had placed section 148A and section 158B on the Statute Book; section 158B, in order to benefit co-sharer landlords who collected their rents jointly, and section 148A to include those who collected separately and were, therefore, not in a position to know whether the rents payable by the tenants to other co sharers had been in fact paid or not.

It is unnecessary for us to consider whether these sections have in any way affected the general principles of legal procedure laid down by the Privy Council as applying to such suits, for we can decide the appeal before us on section 148A itself.

I am of opinion that the essential principles underlying that section are (1) that the suit should, in form, be for the whole rent and in substance for the separate share of rent in arrears; (2) that the whole body of landlords are impleaded, with the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former. In such cases the whole rent *due* must, in the nature of things, be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire rent due and ask the Court to decide on the accuracy of that belief, if and when the impleaded co-sharers appear and claim any arrears as due to themselves. If his belief is accurate the Court will give him a decree for his share of the rent only as being the entire rent due; if inaccurate, the Court will investigate and decree the arrears due to the impleaded co-sharers as well.

These are obviously the principles underlying the decision in *Nunda Lal* v. *Kala Chand* (2), in which it was held that the plaint must be examined to find its intention, and the decision in *Brohmanand Nath Deb Sircar* v. *Hem Chandra Mitra* (6), in which it was held that a very similar plaint to the one before us substantially complied with the requirements of section 148A inasmuch as the rent *due* under that section does not mean the entire rent *payable* on the original contract or lease. It may be the whole of the rent payable if the whole happens to be in arrears, it may include the arrears of the plaintiff and the known arrears of his co-sharers, it may, on the other hand, turn out to be only the arrears due to the plaintiff himself. If the plaint in spirit and intention complies with the essential require-

(4) 29 C. 219.

(5) 35 C. 331; 12 C. W. N. 249; 10 Bom. L. R. 68; 35 I. A. 73; 7 C. L. J. 139; 18 M. L. J. 43; 3 M. L. T. 151 (P. C.).

(6) 23 Ind. Cas. 981; 18 C. W. N. 1016.

Muhammadan Law, Volume II, page 262. The Courts below have confounded the age of fifteen with the age of puberty.

Babu *Kshitis Chundra Sen*, for the Respondent.—The law says that puberty is to be presumed on the completion of the fifteenth year unless the contrary is proved. Refers to section 91 of Wilson's Anglo-Muhammadan Law; Ameer Ali's Muhammadan Law, 4th Edition, Volume II, page 279. If a girl attain puberty before that, she must prove that because it is within her special knowledge. In this case no such evidence has been given. The case for the defence in the Courts below was that the girl was above 15 years, and, therefore, puberty must be presumed, whereas on the evidence the Courts below have found that she was less than fifteen years. It was never the defendant's case that she attained puberty although she was less than 15 years at the time of the marriage in question.

Mr. *Altof Ali* briefly replied.

JUDGMENT.—This appeal arises out of a suit for restitution of conjugal rights. The defendants are the wife and her father, and the plaintiff, the husband, has obtained a decree in both the lower Courts. The defendants denied that any marriage had been celebrated and further pleaded that even if such a celebration had been performed, the marriage was invalid because the consent was given by her father, although his daughter had attained puberty and was consequently competent to give her own consent. As regards the question whether the alleged marriage was performed, the finding of the lower Courts, which is in plaintiff's favour on this point, is conclusive. As regards the competency of the female defendant to give consent to her own marriage, the finding of the lower Appellate Court is that the actual date of the attainment of puberty had still to be ascertained, but that the age of the girl at the time of her marriage was 14 years and 9 months. That Court has held on this finding that as the girl did not attain 15 years of age, the presumption of puberty did not arise, and, therefore, she must be held to be a minor.

On behalf of the appellants, it is contended that the lower Appellate Court has misunderstood the presumption of Muhammadan Law; that although there is a presumption that a girl who has attained the age of 15 years has also attained puberty, there is no converse presumption that the girl who has not reached that age has not attained puberty. This is a correct statement, but we do not find in the judgment of the lower Appellate Court that it has drawn the converse presumption. What appeared to have been the course of proceeding in the two lower Courts was that in defence it was pleaded that the age of the girl was 18 years and that there was no doubt of her power to consent. It does not seem to have been ever pleaded that she is entitled to rely on the physical fact of puberty, if her age was less than 15 years. Defendants relied entirely on the legal presumption to prove puberty and made no attempts to prove it by any other evidence. The fact of puberty obviously was a fact within the special knowledge of the first defendant and the burden of proving that fact lay on her. It is conceded that there is no evidence whatever to discharge that onus. It was argued that the statement of a Muhammadan female that she had attained puberty must, under the Muhammadan Law, be accepted. Assuming for the consideration of this argument that this is a correct statement of Muhammadan Law, it cannot help the defendants in this case, because there is no statement on the record of the actual fact of puberty having been attained. Our attention has been drawn to some statements in the written statements filed by the father and the daughter. But in none of them is there any statement which really goes further than the allegation that the daughter had reached the age at which she would be competent to give her consent. We are asked to remand the case to the lower Appellate Court for a finding on the fact of puberty. As no evidence has been given and as this special plea of puberty was not taken in either of the lower Courts, the appellants are not entitled to a remand at this stage of the case.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

ADITYA PRASAD *v.* PARMANANDA PATEL.

PATNA HIGH COURT.
CIRCUIT COURT, CUTTACK.
APPEAL FROM APPELLATE DECREE No. 17 OF 1917.
January 15, 1919.
Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

ADITYA PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS
versus
PARMANANDA PATEL AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (XI of 1898), s 69—Landlord and tenant—Bhogra land—Permanent lease granted by landlord—Ejectment.

There is nothing in the terms of section 69 of the Central Provinces Tenancy Act from which it may be inferred that every tenant holding *sir* lands is on that account liable to be ejected, nor is there anything in the section which would bar the defendant, in a suit in ejectment from *bhogra* land, from setting up a permanent lease granted by the proprietor himself. The granting of such permanent leases by proprietors of *bhogra* land is not forbidden by either the Tenancy or the Land Revenue Act. [p. 98, col. 2.]

Appeal from a decision of the Sub-Judge, Sambalpur, dated the 8th December 1916, confirming a decision of the Additional Munsif, Sambalpur, dated the 9th September 1916.

Messrs. *M. S. Das* and *J. N. Bose*, for the Appellants.

Mr. *S. C. Mukherji*, for the Respondents.

JUDGMENT.

MILLER, C. J.—The plaintiffs Debi Prasad Patnaik and his two brothers are the *gountias* of Mauza Sudhamal in the Sambalpur District. In the year 1915 they filed a suit in the Munsif's Court at Sambalpur to eject the defendants as ordinary tenants from their *bhogra* lands and to recover *khas* possession. The defendants pleaded that they were not ordinary tenants; that about 50 years ago the lands in suit, together with some *raiyati* lands, were leased in perpetuity at a yearly rental of Rs. 11-8 0 to Dakhu, the great grandfather of the defendant No. 1, and one Damodar by Balmakund Patnaik, a former *gountia* of the village; that the land in suit had remained in the possession of the defendants' family ever since, the *bhogra* lands paying an invariable rent of Rs. 9, the rent of the other parcel, which was *raiyati* land and subject to enhancement, having been from time to time enhanced; that the *bhogra* lands were afterwards divided between the lessees, the portion of the defendants' grandfather coming into the possession of defendant No. 1, the other defendants being his co-sharers; that this lease had been granted on the express condition that the lessees should construct a tank and a *kata* in the village for the use of the villagers and for the improvement of the land, and that these conditions were duly fulfilled. They contended that the defendants, being tenants in perpetuity, were not liable to ejectment. The Munsif as well as the Subordinate Judge of Sambalpur, before whom the case came on appeal, found that the lease relied upon by the defendants was in fact granted, and dismissed the suit. On appeal to the High Court the case was remanded to the lower Appellate Court for the purposes of ascertaining whether Balmakund, the original lessor, had power to grant the lease in perpetuity binding his successors. The answer to this question would depend upon the nature of the interest held by Balmakund. The case was remanded with directions to the lower Appellate Court to answer the following questions:

(1) Had Balmakund a permanent or a temporary tenure as *gountia* in the lands in suit?

(2) If so, was it heritable?

(3) Do the plaintiffs claim to eject the defendants by right of inheritance as *gountia* in respect of Balmakund's interest? If not, do the plaintiffs claim under any other title to eject?

(4) Have the plaintiffs or their predecessors acquired the status of protected *gountia* under section 65 (*a*) of the Central Provinces Tenancy Act?

The lower Appellate Court had power to take further evidence on these points, if necessary. No further verbal evidence was adduced before the Subordinate Judge on remand, but copies of two orders passed by Mr. Bowie, Deputy Commissioner of Sambalpur in 1870, and by Mr. A. M. Russell, the Settlement Officer in 1878, relating to the proprietary rights of the *gountias* in Mauza Sudhamal were referred to, as well as Mr. Russell's Reports on the Land Revenue Settlement of the Sambalpur District of 1876-1877 and the Settlement Reports of 1885 to 1889 and Mr. Dewar's Report of 1906. From these documents it appears that the village in question was at first granted *mafi* to the Patnaik family by the native Government but was

subsequently assessed to land revenue. It, however, continued in the Patnaik family passing succession from one member to another until 1858, when the then *gountia*, being unable to pay the revenue, made over his interest in the village to Balmakund, and the order of Mr. Bowie, already referred to, recognised the proprietary right of Balmakund Patnaik in Mauza Sudhamal. What the exact interest of the *gountias* of this village was in the property before that date is, perhaps, a matter of conjecture. It was contended that according to the Settlement Report of Mr. Russell the *gountias* of Sambalpur were at first merely lessees holding under temporary leases, and that proprietary rights were not conferred on them until 1870. The learned Subordinate Judge came to the conclusion from a perusal of the history of this particular village that Balmakund was recognised as proprietor in 1870, and that even before that he and the Patnaik family had a heritable right to the village and not merely a temporary tenure. His answer to the first question, therefore, may be taken as being that Balmakund had a permanent not a temporary tenure as *gountia* in the lands in suit, and his answer to the second question was in the affirmative. In answer to the third question he found that the plaintiffs claimed to eject the defendants by right of inheritance as *gountias* in respect of Balmakund's interest and not under any other title. His answer to the fourth question was in the negative.

From this judgment the plaintiffs appealed to the High Court and contended in effect that the evidence adduced before the lower Appellate Court did not support the findings of the learned Judge. It was contended that the Settlement Reports, and especially that of Mr. Russell, clearly shewed that before 1870 the proprietary right in the village belonged to Government or to the *zemindar* and that the *gountias* had no permanent transferable interest even in the *bhogra* lands, and that it was not until 1870 that the proprietary right in the *bhogra* lands was given to the *gountias*, and that as the lease in question was granted 50 years ago, *i.e.*, before 1870, Balmakund had no interest at that time which would entitle him to grant a permanent lease binding upon his successors. The respondents contended, firstly, that the evidence was quite sufficient to justify the conclusion that even before 1870 the *gountias* had a permanent transferable right in the *bhogra* lands, and, secondly, that even if their proprietary right was not conferred until 1870 the transferor, having acquired a permanent transferable interest, at all events in 1870, the transfer must be taken to operate on the interest then acquired, Balmakund the transferor being then alive, and that section 43 of the Transfer of Property Act was applicable to the circumstances of the present case. On referring to Mr. Russell's report and the correspondence annexed thereto, it appears that the question of re-settling the land revenue of Sambalpur was taken up by Mr. (afterwards Sir Richard) Temple in 1862, when settlement operations were commenced throughout the provinces, and orders were issued by him for making a settlement on precisely the same principles as those followed in other districts, the characteristic of which was that the village headmen or *gountias* were to be made proprietors of their villages and given rights of transfer. An open declaration of this policy was made to the *gountias* by proclamation at Sambalpur in 1862, and settlement operations were then set on foot but owing to the death of Major Impey, the Deputy Commissioner in 1864, little progress was made. His successor questioned the principles on which the settlement was to be made and a voluminous correspondence ensued, which did not close until 1872 and ended in the making of a settlement on a basis different from that of any other in the provinces. In the result it would appear that the principle followed in the settlement was that the proprietary rights which were conferred upon *gountias* in 1862 were limited to their *bhogra* lands. Although the order made by Mr Bowie in 1870 which concerned a dispute between Balmakund Patnaik and another claimant to the proprietary rights in Mauza Sudhamal, in terms purports to confer proprietary rights in that village on Balmakund, it may well be that even before that date such rights had been recognised in the *gountias* of that village in accordance with a proclamation made in 1862, the terms of which were repeated and confirmed by the Chief Commissioner in a public *darbar* held at Sambalpur on the 9th March 1863. Indeed, the decision

of Mr. Bowie appeared to be based upon a consideration of the history of the *gountiahi* rights acquired by Balmakund's predecessors. However this may be, once it is admitted that Balmakund acquired a permanent transferable interest in the property in 1870, in my opinion section 43 of the Transfer of Property Act will apply, so that the transfer made before 1870 would operate on the interest which the transferor acquired in the property at that date, so as to create in the lessees a permanent transferable interest.

It was contended, however, that by section 69 of the Central Provinces Tenancy Act, 1898, the defendants were liable to be ejected from their holding on the ground that it consisted entirely of *sir* lands. *Bhogra* land is, under the provisions of section 4 (*a*) of the Central Provinces Land Revenue Act, comprised in the term *sir* land, but in my opinion there is nothing in the terms of section 69 of the Tenancy Act from which it may be inferred that every tenant holding *sir* lands is on that account liable to be ejected. The section itself is introduced in the interest of the tenant and restricts the landlord's right of ejectment except in three cases, one of which is where the ejectment is in execution of a decree passed on the ground that the holding consists entirely of *sir* lands. There are undoubtedly certain cases in which the landlord's right to eject tenants from his *sir* land is recognised, but I can find nothing either in the Land Revenue Act of 1881 or in the Tenancy Act of 1898 restraining the proprietors of such lands from granting permanent leases, and where a suit is brought to eject a tenant of *bhogra* land, there is nothing in section 69 of the Tenancy Act which would bar the defendant from setting up a lease granted by the proprietor himself. In the present case it has been found as a fact that the lease was granted, and in my opinion there is sufficient evidence on the record to justify the finding of the lower Appellate Court that the plaintiff's predecessor had a permanent transferable interest which would entitle him to grant the lease in question. In my opinion this appeal must be dismissed with costs.

MULLICK, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 435 OF 1918.

July 8, 1919.

Present:—Mr. Lyle, A. J. C., and Mr. Ashworth, A. J. C.

OUDH BIHARI SINGH AND ANOTHER, MINORS UNDER THE GUARDIANSHIP OF *Musammat* RAM KALI—PLAINTIFFS—APPELLANTS

versus

SURAJ BALI—DEFENDANT—RESPONDENT.

Under-proprietary holdings in Oudh, confiscation and restoration of—Title acquired, nature of—Oudh Estates Act (I of 1869, Sch. II.

Although under-proprietary holdings in Oudh were confiscated absolutely to Government by the Proclamation of 15th March 1858, the rights of the under-proprietors as they existed before the Proclamation were restored in 1859 by letters set out in Schedule II of the Oudh Estates Act and by the Settlement Court proceedings taken under the rules validated by Act XXVI of 1866, and the title acquired by the Settlement Court decrees was a title from the British Government but was the same title which was possessed by the claimants before the confiscation. The title was new in the sense that the grantor was new, but it was old in the sense that what was granted was what was held before. [p. 102, col 2; p. 103, col. 1]

Appeal from the decree of the District Judge, Fyzabad, dated the 2nd August 1918, upholding the decree of the Subordinate Judge, Sultanpur, dated the 8th April 1918.

Mr. *A. P. Sen*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit by the plaintiffs for possession of a one-anna *pukhtadari* share in the village of Sata, Pargana Baraunsa, on the allegation that, when the plaintiffs' great-grandfather Sheoratan Singh mortgaged the share, the share was ancestral property and that the mortgage could not be binding on the plaintiffs as it was not for necessity or to pay off any previous debt. It may be explained that a *pukhtadari* share means a share of a village held in under-proprietary right. The expression *pukhtadari* was an invention of the Settlement Courts intended to indicate the tenure of an under-proprietor whose subordinate right in the villages vested in him such a right of management that he would be liable to the *taluqdar* for a fixed amount of revenue *plus* something extra called *malikana*, but would himself stand to

profit or loss by any excess or deficit in rent collections over the estimated rent roll at the time when the subordinate right was created. (See page 140 of Syke's Compendium.) The learned Subordinate Judge of Sultanpur dismissed the suit on the preliminary finding that the under-proprietary share could not be considered to be the ancestral property of the mortgagor Sheoratan Singh, inasmuch as Lord Canning's Proclamation of the 15th March 1858 divested all the proprietors of land of their proprietary rights and transferred and vested those rights in the British Government. This finding of the Subordinate Judge was upheld by the District Judge of Fyzabad in appeal. The second appeal to this Court originally came before one of us, who asked that the matter should be referred to a Bench of this Court for the reasons stated in the following order :—

"This is a case which should, in my opinion, be referred to a Bench of this Court for decision.

"The facts are that one Sheoratan Singh mortgaged a one anna share of his under-proprietary right in the village of Sata for Rs. 800 to the defendant on the 13th July 1900 for 90 years. The plaintiffs, who are descendants of Sheoratan Singh, brought this suit against the mortgagee for possession of the mortgaged property, on the ground that the property was ancestral property and that the transfer had not been made for legal necessity. The sole question in the case was whether the property was the ancestral property of Sheoratan Singh or his self-acquired property.

"The Courts below have held that it was the self-acquired property of Sheoratan Singh, on the ground that by the Proclamation of Lord Canning of the 15th March 1858 the proprietary right in land in Oudh was confiscated to the British Government and that all who after the date of the proclamation claim title to landed property must claim through the Government, and that, therefore, by the settlement decree which was obtained by Sheoratan Singh after the Mutiny, the property became the self-acquired property of Sheoratan Singh. The Courts below appear to have overlooked the fact that Sheoratan Singh was not the proprietor but the under-proprietor of the property mortgaged by him, and have not discussed the effect of the proclamation of 15th March 1858, and of the subsequent Settlement Court decrees on under-proprietary holdings. In the letter of the Government of India of the 12th September 1860 it was stated as follows :—

"'It was the intention of Government that all such subordinate holders, unless specially deserving of punishment for persisted rebellion, should be restored to the rights they possessed before the rebellion, whether the parent estates were ancestral, acquired or conferred, and that every such holder should be maintained in his rights under the new grantee precisely as if the *taluqa* had not been confiscated or as if having been confiscated, it had been settled with the hereditary *taluqdar*.'

"The questions for decision are :—

"1. What was the effect of the Proclamation of the 15th March 1858 on under-proprietary holdings in Oudh? Were such under-proprietary holdings confiscated absolutely to Government?

"2. What was the effect of the subsequent Settlement Court decrees, by which persons who had held as under-proprietors before the rebellion were recognised and decreed to be holding as under-proprietors?

"3. Did they acquire their title to such under proprietary holdings by virtue of the settlement decree from the British Government or were they by virtue of the decree merely maintained in the rights which they possessed prior to the proclamation?

"As it would appear that no case has been before this Court in which these points have been raised and as they are points of the greatest importance affecting as they do a large area of land held by under-proprietors in Oudh, I refer the case for decision of a Bench of this Court."

It may be stated that there can be no question that the property, apart from Lord Canning's Proclamation, was the ancestral property of Sheoratan Singh and this fact is conceded by the respondent's Counsel. The lower Court's judgment shows that Sheoratan Singh obtained this four-annas share by a Settlement Court decree from his three relations with whom it had been settled, on the ground that the property had belonged to his father. The evidence in cross-examination of Suraj Bali, defence witness No. 1, establishes this. The mort-

gage deed itself states that the property is ancestral. We have, therefore, only to decide the questions of law stated above.

Beginning with Lord Canning's Proclamation of the 15th March 1858, we find that certain *taluqdars* are specified as having deserved well of the British Government. "It is declared that these *taluqdars* are henceforward the sole hereditary proprietors of the land which they held when Oudh came under British rule, subject only to such moderate assessment as may be imposed upon them." (See page 379 of Syke's Compendium). The proclamation goes on to state: "The Governor-General further proclaims to the people of Oudh, that, with the above-mentioned exceptions, the proprietary right in the soil of the Province is confiscated to the British Government which will dispose of that right in such manner as to it may seem fitting." This confiscating proclamation was soon followed by one issued by the Chief Commissioner on the 25th March 1858, informing the land holders of Oudh other than the rewarded *taluqdars* that if they at once came in ready to obey his orders, and had taken no part in the atrocities committed on helpless Europeans, their lands would not be confiscated and claims to land held by them prior to annexation would be heard (See page 62 of Syke's Compendium.) The majority of land holders obeyed this invitation and the second Summary Settlement (the first Summary Settlement having taken place in 1856) followed, the result being that most of the *taluqdars* were reinstated in the estates they held in 1856. This second Summary Settlement was completed before the middle of 1859 (*Ibid.*, page 63). On the 10th of October 1859 was issued the first of the two letters appended to the Oudh Estates Act with reference to section 3 of that Act and which is thus part of the statutory law of Oudh. The second, third and fourth paragraphs of this letter run as follows:—

"2. His Excellency in Council, agreeing with you as to the expediency of removing all doubts as to the intention of the Government to maintain the *taluqdars* in possession of the *taluqas* for which they have been permitted to engage, is pleased to declare that every *taluqdar* with whom a Summary Settlement has been made since the reoccupation of the Province, has thereby acquired a permanent hereditary and transferable proprietary right, namely, in the *taluqa* for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the *taluqa*.

"3. This right is, however, conceded, subject to any measure which the Government may think proper to take for the purpose of protecting the inferior *zemindars* and village occupants from extortion, and of upholding their rights in the soil in subordination to the *taluqdars*

"4. The Governor General in Council desires that you will have ready, by His Excellency's arrival at Lucknow, a list of the *taluqdars* upon whom a permanent proprietary right has now been conferred; and that you will prepare *sanads* to be issued to these *taluqdars* at that time. The *sanads* will be given by, and will run in the name of, the Chief Commissioner, acting under the authority of the Governor General."

It will be seen that in the third paragraph reference is made to any measure which the Government may think proper to take for the purpose of protecting the inferior *zemindars* and village occupants from extortion and of upholding their rights in the soil in subordination to the *taluqdars*, and that in the fourth paragraph reference is made to the preparation of *sanads*. One of the measures taken was the drafting of the *sanad* in such a manner as to secure subordinate rights. We find in the approved form of the *sanad* printed on page 513 of Chhail Behari Lal's Taluqdari Law of Oudh, 1910 edition, the following passage:—

"It is also a condition of the grant that you will so far as in your power promote the agricultural prosperity of your estate and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed."

A second measure taken by Government to ensure the protection of subordinate holders is foreshadowed in paragraph 5 of the second letter, dated 14th October 1859, in the Schedule of the Oudh Estates Act. That paragraph runs as follows:—

"5. This being the position in which the *taluqdars* will be placed, they cannot, with any show of reason, complain if the Government takes effectual steps to re establish and maintain in subordination to them the former rights, as those existed in 1855, of other

persons whose connection with the soil is in many cases more intimate and more ancient than theirs; and it is obvious that the only effectual protection, which the Government can extend to these inferior holders, is to define and record their rights, and to limit the demand of the *taluqdar* as against such persons during the currency of the settlement to the amount fixed by the Government as the basis of its own revenue demand."

The measure foreshadowed is the defining of the subordinate rights. The procedure for defining these rights is contained in the rules given in the Schedule of Oudh Sub-Settlement Act of 1866. The preamble of this Act runs as follows:—

"Whereas rules have been made by the Chief Commissioner of Oudh for the better determination of certain claims by persons possessed of subordinate rights of property in the territories subject to his administration; and whereas it is expedient that such rules should have the force of law; it is hereby enacted as follows: ..."

It is common ground that Sheoratan Singh got the four annas under-proprietary share in the village of which the one-anna share in suit is a fraction under a Settlement Court decree. It is clear also from the citations made by us above that what he got was given in pursuance of the Government's policy to maintain or restore the under-proprietary rights existing previous to the confiscation. The word "maintain" will be the right term if the sentence in the Proclamation of the 15th March 1858 "The proprietary right in the soil of the province is confiscated" be interpreted to mean that nothing more than the full or superior proprietary right was confiscated. The word "restore" will be right if we deem that the expression "proprietary right in the soil" would include under-proprietary rights.

There can be no question to our minds that the proper term to use is the word "restore". For the purpose of interpreting the expression in the proclamation "The proprietary right in the soil of the Province is confiscated", we may have recourse to Lord Canning's own letters and orders at or about the time of proclamation as *expositio contemporanea* of the highest value. In a letter of Lord Canning explaining his policy of the 17th June 1858, from which extensive quotations are made on pages 51 to 61 of Syke's Compendium, at pages 51 and 52, Lord Canning explains that, although a few of the *talukdars* of Oudh were the representatives of ancient families, the majority were men who, having held office as governors or collectors of Government rents under the native Government, had taken advantage of the weakness of that Government to make themselves nominal proprietors and actual possessors of the villages or the majority of the villages which formed what they called their *talukas* or estates, so that the condition of the actual occupants of the soil of the Province was one of unparalleled depression. In numerous instances they were compelled by the *taluqdars* to execute deeds of sale of *whatever proprietary right they nominally possessed.* He goes on to say (with reference to the first Summary Settlement which preceded the Mutiny): "Such being the condition of things in Oudh, the Government of India, perhaps with more of chivalrous justice than political prudence, determined at once to reinstate *these proprietary occupants of the soil in what were believed to be their hereditary rights.*" On 12th September 1860 was issued a letter from the Government of India to the Officiating Chief Commissioner, Colonel Barrow, which is printed on pages 115 *et seq* of Syke's Compendium. The first paragraph of this letter runs as follows: —

"The Governor-General in Council desires me to observe that in declaring that in confiscated estates which have been conferred on *talugdari* tenure on a new grantee the strict terms of the Proclamation of March 1858 are to be enforced against all holders of subordinate rights in such estates, ...the Officiating Chief Commissioner has gone considerably beyond the intentions of His Excellency, and has not acted in accordance with the spirit of Her Majesty's Proclamation".

Later on occurs the passage: —

"As already observed, you are quite right in saying that confiscation under the Proclamation of March 1858 where it has been carried out annuls proprietary rights of every kind in the soil, inferior as well as superior, and in this sense confiscation was carried out throughout the Province except as regards the six estates specified in the proclamation."

These quotations suffice to show that the words "proprietary right in the soil" in the proclamation included under-proprietary right. The literature of the period as given in Syke's Compendium does not suggest that any one ever considered the proclamation not to affect under proprietary rights.

It has indeed been suggested to us in argument that, even though it be admitted that the under-proprietary rights were confiscated to Government by the Proclamation of 15th March 1858, there was no need of actual restoration. Reliance is placed on the Privy Council ruling reported as *Jehan Kadr* v. *Afsar Buhu Begum* (1). In that case it was held that the former title to certain immoveable property in Lucknow as it belonged before the proclamation "was let in" by reason of Government having "withdrawn themselves" without making any order in favour of any definite person. (See page 12 of the ruling.) It has, therefore, been suggested that under-proprietary rights were "let in" in the same way and that no proof of actual grant by Government was necessary. The same ruling, however, expressed the view that such revival of title by withdrawal of Government could not be predicated except where there was no settlement to be made. The title by withdrawal of Government cannot, therefore, have accrued in the case of under-proprietors to claim their rights in the Settlement Court.

The method or conduct by which Government reconferred the confiscated under-proprietary rights is to be found in paragraph 5 of the letter of the 19th October 1859 mentioned above appended to the Oudh Estates Act. The words are, "*Taluqdars* cannot complain if the Government takes effectual steps to re-establish and maintain in subordination to them the former rights as those existed in 1855." The Settlement Court proceedings were merely a defining of the rights which were granted by this paragraph. In brief in this letter Government re-establish under-proprietary rights as defined by subsequent proceedings. Before concluding this judgment it appears desirable to refer to the following passage in the Samarpaha Taluka case, *Bisheshar Bakhsh Singh* v. *Rameshar Bakhsh Singh* (2), decided by Mr. Lindsay and Mr. Stuart and reported in 21 Oudh Case 1. On page 27* we find the following passage:—

"It seems clear, therefore, that it was at this time the intention of the Government, in spite of the grant of full proprietary rights to the *taluqdars*, to revive as against them the rights of certain subordinate *zemindars* and tenure-holders; but beyond this there is nothing in the language of this letter of the 10th October 1859 to indicate that Government had any intention of restoring or reviving other rights, such for example as those of the rights of the reversionary heirs of a deceased Hindu expectant on the death of the Hindu widow in possession of the estate."

Now this passage might appear to conflict with our view that after the confiscation *taluqdars* were granted by their *sanads* and other proceedings their estates subject to such under proprietary rights as should subsequently be found to have existed at the date of confiscation. It is to be remarked, however, that the Samarpaha case was not concerned in any way with under-proprietary rights. The passage quoted up to the semicolon was merely for the purpose of drawing the conclusion that follows the semicolon, and for this purpose it was sufficiently accurate. Nor can this conclusion be held to mean that Government had no intention of restoring reversionary rights in the case of under-proprietary holdings. The conclusion is dealing merely with reversionary rights as affecting the title of the superior holders. This passage does, however, indicate that Mr. Lindsay and Mr. Stuart adopted the view that under-proprietary rights were affected by the proclamation and required to be restored.

Our answers then to the questions for decision referred to this Bench are as follows:—The answer to the first question is that under-proprietary holdings in Oudh were confiscated absolutely to Government by the Proclamation of 15th March 1858. Our answer to the second question is that the rights of the under-proprietors as they existed before the proclamation were restored by the letters of the 10th October 1859 and 19th October 1859, which are set out in Schedule II of the Oudh

(1) 12 C. 1 (P. C.); 12 I. A. 124; 9 Ind. Jur. 322; 4 Sar. P. C. J. 630; Rafique & Jackson's P. C. No. 91; 6 Ind. Dec. (N. S.) 1.

(2) 44 Ind. Cas. 868; 21 O. C. 1; 4 O. L. J. 648.

*Page of 21 O. C.—*Ed.*

Estates Act, and by the Settlement Court proceedings taken under the rules validated by Act XXVI of 1866. Our answer to the last question is that the title acquired by Settlement Court decrees was a title from the British Government, but the title possessed by the claimants before the confiscation. The title was new in the sense that the grantor was new, but the title was old in the sense that what was granted was what was held before. It was just as much in the power of Government to grant a man an ancestral right in property as to grant him a personal right. In every case it is a question of what was the intention of Government, and this has been the principle always adopted in deciding cases of the grant of the proprietary right proper. The lower Courts were right in holding that the Proclamation put an end to the under-proprietary rights but they failed to notice that the policy and the declared intention of Government in re-conferring these rights was to re-confer them in the precise condition in which they had been held before confiscation.

Accordingly we allow this appeal and remand the case to the Court of first instance for decision of the remaining issues. The costs of this appeal will abide the result.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 966 OF 1895.

March 17, 1897.

Present:—Sir Francis Maclean, Kt., Chief Justice, and Mr. Justice Banerjee.

DWARIKA NATH MUKERJEE—DEFENDANT—APPELLANT

versus

DWIJENDRA NATH GHOSAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Lease, construction of—Rent payable in cash and in kind—Value of grain fixed, effect of—Tenant, liability of.

[r Where a *mokarrari maurasi* lease sets out that the rent is payable partly in cash and partly in kind, and that if the latter is not delivered the tenant would pay a certain sum, which the parties themselves fix as its value, the meaning of the document is that the parties intended to fix the value of that part of the rent which was payable in kind, and that in case of default of payment of rent in kind the tenant is liable only to pay the sum fixed. [p. 104, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, 24-Perganahs, dated the 19th March 1895, modifying that of the Munsif, 2nd Court at Barasat, dated the 30th May 1894.

Babu *Shib Chunder Palit* (with him Babu *Nilmadhub Bose*), for the Appellant.

Babu *Sarada Charan Mitra*, for the Respondents.

JUDGMENT.

MACLEAN, C. J.—This is a rent suit, the rent being payable partly in cash and partly in kind, and the question which we have to decide depends upon the true construction of the *kabuliyat* which is set out at page 11 of the paper book. The defendant, the present appellant, who is the tenant, says that under that document, if the paddy which he agreed to deliver were not delivered, the parties themselves put a value upon it, namely, a value of Rs 30. The plaintiff's contention is, that if the paddy were not delivered, then that he was entitled to get the value of it at the market rate of the day. Now by the argument, the defendant, who, as I have just said, is the tenant, agreed to pay a rent which amounted to Rs. 59-10-0 and also to deliver to the plaintiff 1½ *bish* of paddy "which may be valued at Rs. 30 by guess", which I understand is by estimation, "making a total of Rs. 89-10 as. the assessed rent, as also to offer a bonus of Rs. 15." Then the document goes on to say that he "would pay every year the rent fixed," by that, I suppose, was meant the Rs. 59-10-0, and then the document goes on to say that the defendant should carry to the house the amount of paddy to which I have referred. Then if we look at the clause at page 12, we find this "if there be any negligence in the payment of rent or the delivery of paddy, an interest at the rate of 3 pies per rupee per month shall be charged till the day of payment or delivery. No plea of payment shall be put forth on the basis of any receipt or document, other than the *dakhila*, and if the rent is neglected to be paid, it shall

be realized by taking legal measures." The question is what effect, looking at the document as a whole, is to be given to the language used. If the plaintiff's contention is sound, it is difficult to see what real effect is given to the words "paddy which may be valued at R. 30 by estimation, making a total of Rs. 89-10-0 the assessed rent." It is suggested for the plaintiff that these words are adopted merely for stamp purposes for the purpose, that is, of estimating the stamp duty payable for the document. But that is a mere suggestion and I do not think that that is a suggestion which we can accept. It seems to me, taking the document as a whole, that what the parties intended was this, that the defendant was to pay so much rent in money and so much rent in kind, but that in order to avoid disputes and the going into any question as to the value of the paddy in the event of its non-delivery, the parties agreed that it should be valued at Rs. 30 by estimation, and that view is supported by the word "making a total of Rs. 89 10-0 as the assessed rent." This view is also supported by the subsequent clause at page 12, which provides for payment of interest in the event of non-payment of rent and non-delivery of paddy; it says that it shall be charged till the date of payment and delivery. Charged upon what? I think that must mean upon the amount of rent and upon the amount at which they estimated the value of the paddy. The last clause provides that the plaintiff shall be entitled to realize the rent, if it be not paid, by taking legal measures. There is nothing said as to what the plaintiff is to do if the paddy is not delivered. That seems to me again to point to the conclusion that when they speak of "rent" there, they mean not only the rent in cash but the rent in kind the value of which had been assessed as between the parties at Rs. 30. It may very well be that there were good reasons for this; the parties may have thought that it would be more prudent as between themselves to fix the amount which should be taken as the value of the paddy if it were not delivered rather than have a dispute upon each occasion as to the market value of the paddy at the time of the breach.

Looking at the document as a whole, I think the contention of the appellant is sound, and that the decree of the lower Appellate Court must be varied by reducing the amount decreed to the plaintiff, in accordance with our decision, and the appellant must have the costs of the appeal.

BANERJEE, J.—I concur with the learned Chief Justice in thinking that this appeal ought to be allowed. I only wish to add that whatever weight the explanation offered for the plaintiff, that the estimated value of the paddy is given in the *kabuliyat* for the purpose of determining the amount of stamp duty, might have had if the *kabuliyat* had not contained the words, "making a total of Rs. 89 10 0 only as the assessed rent," in the presence of those words, that explanation loses all its force. The words in the original are "*ekuni* 89 *taka* 10 *ana jamma abadharita*", and "*jamma abadharita*" is a well known Bengali expression which means a great deal more than a provisional settlement of the rent for the incidental purpose of ascertaining the stamp duty. The lease was a *mokarrari* and *mourasi* lease; and when such a document mentions a certain sum of money as the "*jamma abadharita*," which words may well be rendered as "the fixed rent," the meaning of the document seems to be very clear, that the parties wanted to fix the value of the paddy, that is, the part of rent which was payable in kind.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 482 OF 1918.

May 29, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

Musammat MAHMUDA—DEFENDANT—APPELLANT

versus

Thakur SHANKAR BAKHSH SINGH—PLAINTIFF—RESPONDENT.

Compromise of doubtful claim, validity of—Consideration—Gratuitous compromise, whether can be enforced Oudh Rent Act XXII of 1886, s 108, cl. 5-A—Forbearance to file non-maintainable suit, whether good consideration for compromise.

A *bona fide* compromise effected to settle doubtfu

claims is not legally invalid because the surrender of a doubtful right by one party, and the forbearance by the other of his right to sue, form a good reciprocal consideration for such a settlement An intending litigant, who *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, does give up something of value, but there must be in fact a serious claim honestly made

Where a person obtained from the Revenue Court a declaration that he was entitled to under proprietary rights, but being misled by the opposite party who threatened to file a suit in the Civil Court to challenge the propriety of the finding of the Revenue Court, relinquished the under-proprietary rights conferred upon him, and accepted a *kabuliyat* and was subsequently sued in ejectment:

Held, that inasmuch as section 108 (5-A) of the Oudh Rent Act forbade the bringing of a suit of the nature threatened, the relinquishment must be regarded as gratuitous and was not enforceable.

Appeal from the decree of the Officiating Subordinate Judge, Partabgarh, dated the 2nd December 1918, reversing that of the Munsif, Kunda, dated the 22nd July 1918.

Syed *Ali Mohammad*, for the Appellant.

Mr *B. B. Chandra*, for the Respondent.

JUDGMENT.—The plaintiff is the superior proprietor of the village in which the disputed plots are situated. The plots were held by Umrao Khan, the husband of the defendant, as a *muafidar*. The plaintiff sought to resume the holding but was unsuccessful. The finding of the Revenue Court, which was upheld by the Board of Revenue, was that Umrao Khan was entitled to under-proprietary rights (*qabiz darmiani*). The plaintiff then threatened to file a suit in the Civil Court to challenge the proprietary cf that finding Umrao Khan was evidently unaware whether a suit of that kind was maintainable in the Civil Court He is said to have agreed to relinq ish the under-proprietary rights conferred on him by the decree of the Revenue Court and to take a lease of the said land on a rental of Rs. 24 per year. A formal deed of relinquishment was obtained from him on the 14th March 1908, and registered on the same day. A *kabuliyat* was granted to him in return for 1315 Fasli on the 22nd May 1908.

On the strength of that *kabuliyat* the plaintiff sought to eject the defendant from the said land in November 1915. The defendant contested the notice of ejectment and set up her under-proprietary rights by virtue of the decree passed in the resumption proceeding. She succeeded. In the present suit the plaintiff claims a declaration that the defendant is not entitled to under proprietary rights. The Court of first instance decided against him but the lower Appellate Court upheld his claim, holding that the deed of relinquishment was not void for want of consideration.

A *bona fide* compromise effected to settle doubtful claims is not legally invalid, because the surrender of a doubtful right by one party and the forbearance by the other of his right to sue form a good reciprocal consideration for such a settlement. An intending litigant who *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate does give up something of value, but as pointed out by Cotton, L. J., in *Miles* v. *New Zealand Alford Estate Company* (1) there must be in fact a serious claim honestly made.

Here the plaintiff had no right to sue at all, for section 108, clause 5-A, of the Oudh Rent Act (XXII of 1886), as amended by Act IV of 1901, distinctly provides that the Courts of Revenue shall have exclusive jurisdiction over matters connected with the resumption of land held rent-free. The declaration made by the Revenue Court under section 108, clause H, that the rent free holder had acquired under-proprietary rights was final and could not have been questioned in the Civil Court. The plaintiff somehow misled Umrao Khan by his threat. The forbearance of a claim which was not maintainable cannot be treated as a forbearance at all The relinquishment was gratuitous. No effect was given to it in the revenue papers and the lower Appellate Court was not justified in holding that it was valid and enforceable as against the defendant.

The appeal is, therefore, allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs throughout.

Appeal allowed.

(1) (1886) 32 Ch. D. 266 at p. 283; 55 L. J. Ch. 801; 54 L. T. 582; 34 W. R. 669.

PARMOD BANABIHARI *v.* ATKINS.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 212 OF 1917.

March 27, 1919.

Present:—Mr. Justice Atkinson and Mr. Justice Das.

Siri Thakur PARMOD BANABIHARI —PLAINTIFF—APPELLANT

versus

C. G. ATKINS AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Endowment, creation of—Trust, how created—Female, powers of—Bengal Tenancy Act (VIII B. C. of 1885), s. 21, Sch. III, Art. 1 (a)—Occupancy rights, firm, whether can acquire—Lease, expiry of—Ejectment—Limitation.

A dedication in favour of an idol to be effectual must be real and not nominal, and it must be shown that the grantor completely divested himself of every portion of the property which is the subject-matter of the grant. Where there is no proof that the income of the property endowed is applied for the maintenance of the idol, and the whole conduct of the parties is inconsistent with the hypothesis of a valid trust, the dedication must be held to be nominal and where this is so, a subsequent grant made by a female having the estate of a Hindu mother cannot create a valid title in favour of the idol, and therefore, the idol cannot maintain a suit in ejectment. [p. 107, cols. 1 & 2]

A lease in favour of a firm or a concern must be taken to be a lease in favour of the individuals constituting the firm, and in the absence of anything to show that the original grantees are no longer members of the firm, there is nothing to prevent them from acquiring occupancy rights. [p. 108, col. 2.]

Certain land was leased to a firm: the lease expired in 1905, but the firm continued in possession of the land. On the 1st April 1915 they were served with notice to quit but they disregarded the notice. On the 24th January 1916 the present suit was brought to eject them:

Held, (1) that the suit, having been brought more than six months after the expiration of the lease, was barred by the special rule of limitation prescribed by Article 1 (*a*) of Schedule III to the Bengal Tenancy Act; [p. 107, col. 1.]

(2) that the firm had acquired a right of occupancy in the land in dispute. [p. 109, col. 1.]

Appeal from a decision of the Subordinate Judge, Monghyr, dated the 29th June 1917.

Messrs. *Lachmi Narain Sinha* and *Jagarnath Prasad*, for the Appellant.

Mr. *Manuk* (with him Messrs. *O.M. Agarwala* and *Panchanan Banerjee*), for the Respondents.

JUDGMENT.

DAS, J.—This appeal comes before us from the judgment of the Subordinate Judge of Monghyr and arises out of a suit instituted by Rani Ranjit Kuer, the present proprietress of the Narhan Estate, as the *shebait* of an idol, for a declaration that 75 *bighas* 11 *kathas* and 1 *dhur* of land, forming part of Mouza Narayanpur, is the *khudkasht* land of the *malik*, and that the defendants, as the partners of a concern known as Daulatpur Factory, have not acquired a right of occupancy therein, and for *khas* possession thereof.

The plaintiff's case is that village Narayanpur was purchased by *Musammat* Ram Kuari, the wife of Babu Ranjit Singh, the then holder of the estate, out of her separate funds, and was dedicated by her to the family idol some time in 1237. The original grant, as contained in the copperplate, has been produced in this case, and it does not appear that it lays down any rule of succession to the office of the *shebait*. According to the plaintiff the income of the village was always appropriated to the use of the idol, although it is admitted that the Narhan Estate always stood recorded as the proprietor of the village in the Land Registration Department. The Court of Wards, who were long in possession of the estate, first on behalf of Babu Barham Narain Singh, then on behalf of his widow *Musammat* Biseswari Kueri, and lastly on behalf of his mother, the present proprietress, always treated Mouza Narayanpur as part and parcel of the estate, but they released the *mouza* on discovery of the copperplate, which discovery took place some time in July 1912.

On the 1st September 1914 Rani Ranjit herself executed a fresh deed in favour of the idol, and there is some contention before us whether this constitutes a fresh grant in favour of the idol or whether it merely confirms the original grant made by *Musammat* Rani Kueri.

The plaintiff's case is that the *mouza* of which the defendants are admittedly in possession is the *khudkasht* land of the idol, and that the defendants have not acquired any right of occupancy therein. On the 1st April 1915 the plaintiff served on the defendants a notice to quit, which was disregarded by the defendants. On the 24th January 1916 the present action was brought.

Now this appeal may be disposed of on a very short point. It is practically conceded by the learned Vakil appearing on behalf of the appellant that if the Full Bench of this Court has decided the case of *Janki Singh* v.

Mahant Jagannath Das (1) correctly, then the plaintiff's suit, having been brought more than six months after the expiration of the lease, is barred by the special rule of limitation provided by the Bengal Tenancy Act. But he argues that that case was wrongly decided, and is at present before the Judicial Committee. So far as we are concerned, we are conclusively bound by the Full Bench decision and must hold that the plaintiff's suit is barred by limitation. But as various other questions have been argued before us, we think it right and proper to deal with them.

The first question that arises is what is the title of the idol which enables it to maintain an action in ejectment. The only evidence of an endowment in favour of the idol is a copperplate which was discovered in an iron safe where the late Rani's ornaments were kept, but a dedication to be effectual must be real and not nominal; and it must be shown that the grantor completely divested herself of every portion of the property which is the subject matter of the grant. In the case of *Madhab Chandra Bara* v. *Sarat Kumari Debi* (2), which was a case of a public endowment, it was laid down by their Lordships that to support the case relied on that the lands in suit formed the subject of a valid public endowment it must be established that an absolute grant was, in the first place, made with the intention that the properties should be applied for the service of the idol, and that the properties have since been so applied, and that the members of the family of the settlor have not treated the property as one the profits of which were mainly intended to be applied for their benefit.

In my opinion the same considerations must apply, only with greater force, to the case of a private endowment which, it must be remembered, can be put an end to by the consensus of the family; and the dedication must be held to be nominal when there is no proof of the application of the income of the property endowed for the maintenance of the idol, and when the whole conduct of the parties is inconsistent with the hypothesis of a valid trust.

In this there is no evidence that the income of the village was ever applied for the maintenance of the idol; there is, on the other hand, positive evidence on the record, and that from the side of the plaintiff herself, that *Musammat* Ram Kuari herself treated this property as belonging to her. The property has always stood recorded, as I have said before, in the name of the estate in the Land Registration Department, and the mode of dealing with the property by the parties interested in the endowment shows conclusively that they regarded the property as belonging to the estate. It seems to me that the original endowment was altogether ineffectual, and that the trust in favour of the idol was never brought into existence. If the original endowment was ineffectual, then the subsequent grant by Rani Ranjit Koer having the estate of a Hindu mother cannot create a valid title in favour of the idol. It follows, therefore, that the idol cannot maintain a suit in ejectment.

The principal question of fact in this case is:—Are the lands, the subject-matter of the suit, the proprietor's private lands so as to prevent the accrual of a right of occupancy therein.

Mr. Manuk's argument is that under the combined operation of sections 20 and 21 of the Bengal Tenancy Act the defendants would have a right of occupancy in the land, unless it can be established (1) that the land has been cultivated as *zerait* land by the proprietor himself with his own stock and by his own servants or by hired labour for 12 continuous years immediately before the passing of the Bengal Tenancy Act; or that the land is recognized by village usage as proprietor's private land, and (2) that the land is held under a lease for a term of years or under a lease from year to year.

It is Mr. Manuk's argument that section 120 of the Bengal Tenancy Act gives a convenient definition of 'proprietor's private land,' but that section 116 of the Act is the substantive section that deals with the non-accrual of a right of occupancy in a proprietor's private land; and that, in order to establish such non-accrual, it must be shown as a condition precedent that the land is actually held under a lease for a term of years or under a lease from year to year.

In this case the lease in favour of the defendants expired in 1905. The suit was brought in 1916. Between 1905 and 1916

(1) 44 Ind. Cas. 94; 3 P. L. J. 1.
(2) 6 Ind. Cas. 26; 15 C. W. N. 126.

the defendants have been in actual possession of the land without a lease, and it seems to me that the essential condition for non-accrual of a right of occupancy is not satisfied.

Mr. L. N. Sinha, however, argues that it must be presumed that the tenant has held over on the same terms and conditions, and that, therefore, he has in effect held under a lease from year to year or for a term of years.

This argument has great force, for it has been held that all that the landlord need prove on this point is that when the holding was first created it was held under a lease for a term of years or from year to year. It is, however, unnecessary to come to a definite conclusion on this point, because I am satisfied that the plaintiff has failed to establish that the land is the proprietor's private land within the meaning of section 120 of the Bengal Tenancy Act. There is no evidence worth the name that the land has been cultivated by the proprietor himself with his own stock by his own servants or by hired labour for twelve continuous years immediately before the passing of the Bengal Tenancy Act, and it is not suggested that the land is recognised by village usage as the proprietor's *zerait*.

Mr. L. N. Sinha relies on two circumstances in support of his contention. First, on the *patta* granted by Babu Permeshwar Narain Singh, the then holder of the estate, on the 11th February 1872 coupled with a letting by Poshan Jha in favour of Daulatpur Factory on the 27th March 1873 for cultivating purposes; and, secondly, on the admission of the defendants that the land is the *zerait* land of the *malik*.

I am of opinion that there is no force in this contention. The fact that the plaintiff's predecessor-in-interest was letting out a portion of the village for cultivating purposes in my opinion leads to nothing at all, and the admission of the defendant that the land is the *zerait* of the *malik* must be taken with all other facts, admitted or proved in the case, before it is possible for us to arrive at a definite conclusion.

It is admitted that the finally published Record of Rights, which was promulgated after the admission made by the defendants, is against the contention of the plaintiff, and the plaintiff has given no evidence whatever to discharge the heavy onus that is on her to bring her case within section 120 of the Bengal Tenancy Act; I hold, therefore, that the land which is the subject-matter of this suit is not the *zerait* land of the plaintiff.

It was next contended by Mr. L. N. Sinha that in any case the defendants, being a concern or a firm, are incapable of acquiring a right of occupancy in any land, and reliance was placed on the case of *Cannan, Liquidator Agra and Masterman's Bank* v. *Kylash Chunder Roy Chowdhry* (3), *Rai Komul Dossee* v. *J. W. Laidley* (4) and *Burrangi Raut* v. *M. H. Mackenzie* (5).

The first two cases were decided under the old Rent Acts which contained no definition of a *raiyat*, but the word has now been defined in the Bengal Tenancy Act to mean

"Primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself or by members of his family or by hired servants, or *with the aid of partners*, and includes also the successors-in-interest of persons who have acquired such a right."

It is impossible to hold now that the members of a firm are incapable of acquiring a right of occupancy in the land. The two earlier cases were considered in the case of *Laidley* v. *Gour Gobind Sarkar* (6), and it was there pointed out that, so far as the first case was concerned, the report did not show the particular facts on which the decision was based, and with reference to which the observations of the learned Judges were made, and, so far as the second case was concerned, the observations on which the plaintiff relied, were *obiter dicta* and were not necessary for the decision of the case. The Court came to the conclusion that a lease in favour of a firm or of a concern must be taken to be a lease in favour of the individuals constituting the firm and as there was nothing to show in that case that the original grantees were no longer members of the firm, there was nothing to prevent them from acquiring a right of occupancy in the land. In the

(3) 25 W. R. 117.
(4) 4 C. 957; 3 Shome L. R. 46; 2 Ind. Dec. (N. S.) 605.
(5) 7 C. L. J. 475.
(6) 11 C. 501; 5 Ind. Dec. (N. S.) 1093.

case before us the last lease in favour of the Daulatpur Factory is dated the 22nd May 1900, and there is nothing to show that the original grantees are no longer members of the firm. There is, on the other hand, a clear admission by the plaintiffs in their plaint that the original grantees are still the members of the firm.

This case was again considered in *Bujrangi Raut* v. *M. H. Mackenzie* (5), wherein its authority was not in any way shaken. The facts in the latter case were entirely different. The names of the original grantees in that case were unknown and the person who claimed to have acquired a right of occupancy in the land was some one different from the original grantees. It is obvious that that case can have no application to the facts of the case before us.

I hold that the defendants have acquired a right of occupancy in the land in dispute.

This appeal, therefore, fails, and I would dismiss it with costs.

ATKINSON, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 24 OF 1919.

April 22, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

BISHESHWAR—PLAINTIFF—APPLICANT

versus

CHHEDI LAL AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Transfer of Property Act (IV of 1882), s. 108—Lease terminable on happening of certain event—Notice by lessee terminating lease, effect of.

Where a lease is terminable upon the happening of an event, as, *e. g.*, a default in the payment of rent, it cannot, in the absence of such event happening, be terminated by the lessee. A notice, therefore, in such a case sent by a tenant under section 106 of the Transfer of Property Act, terminating the lease, is of no value.

Application to revise the order of the Additional Judge of the Court of Small Causes, Lucknow, dated the 26th August 1918.

Mr. *A. Sham*, for the Applicant.

Mr. *H. K. Ghose*, for the Opposite Party.

JUDGMENT.—This was a suit for the recovery of arrears of rent in respect of a house let by the plaintiff to the defendants. The lease was granted for a period of one year. The rent was payable monthly, and the only contingency in which the lease could be terminated before the lapse of one year was according to the lease dependent on the will of the lessor, who was empowered to ask the lessees to vacate the house if he wanted the house himself or if the rent stipulated was not regularly paid. It is not disputed that none of these contingencies actually happened. What happened was that the lessees themselves chose to terminate the lease by sending a notice to the landlord and vacated the house on the 13th July 1917, within 8 months of the date when the lease was granted. They had, however, no such right under the lease. Section 106 of the Transfer of Property Act (IV of 1882), which has been relied on, expressly saves a contract to the contrary and section 111 declares that a lease of that kind can be determined either by the efflux of the time limited by it or where such time is limited conditionally on the happening of some event, by the happening of such event. As the lessees had taken the lease of the house for a period of one year, they are liable to pay to the landlord the rent due for that period. As pointed out in *Khuda Bakhsh* v. *Abid Husain* (1), a notice sent by a tenant under section 106 is of no value, where there is an express contract providing for the manner in which the tenancy is to be terminated. The Court below granted a decree to the plaintiff for eight months.

Let the decree of the Court below be modified so as to allow the plaintiff a decree for Rs. 80 in addition to the amount allowed by the Court below with costs here and hitherto. The defendants will bear their own costs throughout.

Application allowed.

(1) 3 Ind. Cas. 873; 12 O. C. 279 at p. 284.

EMAMUDDIN *v.* MOHAMMAD RASHIDUL HUQ.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 166 OF 1918.

March 27, 1919.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

EMAMUDDIN—DEFENDANT—APPELLANT

versus

Saiyid MOHAMMAD RASHIDUL HUQ AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 22 (2)—"Third person", who is—Co-sharer proprietor, whether can be third person.

A person inducted on to land as a tenant and not as a proprietor, and as a person intending to cultivate the land with his own ploughs, is a "third person" within the meaning of section 22 (2) of the Bengal Tenancy Act, even though he may be a co-sharer proprietor.

Appeal from a decision of the Additional Subordinate Judge, Monghyr, dated the 12th November 1917, setting aside a decision of the Munsif, Monghyr, dated the 2 th March 1917.

Messrs. *Mohammad Ishfaq* and *Sushil Madhab Mullick*, for the Appellant.

Mr. *Kulwant Sahay*, for the Respondents.

JUDGMENT.

ROE, J.—The land in suit in this case has been recorded in the finally published Record of Rights as being the *bakasht* of the plaintiff, who is a co sharer proprietor of the village. The case made out in the plaint was that it was not true *bakasht* land, but it was an old occupancy holding which had been acquired by the plaintiffs and for which they paid rent to their co-sharer *maliks*. The learned Munsif who tried the case came to the conclusion that there was nothing to show that the land had ever been an occupancy *jote*, and he appears to have accepted the evidence of two of the plaintiffs' witnesses that the land was *kamat* land. The learned Subordinate Judge does not come to a finding upon this point. He describes the land simply as the *bakasht* land of the plaintiffs.

The position of the defendant is that he was inducted on to the land by the common manager of the whole body of landlords. He is himself a co-sharer proprietor, and it is the case common to both sides that he pays rent not to the whole body of landlords, but to those among them only who are the plaintiffs in this case. The learned Subordinate Judge found that his position is that of a non-occupancy *raiyat* who can be evicted upon service of notice as one who is holding on a lease from year to year, the suit being one for ejectment. The suit was decreed in the Appellate Court upon this ground. In the Court of first instance the suit was dismissed although, as it seems to me, if the learned Munsif was going to accept evidence that the land was *kamat* land he should have accepted that evidence in its entirety and regarded the land as falling under section 116. That, however, is immaterial to the present question. We may assume, for the purposes of the case, that the plaintiff's story, as given in the plaint, is the correct story, that he is a co-sharer proprietor and acquired these lands in the manner contemplated by section 22 of the Bengal Tenancy Act; but he has also let out the land in the manner contemplated by section 22 (2), and, that being so, the person to whom he has let out the land becomes a *raiyat* upon the land, and as a *raiyat*, whether he has a right of occupancy or not, he cannot be ejected except upon conditions prescribed in the Bengal Tenancy Act, none of which have been fulfilled. It is, however, contended by Mr. Kulwant Sahay that a co-sharer proprietor of a village is not a third person within the meaning of section 22 (2). I for my own part fail to appreciate this distinction. It is a mere accident that the defendant in this case holds a small share in the village. He was inducted on to the land as a tenant and not as a proprietor, and as a person intending to cultivate the land with his own ploughs, to my mind he is a third person within the meaning of the section.

I would, therefore, decree this appeal and dismiss the plaintiff's suit with costs in all Courts.

COUTTS, J.—I agree.

Appeal allowed.

HARIDAS BASAK *v.* RAJ KUMAR DEY.

CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 166 OF 1918.
June 12, 1919.
Present:—Mr. Justice Newbould and Mr. Justice Cuming.

HARIDAS BASAK—DECREE HOLDER—APPELLANT

versus

RAJ KUMAR DEY SARKAR AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XXI, rr. 11, 17—Execution of decree—Application for execution proving infructuous—Decree-holder not wishing to proceed, effect of—Application to amend previous application, nature of—Proceedings interrupted owing to erroneous order of Court—Inherent power of Court, exercise of.

Where an application for execution of a decree proves infructuous, and the decree-holder states that he no longer intends to proceed with it, the proceeding arising out of the application *ipso facto* comes to an end, and there is no necessity for a formal order striking off the application to terminate the proceeding. [p. 113, col 2.]

An application to amend a previous application, though not in the form prescribed by rule 11 of Order XXI of the Civil Procedure Code, but which, when read with the previous application, supplies all the information required by that rule, should be treated as a fresh application, and execution should be directed to proceed [p 113, col. 2.]

The fact that a decree-holder has, by an erroneous order of the Court, been prevented from proceeding with the execution of his decree in accordance with law, would justify the bringing into operation of section 151 of the Civil Procedure Code. So, too, where it is found that a plea advanced by a judgment-debtor of payment is dishonest, and was made with the intention of delaying the execution until the decree was time-barred. [p. 114, col. 1.]

Appeal against the order of the District Judge, Dacca, dated the 8th March 1918, reversing that of the Munsif, 1st Court, Munshigunge, dated the 22nd January 1918.

FACTS appear from the judgment.

Babus *Prokash Chandra Pakrashi*, for the Respondents, raised a preliminary objection that the value of the suit being less than Rs. 500, the second appeal was not competent under section 102 of the Civil Procedure Code.

Babu *Upendra Lal Roy* (with him Babu *Sarat Chandra Dutta*), for the Appellant.—The suit is one for accounts not cognizable by a Court of Small Causes, and the decree is for Rs. 746, so the second appeal is competent.

The appeal is on behalf of the decree-holder and it arises out of an application for execution of decree, by which the decree holder seeks to proceed against the immoveable properties of the judgment-debtors The point involved in this case is covered by the decision in *Gnanendra Kumar Roy Chowdhury* v. *Shayama Sunder Jen* (1). The decree-holder's application for attachment of the moveable properties was made within 12 years when the decree was not time-barred. Refers to Order XXI, rule 17, Civil Prosedure Code and *Salimulla Bahadur* v. *Sainaddi Sarkar* (2). In *Asgar Ali* v. *Troilokya Nath Ghose* (3) the list was filed after the expiry of the period of limitation. In this case the application for execution together with the list having been filed within the period of limitation, no question of limitation can arise

Further, the fraudulent conduct of the judgment-debtors in delaying the execution of the decree by obtaining several postponements would entitle the decree-holder to execute the decree even after the expiry of 12 years. All the High Courts have unanimously held that where the judgment-debtor by fraudulent means delays or hampers the execution of the decree, the decree can be executed even after the expiry of 12 years, and the judgment-debtor would be debarred from raising the plea of limitation.

Babu *Gunoda Charan Sen* (with him Bab *Prokash Chandra Pakrashi*), for the Respondents.—The application for execution is to be made in a certain form prescribed in Order XXI, rule 11, Civil Procedure Code, and unless that is so, the application cannot be treated as an application for execution in accordance with law. The second application for execution cannot be treated as a fresh application in accordance with law, as it does not give the information required by law to be given in an application for execution. The question is, whether the second application can be considered as a continuance of the original application. It cannot be so regarded, because in the original application there was no prayer for attachment of the immoveable properties of the judgment-debtors. The relief prayed for by the original application was exhausted

(1) 44 Ind. Cas. 553; 22 C. W. N. 540; 27 C. L. J. 398.
(2) 22 Ind. Cas. 337; 18 C. L. J. 538.
(3) 17 C. 631; 8 Ind. Dec. (N. S.) 960.

when the peon gave his return, saying that no moveables of the judgment debtors could be found. If you want a continuance, there must be continuance in the proper sense of the term. In the case of *Gnanendra Kumar Rai Chowdhury* v. *Shayma Sunder Jen* (1), there was a distinct prayer in the original application for execution of the decree for proceeding against the immoveable property of the judgment-debtor, so that in that case there could be in law a continuance of the original application; but in the present case there could be no continuance of the original application, because in the original application there was no prayer for proceeding against the immoveable properties of the judgment-debtors.

The real question for decision is, whether the present application can be regarded as an amendment of the original application within the meaning of Order XXI, rule 17 of the Civil Procedure Code. What the decree-holder wants is to add to the original application for execution a prayer to the effect that the immoveable properties of the judgment-debtors may also be proceeded against. But in the original application there was no immoveable property mentioned which could be attached, and, therefore, as has been held in *Asgar Ali* v. *Troilokya Nath Ghose* (3), the Court cannot add any new item of property not to be found in that application. The present application cannot be treated as an application for amendment of the previous application. In the case of *Asgar Ali* v. *Troilokya Nath Ghose* (3) their Lordships were agreed that amendment cannot be allowed after the application has been registered. See also the case of *Hurry Charan Bose* v. *Sulaydar Sheikh* (4), see also *Padmanund Singh* v. *Anant Lal Misser* (5) in which reliance was placed upon the decision in *Asgar Ali* v. *Troilokya Nath Ghose* (3). The case of *Gnanendra Kumar Rai Chowdhury* v. *Shayama Sunder Jen* (1), in which there was a list of immoveable properties, is distinguishable from the case of *Asgar Ali* v. *Troilokya Nath Ghose* (3) and the present case. In the case of *Salimulla Bahadur* v. *Sainaddi Sarkar* (2), which is distinguished in *Gnanendra Kumar Rai Chowdhury* v. *Shayama Sunder Jen* (1), the question which has now arisen for decision did not arise at all I submit that in view of the Full Bench case the decision of the Court of Appeal below should be allowed to stand.

Then, section 151, Civil Procedure Code, can have no application to the facts of this case. If the Court was not competent to allow an amendment under Order XXI, rule 17, Civil Procedure Code, it cannot allow an amendment under section 151 invoking the inherent jurisdiction of the Court. If the law does not permit an amendment of the application for execution of the decree after the application has been registered, the Court cannot exercise its inherent jurisdiction to give that relief to the decree holder The power under section 151 of the Civil Procedure Code must be exercised with care and caution, and cannot be exercised where the Code makes an adequate provision for the purpose. Refers to *Abdul Karim Abu Ahmed Khan* v. *Allahabad Bank Limited* (6).

Further, the second application for execution is barred by limitation. Now, the question is—am I estopped from raising the plea of limitation? The argument that because the judgment debtor paid various sums in obtaining several adjournments, therefore he is estopped from contending that the application was out of time, has got no substance in it. Refers to *Mina Konwari* v. *Juggat Setani* (7).

Babu *Upendra Lal Roy* briefly replied.

JUDGMENT.—This is an appeal against an order of the District Judge of Dacca reversing the order of the Munsif of Munshigunge passed in execution proceedings. The decree sought to be executed was passed on the 31st July 1905. The present proceeding arises out of an application for execution which was made on the 10th May 1915. In this application the decree-holder asked that the moveable property only of the judgment-debtors might be attached. The decree-holder was unable to attach any moveable property, so on the 10th July he filed a petition asking that his application for

(4) 12 C. 161; 6 Ind. Dec. (N. S.) 110.

(5) 34 C. 20; 4 C. L. J. 421 (F. B.); 11 C. W. N. 38; 1 M. L. T. 355.

(6) 41 Ind. Cas. 598; 44 C. 929 at pp. 936, 937; 21 C. W. N. 877; 26 C. L. J. 49.

(7) 10 C. 196 at pp. 197, 201 (P. C.); 13 C. L. R. 385; 10 I. A. 119; 7 Ind. Jur. 550; 4 Sar. P. C. J. 454; 5 Ind. Dec. (N, S.) 132.

execution might be struck off, with the intention of making a fresh application for attachment of the judgment-debtors' immoveables. In the meantime the judgment-debtors had filed a petition alleging that the decree had been satisfied, and as these proceedings were pending the Munsif refused consent to the decree-holder's application to strike off the execution proceeding. Thereupon the decree-holder on the 18th July filed an application to amend his original petition so as to proceed against the immoveable property of the judgment-debtors. This was allowed by the Munsif, but his order was reversed on appeal by the learned District Judge. The learned District Judge has held, relying on the Full Bench decision in *Asgar Ali* v. *Troilokya Nath Ghose* (3), that the original application for execution having been accepted and registered could not be amended.

On behalf of the appellant our attention has been drawn to the decision of a Bench of this Court to which one of us was a party, in the case of *Gnanendra Kumar Rai Chowdhury* v. *Shayama Sunder Jen* (1). In our opinion the facts of that case are distinguishable from the facts of the present case; and although we think the District Judge's order is wrong, we do not base our decision on the authority of that ruling. The principles, of the provisions of Order XXI, rule 17, are explained in the judgment of Petheram, C. J., in *Asgar Ali* v. *Troilokya Nath Ghose* (3): "Section 245" (of the old Code corresponding to Order XLI, rule 17, of the present Code) "gives a power of amendment before admission and registration, and I think by implication excludes any such power afterwards; indeed it is apparent that no such power is needed in the interests of justice, as if one application is defective, the applicant can at any time within the period of limitation present another in proper form." In the present case this remedy of presenting a fresh application was withheld from the appellant by the order of the Munsif. That order ought not to have been passed. He should have allowed a fresh application to be filed and the execution proceeding to be struck off, and that would not have prevented him from continuing his enquiry into the judgment-debtors' allegation of payment, which should have been treated as a separate proceeding under Order XLI, rule 2. But though after the Munsif's order the decree-holder could not in form make a fresh application, in our opinion he did so in substance. When he had stated that he no longer intended to proceed with his original application, the proceeding arising out of that application *ipso facto* came to an end and it was not necessary that there should be a further formal order by the Munsif striking off the application to terminate those proceedings. The Munsif, when the decree-holder filed the application to be allowed to proceed against the immoveable property, ordered that the petition should be made part of the execution petition. The consequence was that though that petition for amendment was not in the form prescribed by rule 11, Order XXI, yet reading the two petitions together, all the informations required by rule 11 and the subsequent rules relating to the information to be given in applications for execution were supplied to the Court.

The present case differs from the other cases on this point to which our attention has been drawn, as there is no necessity to invoke the aid of rule 17 and make the application of the 18th July date back to the 10th of May 1915, since a fresh application on the 18th July would not have been barred by limitation. Treating this application for amendment as an application for execution, the Munsif could have directed the execution to proceed and as stated above, we do not think that Order XXI, rule 11, Civil Procedure Code, would be any bar. Also we think that the Munsif's order can be supported from another point of view. He justified his order by reliance on section 151, Civil Procedure Code, which provides for the inherent power of the Court to make such order as may be necessary for the ends of justice or to prevent abuse of the process of the Court. We fully appreciate that one should be careful in applying this section, and we are in full agreement with the remarks to this effect made in more than one judgment in the case of *Abdul Karim Abu Ahmed Khan* v. *Allahabad Bank, Limited* (6). But there are two special circumstances

in this case which, in our opinion, would have justified our bringing section 151, Civil Procedure Code, into operation had it been necessary. The first is, that the decree holder was prevented by an erroneous order of the Court from proceeding with the execution of his decree in accordance with law. The second is, that both the lower Courts have held that the judgment-debtors' plea of payment was dishonest and was made with the intention of delaying the execution proceedings until the decree became time-barred.

We, therefore, hold that the application for attachment of immoveable property filed on the 18th July 1917 should be treated as an original application in execution and allowed to proceed.

A point was taken before us that the application is barred by limitation, because the second application for execution made on the 21st August, 1911 was made more than three years after the last previous step-in-aid of execution. Assuming that this was so, we think that the conduct of the judgment debtors in the subsequent execution case, in which they paid various sums in order to obtain postponements, barred them from raising the plea of limitation in the present execution proceeding. The case relied on by the lower Courts, *Coventry* v. *Tulshi Pershad Narayan Singh* (8), supports their decision on this point. It is more applicable to the facts of the present case than the decision of the Judicial Committee of the Privy Council in *Mina Konwari* v. *Juggat Setani* (7) which was cited on behalf of the appellant.

The result is, that the appeal is decreed. The order of the District Judge is set aside and that of the Munsif is restored. The appellant will get his costs in this Court and in the lower Appellate Court. We assess the hearing fee in this Court at two gold *mohurs*.

Appeal allowed.

(8) 31 C. 822; 8 C. W. N. 672.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 141 AND 155 OF 1918.

August 16, 1919.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Foster.

BADRI CHAUDHURI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARBANS JHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraudulent transfer—Owner continuing in possession for more than twelve years after transfer, effect of—Adverse possession—Fraud carried out—Possession, confirmation of, suit for.

Where the owner of property executes a fraudulent transfer thereof from some ulterior motive but continues in possession of the property for more than 12 years, he is entitled not only to confirmation of possession but to recover possession if he subsequently loses it, even though the fraud intended to be effected was effected. [p. 118, col. 2; p. 119, col. 1.]

Appeal from a decision of the District Judge, Darbhanga.

Messrs. *Sultan Ahmad* and *Murari Prosad*, for the Appellants.

Messrs. *K. B. Dutt* and *L. K. Jha*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—The plaintiffs are appellants in this case. The plaintiffs Nos. 1 and 2 are the sons of one Mohan Lal. Plaintiffs Nos. 3 and 4 purchased a portion of the property from plaintiffs Nos. 1 and 2 by means of a *kobala*, dated the 26th April 1912. The plaintiffs brought the present suit for confirmation of possession and in the alternative for recovery of possession of the properties in suit on declaration of their title thereto and on holding that the defendants are merely Farzidars having no title in the properties in suit, nor have they ever been in possession thereof. Mohan Lal, the father of plaintiffs Nos. 1 and 2, executed an unregistered mortgage-bond in the Farzi name of Babunandan Jha on the 25th Chait 1266. Babunandan Jha on the basis of the said mortgage obtained a Farzi decree in execution of which he purchased the properties in suit on behalf of Mohan Lal. These properties consisted of some shares in four villages; 7-*gandas* 2-*cowris* share *pokhta* out of 16-annas share of Mouza Machheta, Tauzi No. 3403, and 13-*gandas* 1-*cowri* and 1 *K. pokhta* out of 16 annas

of a Mouza called Awksi Madhubani, bearing Tauzi No. 3490, 5 *gandas* 3 *cowris pokhta* share in Mauza Nadiani, Tauzi No. 13466, and 4 *gandas pokhta* share in Mauza Nadiani bearing Tauzi No. 3431. The latter two shares in village Nadiani are covered by suit No. 353, Second Appeal No. 155. The shares in the former two are covered by Suit No. 311, Second Appeal No. 141. The facts giving rise to the cause of action in both the suits are almost the same. The suits and the appeals in the Courts below were tried analogously and consequently the second appeals in this Court were heard together and it will be sufficient to dispose of all these second appeals by one judgment.

The plaintiffs' case is that at the time when the mortgage bond was executed in the Farzi name of Babunandan Jha, who was the father's sister's son of Mohan Lal, there was a decree for rent against Mohan Lal of the Maharajah of Darbhanga amounting to Rs. 7,000. The said bond was executed in order to save the properties from the Court sale in execution of the said decree of the Maharaja of Darbhanga. The decree of Babunandan Jha and the subsequent auction sales in execution thereof were all the result of the same intention and have been styled in the plaints as "collusive transactions." The translation in the paper book of the plaint is not accurate.

In paragraph 5 of the plaint it is stated that in order to maintain the Farzi nature of the transactions the defendant No. 1's name was designedly recorded in the Collectorate in respect of the said shares. The plaintiffs assert, however, that in spite of the said Farzi transaction the plaintiffs' ancestor and thereafter the plaintiffs continued to be in possession of the properties in suit, and in the year 1900, when the survey operations were undertaken, the plaintiffs preferred an objection to the survey authorities praying that their names be entered in the survey records and the names of the defendants be expunged. The survey authorities in respect of all the villages in question found that the transactions by virtue of which the names of the defendants or their ancestors were recorded in the Collectorate were all Benami and Farzi and that the title remained all along with Mohan Lal and after his death, with the plaintiffs. In respect of the villages comprised in Suit No. 311 corresponding to Appeal No. 141, the survey authorities definitely came to the conclusion after enquiry on the spot that the said shares were all along in the uninterrupted possession of the plaintiffs and the defendants had never been in possession of the said shares by virtue of the Farzi entries in the Government records or on the strength of the auction purchase. In respect of the properties comprised in Suit No. 303 corresponding to Appeal No. 155, the Assistant Settlement Officer found that Mohan Lal was in possession of the lands but Harbans Jha son of Babunandan was collecting rents in respect of the lands held by the defendants. The survey authorities, however, did not actually cause mutation of names, inasmuch as the names of the defendants were recorded in Register "D" of the Collector, but made a note of the aforesaid findings in the Khewat prepared by them. Thereafter the plaintiffs applied in the Collectorate for mutation of their names in place of the names of the defendants, but their application was rejected on the 5th of May 1913 in respect of the villages in Suit No. 311 and on the 21st of May in respect of the villages in Suit No. 303. On the strength of the orders of the Land Registration Deputy Collector the defendants caused some interference in the possession of the plaintiffs. The plaintiffs accordingly brought the present suits for declaration of their title and for a further declaration that the defendants were mere Farzidars, and for confirmation of their possession.

The defendants are the descendants of Babunandan Jha. They resisted the plaintiffs' claim. The name of Babunandan Jha in whose name the mortgage-bond was executed and the property was purchased at the auction-sale was originally recorded in the Collectorate in respect of the properties in suit. After his death his two sons by different wives Harbans Jha and Chatur Jha were recorded in the Collectorate in place of Babunandan Jha. The suits have been brought against Harbans Jha and Makund Jha son of Chatur Jha and their respective descendants. Two written statements were filed in the suits, one on behalf of the defendants Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, and 11 and the other on behalf of Makund Jha, defendant No. 2. But the

pleas taken in the written statements are practically the same in both. The defendants denied that Babunandan Jha was the Farzidar of the plaintiffs' ancestor Mohan Lal and asserted that the mortgage-bond, the decree and the auction purchase in execution of that decree were all *bona fide* and that Babunandan Jha purchased the properties for himself and that he was in possession of them in his own right and after his death the defendants have been in possession of the properties in suit. The pleas taken by the defendants were that the suits were barred by sections 66 and 47 of the Civil Procedure Code and by limitation. Upon the pleas of the defendants among others the following issues were framed by the learned Munsif:—

(1) Are these suits barred by sections 66 and 47 of the Code of Civil Procedure?

(2) Are the defendants of these suits Benamidars of the plaintiffs?

(3) Can these suits for confirmation of possession lie?

(4) Have the defendants acquired any right to the disputed properties by adverse possession for over 12 years?

The Munsif decided the aforesaid issues in favour of the plaintiffs and against the defendants. The Munsif found that the mortgage-bond of 1869 was merely a "paper transaction" and that the decree obtained on the basis of the mortgage was only a collusive one and that it created no right in favour of the defendants. He also held that Mohan Lal and thereafter the plaintiffs have been in possession of the disputed properties all along and that the said transactions in the name of Babunandan Jha, the ancestor of the defendants, did not in fact cause any change in the title or possession of the properties, which the plaintiffs had prior to and at the time of the said transactions. He overruled the defendants' pleas in bar and held that the suit was not barred by limitation, nor was the suit affected by sections 66 or 47 of the Civil Procedure Code. He accordingly decreed the suit of the plaintiffs, declaring their title to the lands in suit and confirming their possession.

On appeal by the defendants the learned Judge agreed with the Munsif so far as the findings regarding the pleas in bar were concerned. The only point that was pressed before the learned Judge on behalf of the appellants was that the suits did not lie. The learned Judge upheld this contention on the ground that the plaintiffs' ancestor executed the mortgage-bond and caused the property to be sold and purchased in the name of Babunandan Jha, the defendants' ancestor with the view of defrauding the creditor, the Maharaja of Darbhanga, in respect of the decree of rent already obtained and that the intended fraud was carried into effect inasmuch as the decree of the Maharaja of Darbhanga was only partially realised and the rest was time-barred. The learned Judge, therefore, held that the plaintiffs were not entitled to a declaration that the said transactions were Benami and he accordingly upset the decision of the Munsif and dismissed the suit of the plaintiffs.

Against that decision the plaintiffs came in second appeal to this Court. In order to dispose of the appeal this Court thought it necessary to have the decision of the Court below on two issues of facts, and accordingly by its order of the 14th March 1919 the case was remanded to the Court below for a determination of the issue framed by this Court. The issue was:—

"The plaintiffs' cause of action being dated the 5th May 1913 with regard to a declaration which they desire and the 15th Chait 1321 with regard to the actual dispossession against which they seek relief, were the plaintiffs in possession of the land adversely to the defendants for 12 years prior to the 5th May 1913, or for 12 years prior to the 15th Chait 1321?"

The learned Judge has now remitted his decision upon the said issue in a very careful and detailed judgment. He has come to a clear and definite finding of fact which may be quoted as follows:—

"The respondents never had a good title and were never in possession of the disputed properties. There can be no reasonable doubt that the whole series of transactions was Farzi, and I accordingly find that the appellants have been throughout in possession of the properties in suit adversely to the defendants-respondents down to the date of their dispossession on or about the 15th Chait 1321."

The learned Counsel on behalf of the respondents contends that this finding of fact though against the respondents, does

not entitle the plaintiffs to a decree in the suits and that in spite of the aforesaid findings the judgment of the District Judge before remand should be upheld. Reliance has been placed by the learned Counsel upon the decision of their Lordships of the Judicial Committee in the case of *Petherpermal Chetty* v. *Muniandy Servai* (1). The actual decision in that case was that where the purpose of the fraud is not effected, there is nothing to prevent the plaintiff from repudiating the transaction as Benami and recovering possession of the property. Lord Atkinson in delivering the judgment observed as follows:—"to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then and then alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with." Applying this Mr. Dutt on behalf of the respondents says that according to the findings of the District Judge in this case, the intended fraud to defeat the creditor was carried into action and hence the plaintiffs cannot seek the assistance of the Court to give a decree to them in respect of the property in suit. The principle will apply only when the plaintiff seeks to receive possession of properties lost by him on account of his fraudulent and Benami transaction. In the present case the plaintiffs do not invoke the aid of the Court to restore them to possession of the property which they lost by virtue of the Farzi transactions. The plaintiffs' case is that no change in the *status quo* of the properties in any way occurred on account of the said transactions and that as a matter of fact there was no transfer of the properties in question to the defendants but that there was only a paper transaction and as that paper transaction was threatened to be used by the defendants against their undisputed title and the possession which have been found concurrently by the Courts below in their favour, the plaintiffs simply want a declaration of the true existing state of affairs, namely, that they are the real beneficial owners of the properties and they have been in possession all along of the properties and that the defendants have no concern at all.

The case of *Banka Behary Dass* v. *Raj Kumar Dass* (2) no doubt lends some colour to the contention of the learned Counsel. But in the case of *Jadu Nath Poddar* v. *Rup Lal Poddar* (3), after a detailed review of the authorities on the subject, Mookerjee, J., declined to accept entirely the broad proposition laid down in the case of *Banka Behary Dass* v. *Raj Kumar Dass* (2) and at page 983 of the judgment observed: "with all respect I am unable to see how the view taken by this Court in the case of *Banka Behary Dass* v. *Raj Kumar Dass* (2) enables a party to a dishonest trick by which his creditors may have been defrauded to get himself reinstated when his purpose has been served. On the other hand, it seems to me that if the Court refuses to aid the plaintiff who has made a fictitious transfer of his property from an improper motive but has not carried into effect his intention, the Court really becomes an instrument to aid the defendant in his fraudulent claim to possession contrary to the real agreement with the plaintiff." Even if the proposition laid down in *Banka Behary Dass* v. *Raj Kumar Dass* (2) be accepted, the case is distinguishable from the present one, inasmuch as the defence taken in that case was that after the Farzi conveyance in question two of the creditors of the plaintiffs attached some of the property conveyed to which the defendants preferred a claim and the properties were released from the attachment. In the present case the defendants have not raised any such plea. Their defence throughout has been that there was no decree of the Maharaja of Darbhanga and that there was no intention to defraud any creditor by means of the mortgage and the decree in question. The plaintiffs also did not make any such allegation in the plaint that any creditor was as a matter of fact defrauded or that the object of the fictitious transac-

(1) 35 C. 551; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 12 Bur. L. R. 108; 18 M. L. J. 277; 35 I. A. 98; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).

(2) 27 C 23; 4 C. W. N. 289; 14 Ind. Dec. (N. S.) 153.

(3) 33 C. 967; 10 C. W. N. 650; 4 C. L. J. 22.

tion was to defraud any creditor of the mortgagor Mohan Lal. All that the plaints averred is that there was at the time the mortgage-bond was executed a decree of the Maharajah of Darbhanga and in order to save the properties from the sale the said mortgage-bond was executed in the Farzi name of the defendants' ancestor Babunandan. There was no issue raised in the trial Court as to whether the fraud was carried into effect and whether the Maharaja of Darbhanga or any other creditor of the plaintiffs' ancestor was as a matter of fact defrauded by means of the said transaction. Upon the pleadings in the present case the decision in *Banka Behary Dass* v. *Raj Kumar Dass* (2) is distinguishable and cannot be applied, nor can it be held that the plaintiffs are not entitled to the declaration that they have sought in this case.

I do not think it was open to the District Judge, when it was neither the case of the plaintiffs nor of the defendants, nor was there any issue upon the point, to hold that the fraud was carried into effect and the Maharaja of Darbhanga was defrauded in respect of his decree. We have looked into the sale certificates Exhibits 23, K and 328 and the previous deposition of one of the plaintiffs, but we do not find anything in them to shew that the Farzi transactions were used for the purpose of laying any claim in execution of the Maharaja's decree or that on account of the said transactions the execution of the decree failed. The endorsements simply shew that the sale certificates were filed in some Court, but the nature of the case and the purpose of the filing are not shown. The order sheet in the claim case and the objections, if any, made to the execution of the decree were necessary to be filed to raise the plea. Again the depositions only shew that a part of the decree was satisfied and the rest was time-barred. There is a big gap to shew that the Farzi transactions in question were the cause of this result. There is no evidence thereof to shew that the fraud was carried into effect and the aforesaid evidence relied upon can only be a matter of surmise and supposition. If the lower Appellate Court thought that the point was necessary to be investigated into it ought to have framed an issue to allow the parties to give evidence on the point. If the finding of the Judge is not accepted, then there can be no question that the fraud was not carried into effect and hence upon the aforesaid authority of the Privy Council case of *Petherpermal Chetty* v. *Muniandy Servai* (1) the plaintiffs are entitled not only to confirmation of possession but to recover possession if they had lost possession on account of the Farzi transactions. Even if the finding of the learned Judge be accepted as a finding of fact, the plaintiffs, being in possession for over 12 years, have acquired title by adverse possession and are entitled to the declaration sought for.

Again there was no question in the case of *Banka Behary Dass* v. *Raj Kumar Dass* (2) as to the effect of the continuous possession of the plaintiff for over 12 years prior to the institution of the suit. The Farzi conveyance in that case was executed in 1859 and the suit was brought in 1893. During a short period of 4 or 5 years no question of acquisition of title by virtue of adverse possession of any of the parties could arise. In the present case plaintiffs have been in possession of the properties from 1859 up to the present moment a period of 60 years not to speak of 12 years which under section 28 of the Limitation Act is sufficient not only to extinguish the right and title of a person to a property but to create a complete title in favour of the person who has been in possession for over 12 years. The point appears to me to have been settled, and it is, therefore, needless to quote any authority in support of it. It is sufficient to quote the judgment of Mookerjee, J., in the case of *Nawab Bahadur of Murshidabad* v. *Gopinath Mandal* (4), where it was laid down that the effect of section 28 of the Limitation Act is not merely to extinguish the title of the rightful owner of the land but also to create a title by negation in the occupant, in which he can actively assert if he loses possession even as against the true owner. That principle will apply with greater force in the case of a rightful owner being in possession of the property for over 12 years in spite of his having executed a Farzi

(4) 6 Ind. Cas. 392; 13 C. L. J. 625.

transaction for some ulterior motive. The case of *Govinda Kuar* v. *Lala Kishun Prosad* (5) would seem to appear to be on all fours with the present case. In that case it was held that where the ostensible transferee never had any exclusive possession of the property in question, which was for a great many years treated as a part of the joint family property, and which was enjoyed by the joint family (of which the plaintiff was now the sole surviving member) for more than 12 years before suit, the plaintiff was entitled to have a declaration of his right to the property and to confirmation of his possession thereof in spite of the fact that he had executed a colourable transfer for the purpose of defrauding his creditors and where his intention was wholly or partially carried into effect. Mr. Dutt, however, seeks to distinguish this case by contending that in that case the property was joint family property and the fraudulent conveyance was by a member of the family. I fail to appreciate the distinction in principle. In the present case the plaintiffs' case is that their father was in possession of the property in suit and thereafter they have been in possession all along. This Court, while remanding the case for a finding upon the said issue, had clearly in view the principles enunciated in the case of *Govinda Kuar* v. *Lala Kishun Prosad* (5). It was then understood clearly by this Court and at the Bar that the finding of fact upon the issue remitted would dispose of the case and that if it was found by the Court below that the plaintiffs were in continuous possession for over 12 years before their possession was interfered with, they would be entitled to a decree in the suit. On fuller construction of the law on the subject and upon a true construction of the pleadings in the case the view taken by this Court before remand appears to have been confirmed.

The plaintiffs are, therefore, entitled to the reliefs granted to them by the learned Munsif. The result is that the decision of the District Judge is set aside and that of the Munsif is restored. The appeal is allowed with costs of the remand and also those assessed in the decree.

FOSTER, J.—I agree.

Appeal allowed.

(5) 28 C. 870.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2338 OF 1915.

July 18, 1919.

Present:—Mr. Justice Abdur Raoof and Mr. Justice Bevan-Petman.

ABDUL RAHMAN AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

ALLAH BAKHSH AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 144—Restitution—Mesne profits—Decree reversed on appeal—Successful party, right of, to restitution.

If a decree is reversed in appeal, the party against whom the decree had been given is entitled to have restitution of all that he has been deprived of under it, including the profits accruing from property of the possession of which he had been deprived by the other party. [p. 121, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Gujranwala, dated the 19th August 1915, directing the decree-holder respondent to be put in possession of certain land.

Messrs. *Morton* and *Anant Ram*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—This miscellaneous appeal has arisen out of the following facts:—Muhammad Din and others, plaintiffs, brought a suit for dissolution of partnership against Nur Din, defendant, the ancestor of the present respondents to this appeal. In paragraph 1 of the plaint the plaintiffs stated that they (the parties) contributed funds in equal shares for the purchase of land in Manzas Mehdpore and Pathanwali. The suit was hotly contested between the parties. Eventually Mr. Makhan Lal, Subordinate Judge, passed a decree on the 31st of May 1901 in the following terms:—

"It is ordered that the defendant do pay to the plaintiffs Rs. 1,015-15-2, that the plaintiffs should also retain the immoveable property unless the defendant chooses to have it partitioned and take his share, in which case he must pay them Rs. 5,368-2 3."

It is admitted that in consequence of this decree the plaintiffs took exclusive possession of the share of the defendant in Manzas Mehdpore and Pathanwali mentioned above. From this decree Nur Din, defendant, appealed to the Chief Court, which set aside the judgment and the decree of the learned

Subordinate Judge and remanded the case to be tried *de novo*. The order was made on the 31st of May 1906. On the 20th of October 1906 the defendant made an application under section 583, Civil Procedure Code, for restitution praying that the possession over his half share in the properties in Mehdpore and Pathanwali should be restored to him and that the plaintiffs should be ordered to pay mesne profits. This application was disallowed by Mr. Malan, District Judge, on the 15th January 1907, on the ground that it was premature inasmuch as an order under section 552, Civil Procedure Code, not being a decree, did not entitle the defendant to the benefit of section 583 of the Code. This order was upheld in appeal by Mr. Justice Rattigan on the 31st of June 1907.

On the case coming back to the original Court on remand parties agreed to refer their dispute to arbitration. The arbitrator gave his award under which a large sum was found due to the defendant from the plaintiffs. Objections were raised by the plaintiffs to the legality of the award on various grounds. Sardar Gulab Singh set aside the award, decided the case on the merits and passed a decree on the 10th of July 1919. Both the parties appealed from the decree to the Chief Court. The defendant's appeal raised the question whether Sardar Gulab Singh was justified in refusing to pass a decree in accordance with the award, while the plaintiffs attacked the decree on the ground that an inadequate amount had been decreed to them. The appeal of the defendant was first taken up, as it went to the root of the case and raised a question of principle. It was heard and decided by a Division Bench of the Chief Court, which allowed the defendant's appeal, set aside the decree of the Subordinate Judge dated the 10th of July 1909, and ordered a decree to be drawn up in accordance with the terms of the award made by the arbitrator on the 22nd of October 1908. The appeal of the plaintiffs was dismissed. The decree of the Chief Court was passed on the 14th of May 1914. In the meantime the defendant had again applied for restitution. The application was transferred by the District Judge of Rawalpindi to that of Gujranwala within whose jurisdiction the property claimed was situated. Mr. Harris, the District Judge of Gujranwala, made an order on the 1st of July 1911 staying further proceedings under the application to the 15th of July 1911 at the request of the plaintiffs-judgment-debtors, who had made an application to the Chief Court for stay of execution on the 19th of June 1911. An order was made on the 27th of July 1911 staying the proceedings on condition of the plaintiffs giving security for the mesne profits to which the defendant may be entitled.

After the decision of the appeal by the Chief Court passing a decree according to the terms of the award, Allah Bakhsh and Khuda Bakhsh, the heirs and legal representatives of Nur Din, defendant, on the 24th of March 1915 renewed the application for restitution and mesne profits. Paragraph 5 of the application ran in these words:—

"That the applicants have ultimately been declared entitled to recover Rs. 11,571-14 0 besides the other house property as detailed in the decree of the Chief Court, dated 14th May 1914, and the plaintiffs' claim against the applicants has been dismissed on the dissolution of partnership and rendition of account in accordance with the award of the arbitrator."

This application was opposed by the plaintiffs-judgment debtors mainly upon two grounds, namely, (1) that the application purported to be an application for the execution of the decree of the Chief Court and that unless it was shown that the property claimed was given to the decree holders under the decree, they were not entitled to claim it in execution of the decree; and (2) that as no mesne profits had been ordered and decreed under the above decree, the decree-holders were not entitled to claim mesne profits. Both these pleas were repelled by the learned Senior Subordinate Judge of Gujranwala who, by his order dated the 19th of August 1915, held that the decree-holders were entitled to recover by way of restitution the two properties Mehdpur and Pathanwali. The learned Senior Subordinate Judge further held on the question of mesne profits that the decree-holders were entitled to claim them from the date of the mutation entry of 1904. The judgment-debtors have filed this appeal, in which they reiterate their objections taken in the Court below and challenge the right of the decree-holders to get back the possession of the

above-mentioned property in the execution proceedings and also their right to claim mesne profits. The decree-holders on the other hand have filed a revision No. 848 of 1915, in which they claim mesne profits for a longer period commencing from the year 1901, when the suit was first decreed in favour of the plaintiffs authorising them to retain possession of the properties in dispute until payment of Rs. 5,368-2-3.

In our opinion the appeal on behalf of the plaintiffs has no force. They have misunderstood the nature of the application by which the restitution of the land in suit is claimed. This is not an application for the execution of the decree of the Chief Court, dated 14th May 1914. It is substantially an application made under section 144, Civil Procedure Code, or it may be treated as an application asking for the revival of the previous applications made under section 583, Civil Procedure Code, the trial and disposal of which had been postponed on account of the pendency of the proceedings in the regular suit. Now when the suit has been finally disposed of by the judgment of the Chief Court dated the 14th May 1914, all obstacles have been removed and the decree-holders are entitled to claim the restitution of their property. As regards the rights of the decree-holders to claim mesne profits, it has been held in several cases that if a decree is reversed in appeal, the party against whom the decree had been given is entitled to have restitution of all that he has been deprived of under it. The Courts have always tried to put the successful party into the position in which he ought to have been. In this case there is no doubt that the decree-holders were deprived of their half share of the profits owing to the exclusive possession of the successful plaintiffs under the decree of the 31st May 1901. The decree-holders are, therefore, entitled to all the profits of which they have been deprived by the plaintiffs-judgment-debtors. The appeal of the judgment-debtors in this view fails and is hereby dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 133 OF 1917.

October 2, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

KRISHNA CHETTIAR—PLAINTIFF—APPELLANT

versus

VENKATACHELLAPATHI CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 34, 35—Surety-bond—Assignment—Breach of bond, what is—Suit on bond, when maintainable.

In the case of a surety-bond for the due discharge of his obligations under a bond given to the Court under section 34 (*a*) of the Guardians and Wards Act by the guardian of a minor, the Court is the obligee under the bond and is alone entitled to sue on it in the absence of an assignment in due form of law. An order by the Court that the bond be assigned to a person does not amount to a regular assignment so as to entitle that person to institute a suit to enforce the obligation under the bond. [p. 122, col. 2.]

To constitute a breach of a bond given to the Court under the Guardians and Wards Act there must be a failure either duly to account at a period directed by the Court, or the failure to pay, as ordered by the Court, a balance found due, and in the absence of any evidence that there was such a failure there is no breach of the bond, and a suit on the bond must necessarily fail. [p. 122, col. 2; p. 123, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam Aiyan, in Original Suit No. 53 of 1915.

Messrs. *A. Krishnaswami Iyer* and *G. Gopalakrishna Aiyangar*, for the Appellant.

The Hon'ble *S. Srinivasa Aiyangar*, Advocate-General, and Messrs. *K. Bashyam Aiyangar* and *K. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—This is an appeal from the decree of the Subordinate Judge of Kumbakonam, in so far as it dismissed the suit brought by the plaintiff as assignee of a surety-bond, Exhibit A, dated 21st April 1896, charging the immoveables therein mentioned for the due performance by the 1st defendant of his obligations under the bond given by him to the District Court, under section 34 (*a*) of the Guardians and Wards Act, as guardian of the plaintiff who was then a minor. The immoveable properties of the other sureties being insufficient, the 1st defendant added certain properties of his own and became a party to the surety-bond,

Exhibit A, as well as to the principal bond which is now missing. The Subordinate Judge passed a personal decree against the guardian, the 1st defendant, who did not contest the suit, and otherwise dismissed it on the ground that the plaintiff had no right to sue on the bond Exhibit A at the date of the suit, as the principal bond had not been assigned to him and there had been no regular assignment to him of the surety bond Exhibit A but only an order by the District Court that it should be assigned. He also dismissed the suit on the ground that the plaintiff had failed to prove what were the terms of the principal bond which was missing, and held that the defendants, who are alienees from the sureties under Exhibit A, took without notice and are exempt from liability.

As regards the first point, I am of opinion that the plaintiff had no title to sue on Exhibit A, without an assignment to him by the Court both of the principal bond and of the surety bond Exhibit A but I do not think the case can be satisfactorily disposed of on this ground. The District Judge has since assigned Exhibit A by a registered instrument and though the principal bond has not yet been assigned, we might, I think, accept the assignment even at this late stage if this was the only difficulty in the plaintiff's way. The fact that the principal bond is lost would not prevent its being duly assigned. The Ecclesiastical Courts were required by a Statute of Henry VIII to take bonds with sureties from persons to whom they granted administration of the estates of deceased persons, and a Statute of Charles II settled the terms of the bond to be so taken. There was a right of action on these bonds in the common law Courts, but the Ecclesiastical Judge to whom the bond had been given did not sue himself, but as stated in *Bolton* v. *Powell* (1), the Ecclesiastical Court made an order in favour generally of one of the next-of-kins that the bond be "attended with" and the party in whose favour the order was made was allowed to sue in the name of the Ecclesiastical Judge to whom the bond had been given. Whether under any circumstances the sureties could be proceeded against in equity without such an order of the Ecclesiastical Court was discussed in the case just mentioned. The Probate Act of 1857 first made these bonds assignable, and its provisions in this respect have been reproduced in the Indian Succession Act and the Probate and Administration Act, 1881, and lastly in sections 34 and 35 of the Guardians and Wards Act, 1890. The Court now being the obligee under the bond is alone entitled to sue on it, in the absence of an assignment in due form of law.

In the present case I feel constrained to hold in the present state of the evidence that the suit fails on the broad ground that no breach of the conditions of the bond Exhibit A has been proved. Section 34 (*a*) of the Guardians and Wards Act obliges the guardian, if so required, to give a bond to the Judge of the Court "engaging duly to account for what he may receive in respect of the property of the ward." By section 34 (*b*) he is to deliver an inventory within six months, and by section 34 (*c*) he is to "exhibit his accounts in the Court at such time and in such form as the Court from time to time directs." And by section 34 (*d*) he is "to pay into the Court the balance due from him on those accounts, or so much thereof as the Court directs." The form of bond prescribed in Form 93 of the Civil Rules of Practice, 1902, clearly follows the provisions of section 34 (*c*) and (*d*) just set out, the condition of the bond being that the guardian shall duly account at such periods as the Judge shall appoint and shall duly pay or dispose of balances which shall from time to time be found to be due from him as the said Court or Judge has directed, or shall hereafter direct. No doubt this form was not in force in 1896 when the 1st defendant, as guardian, executed the principal bond which is now missing, but there is no reason to assume that the bond then executed by the 1st defendant was of a more onerous character than the form now prescribed. Now to constitute a breach of this bond there must be a failure either duly to account at a period directed by the Court, or a failure to pay as ordered by Court a balance found due from him, and where there is no evidence of any order to account within a fixed time, or to pay any balance within a fixed period, there is no breach of the obligations of the bond. This follows from the language of the bond, and

(1) (1852) 2 De G. M. & G. 1 at p. 21; 14 Beav 275; 16 Jur. 24; 95 R. R. 1; 42 E. R. 771.

has been expressly ruled in the case of a similar provision in the old statutory form of administration bond. *Archbishop of Canterbury* v. *Tappen* (2) and *Archbishop of Canterbury* v. *Robertson* (3). The latter case also deals with the question of what amounts to a breach of the condition well and truly to administer the estate in the old form of administration bond. To establish a breach of that condition it was not necessary to show a failure to obey a specific order of the Court. Similarly under section 81 of the Probate Act, 1857, the bond is to be conditioned for duly collecting, getting in and administering the estate of the deceased, language followed in section 256 of the Indian Succession Act and section 78 of the Probate and Administration Act, and, therefore, in the case of these bonds it is enough to show a failure to administer or collect and it is not necessary to show a failure to obey a specific order of the Court. Where, however, as we must assume in the present case, the only conditions in the bond were to exhibit accounts when ordered by the Court and to pay or apply the balance found due as directed by the Court, if there is no order, there is no breach and the suit on the bond necessarily fails. There is no evidence of any order to account or of any order to pay in the present case. All the District Judge did was to direct the assignment of the bond on the ground that there was a *prima facie* case of maladministration against 1st defendant. In the case of bonds under the Guardians and Wards Act the proper course appears to be to get an order to pay against the guardian under section 34 (*d*) or a decree against him, and if he fails to satisfy the order or decree, then to sue the sureties in respect of this breach, as to which there will be no defence and the Article of limitation will be Article 68 unless, as in the present case, the bond charges immoveable property, when that Article may be inapplicable. It is unnecessary to consider this point or the other question raised in argument before us as to when time begins to run when the condition in the bond is duly to administer. In my opinion the appeal fails and must be dismissed with costs against defendants Nos. 3 to 9, the alienees. As those grounds apply also to the decree against the 1st defendant, we set aside that decree also but without costs in the exercise of our powers under Order XLI, rule 33.

SESHAGIRI AIYAR, J.—I agree.

M. C. P.

Appeal dismissed.

(2) (1828) 8 B. & C. 151; 2 Man & Ry. 136; 6 L. J. K. B. 250; 32 R. R. 362; 108 E. R. 1000.

(3) (1833) 1 Cr. & M. 690; 3 Tyr. 393; 3 L. J. Ex. 103; 2 Dowl. P. C. 78, 149 E. R. 576.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3427 OF 1915.

June 26, 1919.

Present :—Mr. Justice Shadi Lal and Mr. Justice Bevan-Petman.

AMAR NATH—PLAINTIFF—APPELLANT

versus

KHUDU MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (b)—Partition—Document reciting fact of partition, whether compulsorily registrable—Contract Act (IX of 1872), s. 11—Contract by minor, validity of—Ratification by minor, effect of.

A document reciting the fact that certain immoveable property has already been partitioned and that each party has since been in possession of the share allotted to him at partition, does not come within the purview of section 17 (*b*) of the Registration Act and need not be registered [p. 124, col. 1.]

A contract by a minor is void and not voidable and cannot, therefore, be ratified by any subsequent act of the minor. [p. 124, col. 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 4th August 1915, affirming that of the Subordinate Judge, 1st Class, Jullundur, dated the 4th May 1914, dismissing the claim with costs.

Lala *Hargopal*, for the Appellant.

Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—This was an action by one Amar Nath, a Khatri of the Jullundur District, against his brother and cousins, for the partition of certain property which he described as the property of a Hindu co-parcenary consisting of himself and the defendants. The District Judge, concurring with the Subordinate Judge, holds that at the time of the suit there was neither a joint Hindu family as alleged by the plaintiff nor any joint property in which the plaintiff was a co sharer with his relatives.

The second appeal preferred by the plaint-

iff was admitted on the question whether a document, dated the 26th August 1909, was a partition deed relating to immoveable property, and consequently required compulsory registration. Now, we have carefully perused the terms of the deed; and we find that the instrument deals mainly with the moveable property belonging to the joint business, and effects a partition thereof; and that so far as the immoveable property is concerned, it merely recites the fact that property had already been partitioned, and that each party had since been in possession of the property allotted to him on partition. There can, therefore, be little doubt that at the time of the execution of the instrument the partition of the immoveable property was a *fait accompli*, and a document containing the recital of such a fact does not come within the purview of section 17 (*b*) of the Registration Act, and need not be registered.

Mr. Hargopal for the appellant does not seriously contend that the deed was compulsorily registrable, and could not, therefore, be admitted in evidence. The learned Vakil, however, urges that his client is entitled to recover $\frac{1}{4}$th share in a house (*vide* plan A), which was originally purchased by the parties' ancestors Thandu Mal and Budha Mal. Now, it appears that the plaintiff and his brother Bhana Mal sold their $\frac{1}{2}$ share in the house to the defendants by a registered deed, dated the 9th November 1938, but the plaintiff contends that he was a minor at that time and is consequently not bound by the deed which was executed by him wrongly representing himself to be *sui juris*.

The learned District Judge, while holding that the plaintiff was a major on the 26th August 1909, has not determined the question whether he was a minor at the time of the sale-deed; and the Court of first instance, though making some observations against the plaintiff's contention as to his age, has disposed of it by holding that he ratified the sale subsequently. Now, it is perfectly clear that a contract by a minor is void and not voidable, and that there cannot be a ratification of a void contract.

In view of the unsatisfactory judgments of the lower Courts on the question, we have examined the evidence on the subject of the alleged minority and reached the conclusion that the plaintiff has failed to discharge the onus which undoubtedly rested upon him. The horoscope produced by him cannot be regarded as a reliable document, and the entry from the Birth Register may or may not refer to him. But there is one fact which, in our opinion, goes to show that the plaintiff was not a minor in November 1908. It appears that one Mukand Lal instituted a suit against the plaintiff and his brother Bhana Mal in that year, and that the present plaintiff was not only described as a major in that litigation, but appeared in October before the Court, filed a written statement and never asserted that he was a minor and should consequently be represented by a guardian *ad litem*. We must, therefore, hold that the plaintiff rightly described himself as a major in the sale-deed; and that he cannot now back out of it.

For the aforesaid reasons we confirm the decree of the lower Appellate Court, and dismiss the appeal with costs.

Appeal dismisesd.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2676 OF 1917.

May 21, 1919.

Present:—Mr. Justice Newbould.

JOGESH CHANDRA ROY—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—RESPONDENTS.

Mesne profits—Dispossession—Plaintiff wrongfully kept out of possession of land, whether entitled to mesne profits—Limitation.

Where a plaintiff succeeds in establishing that he has been kept out of possession of land to which he was entitled, he should be allowed reasonable mesne profits for the period during which he has been kept out of possession, subject to any law of limitation. [p. 125, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 7th of September 1917, affirming the decree of the Munsif, 3rd Court at Patuya, dated the 26th of July 1916.

FACTS appear from the judgment.

Babu *Dhirendra Lal Kastgir* (with him Babu *Tarakeswar Nath Mitra*), for the Appellant.—The plaintiff is the appellant. The appeal arises out of a suit for recovery of possession after declaration of title thereto. The plaintiff's case is that the land belonged to his permanently settled estate. In his absence it was recorded as belonging to the Government. The defendant on the basis of a lease from defendant No. 1 dispossessed him in 1912. Hence the suit. Plaintiff served a notice on the defendant No. 1, the Secretary of State for India, who has denied plaintiff's title and possession. The Amin found that it was part of the plaintiff's estate, which has never been challenged. The first Court decreed the suit but did not award mesne profits. On appeal the District Judge dismissed my claim for mesne profits. My submission is that where it has been found that the plaintiff has been dispossessed by the defendant from a property belonging to the plaintiff, he is entitled to mesne profits for the period of dispossession. The learned District Judge has erred in law in dismissing my claim for mesne profits.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Respondents.—I do not think I can resist the argument of the plaintiff. But as to the amount payable by the Government, the plaintiff should accept your Lordships' suggestion that the parties must abide by the settlement as to the amount made by the District Collector.

JUDGMENT.—This appeal arises out of a suit for recovery of possession of a piece of land on declaration of the plaintiff's title. The plaintiff succeeded in the suit, but in granting the decree the Munsif overlooked the fact that he claimed mesne profits for the period of dispossession. The plaintiff appealed to the District Judge of Chittagong claiming mesne profits, but that appeal was dismissed and the plaintiff has now appealed to this Court. As the plaintiff has succeeded in establishing that he had been kept out of possession of the land to which he was entitled, he should be allowed reasonable mesne profits for the period during which he was dispossessed, subject, of course, to any law of limitation.

On my suggesting that it would be to the interest of the parties to come to an agreement as to the sum payable for mesne profits, the learned Pleader for the appellant conceded that his client who is a wealthy Zemindar would be well content to accept any sum which may be awarded by the Collector. The learned Senior Government Pleader who appealed for the respondents agreed that on that undertaking he would not contest this appeal. The appeal is accordingly decreed. The appellant, the plaintiff, is declared to be entitled to such mesne profits as the Collector may consider fit and proper.

I make no order as to costs in this Court.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 147 OF 1917.

November 5, 1918.

Present:—Mr. Justice Coutts Trotter.

MAHOMED IBRAHIM MAHOMED JAFFIR SAHIB & Co.—PLAINTIFFS

versus

NALAM LAKSHMIKANTAM AND ANOTHER—DEFENDANTS

Sale of goods—Transit by canal in boats—Shortage of water—Delay in delivery—Rescission of contract, right of vendee to—Impossibility of performance, doctrine of, limits of—Reasonable time, performance in—Shipment, whether amounts to delivery—Contract Act (IX of 1872), ss. 50, 55, 56, 64, 73.

Plaintiffs agreed to purchase from 1st defendant 5,000 bags of Covelong salt at a fixed price and paid to 1st defendant as advance therefor Rs. 1,000 on 30th November 1916. The conditions of the contract were *inter alia* that the 1st defendant was to despatch the salt by boats from Covelong to Elephant Gate Basin, Madras, through the Buckingham canal, and the amount due for each consignment was to be paid by the plaintiff before taking delivery at the Elephant Gate Basin. No time was fixed, however, for the delivery of the entire quantity of salt. The course of business adopted was that along with each consignment a watchman was sent by the vendor who was responsible for its custody. The despatch of the salt and its expected arrival in Madras were notified by the vendor, not to the purchasers, but to his own agents in Madras and, when it did arrive, the latter either sent a delivery order to the purchasers or sent one of their own men to meet the boats with the purchasers' represen

tative and indicate that delivery was to be made to the purchasers. The 1st defendant sent two consignments on 8th and 17th January 1917, totalling 740 bags, which were shipped on twelve canal boats. The remaining quantity was detained at Pappanchavidi, 13 miles from Covelong, as water in the canal was very low and the boats could proceed no further. The plaintiffs, after complaining of the delay in delivery of the balance of the stipulated salt, formally rescinded the contract on 20th February 1917, and brought the present action for damages. The defendants pleaded: (1) that shipment of the salt amounted to delivery, (2) that they could not be held liable for the contract becoming impossible of performance owing to the state of the canal, and (3) that they had substantially performed the contract and that the plaintiffs' action in rescinding it was premature:

Held, (1) that the property in the goods did not pass on shipment but that the vendor kept them as his property until they were paid for and delivered and that the appropriation at Covelong was conditional only; [p. 130, col. 1.]

(2) that the absence of facilities in transit could not excuse defendant on the ground of impossibility of performance; [p. 130, col. 1]

The principle of the Coronation cases, *Krell* v. *Henry*, (1903) 2 K. B. 740; 72 L. J. K. B. 794; 89 L. T. 328; 19 T. L. R. 711; 52 W. R. 246, explained;

(3) that the defendant having substantially performed the contract and discharged his obligation and the delay being attributable to causes beyond his control, plaintiffs' repudiation was unjustifiable. [p. 131, col. 1.]

FACTS appear from the judgment.

Mr. *C. P. Ramaswami Aiyar*, for the Plaintiffs.—Though no time was specified in the contract, the 1st defendant was bound to discharge his obligation within a reasonable time. The absence of facilities for transmitting the salt is no excuse. If transport through the canal became difficult, the vendor should have devised or adopted other means for effecting the delivery. It was open to him to use portage over the shallow places and re-load the cargo where water was deep enough. Or he could relieve the boats of their weight and distribute the cargo of the fully laden boats among other boats, so that they could be pulled through the shallowest part of the canal. The plaintiffs are not bound to wait indefinitely and till the defendant secures facilities for transport. The defendant should have foreseen these contingencies at date of contract. The rescission by plaintiffs was quite justifiable.

The property in the goods passed only on delivery at Elephant Gate Basin.

Messrs. *Venkatasubba Rao* and *Radhakrishnaya*, for the Defendants.—The rescission was not warranted and was premature. Defendants' obligation was discharged when they shipped the goods at Covelong under the terms of the contract, which laid down that the salt was to be put on boats. *Fragano* v. *Long* (1), *Tregelles* v. *Sewell* (2), *Wiltshire Iron Company, In re, Pearson, Ex parte* (3). The defendants are not liable for what happened afterwards and for delay in transit.

Secondly, as the contract became impossible of performance by water being low in the canal, performance is excused.

Lastly, the defendants have substantially performed the contract. The mode of transit contemplated by the parties was that the salt should be shipped at Covelong. The entire quantity stipulated to be supplied was shipped and if plaintiffs had only waited awhile, they would all have been delivered. The defendants are not bound by any limitations of time according to the contract. In any event they are entitled to reasonable time for performance.

JUDGMENT.—This is a suit for damages for non-delivery of certain salt contracted to be delivered by the defendants to the plaintiffs. The facts of the case have taken some trouble to elucidate, but at the end of the case they were practically not in dispute. The 2nd defendant, Messrs. Holst and Nathan, were added as parties to the suit on the motion of the 1st defendant, but a perusal of the agreement of the 11th of December 1915 between the 1st and 2nd defendants makes it clear that the 1st defendant was to sell the salt covered by the agreement and that no privity of contract could possibly exist between Messrs. Holst and Nathan and third parties with whom the 1st defendant entered into contracts.

The contract sued upon is dated the 30th of November 1916. It recites an advance of Rs. 1,000 by the plaintiffs to the 1st defendant for the supply of 5,000 bags of Covelong salt and is in the following terms: "Received from Messrs. Mahomed

(1) (1825) 4 B. & C. 219; 3 L. J. (o. s.) K. B. 177; 107 E. R. 1040; 28 R. R. 226; 6 Dowl. & Ry. 283.
(2) (1862) 7 H. & N. 574; 126 R. R. 558; 158 E. R. 600.
(3) (1868) 3 Ch. 443; 37 L. J. Ch. 554; 18 L. T. 38; 16 W. R. 682.

Ibrahim Mahomed Jaffir and Co., Madras, the sum of Rs. 1,000 being the advance for the supply of 5,000 bags of Covelong salt for export from Madras to Calcutta under the following terms:

1. That the abovesaid Company shall supply gunnies and twine at the Covelong Salt Factory.

2. That on receipt of gunnies, necessary application will be made for removal of salt.

3. That on obtaining permission from Inspector for removal, the gunnies will be filled in as per rules of the department and the bags will be despatched by boats from Covelong to Elephant Gate Basin, Madras.

4. That the said Company will take delivery of the salt bags from boats immediately on arrival at the Basin.

5. That the rate fixed and approved for each bag of salt so delivered at Elephant Gate Basin is Rs 3 4 6 per bag.

6. That the amount due for each consignment of salt at the above mentioned rate will be paid before taking delivery of the bags at the Elephant Gate Basin.

7. That the advance amount of Rs. 1,000 lodged with us will be adjusted at the last consignment while settling the whole account."

The course of business is this: the salt is collected from lands over which the sea flows in the neighbourhood of Covelong and put into the Government Salt Factory at that place for cleansing and refinement. It is taken out of the factory by the contractors in the position of the defendants, who have to provide gunny bags to pack it with and to pay the price and the tax. The Buckingham canal goes past Covelong and there is a wharf within the boundaries of the factory, from which the bags of salt can be loaded into boats for conveyance by the canal to Madras. By the terms of the contract the plaintiffs were to supply the gunny bags and twine for receiving the salt. In practice, the defendants take a lump sum from the plaintiffs to cover the cost of the bags and provide them themselves. It is now beyond dispute that there was ample salt at Covelong at the disposal of defendants for them to fulfil their contract and they could not and do not attempt to show that there were not enough bags into which to pack the salt. The trouble arose over the conditions of the waterway and the facilities of despatch. The first two consignments were sent off on the 8th and the 17th of January and totalled 740 bags shipped on twelve canal boats. The subsequent despatches were as follows:—

Date of Despatch.	No. of boats.	No. of bags.
25th January	4	300
1st February	6	507
2nd ,,	6	400
9th ,,	10	600
10th ,,	12	745
16th ,,	17	1000
5th March	7	500

Under normal conditions the transit from Covelong to Madras takes three or four days, and I think I may assume that, if the boats had arrived in Madras after the normal interval from their despatch from Covelong, there would have been a substantial compliance with the terms of the contract. In fact, during the latter part of January and whole of February the water in the Buckingham canal was very low and the boats arrived as far as Papanchavadi, which is some thirteen miles from Covelong and nine to the Elephant Gate Basin, and proceeded no further.

It is suggested that the boats might have been got to Madras by one or two methods, either by using portage over the shallow places and re-loading the cargo where the water was deep enough again or by distributing the cargo of the fully laden boats among other boats and so ensuring that no boat had so heavy a load that she could not be pulled through the shallowest part. I do not doubt that both of the suggested courses were physically possible. *I am convinced that as a matter of business both were commercially impracticable.* It is reasonably clear from the evidence that there were not enough boats available for all the cargo to be carried through in half-laden boats, and with regard to the portage scheme, *though it may be theoretically possible,* the evidence is conclusive that no one has ever attempted to do it with a cargo of salt. The figures given by the look-keeper at Adayar South Lock appear to me to be conclusive on this point. He has produced the record of the boats carrying salt cargoes for the months of January, February and March,

and it speaks for itself. In the month of January 80 boats went through the lock with salt cargoes, 29 from the 1st to the 10th, 21 from the 11th to the 20th and 30 from the 21st to 31st. In the month of February not one single boat went through with a salt cargo, though 264 boats went through loaded with cargoes of different descriptions. In the month of March no salt boat went through from the 1st to the 20th and one only from the 21st to the 31st. During that month 346 boats went through carrying other cargoes. The result was that the boats laden with salt destined to fulfil this contract stopped at Pappanchavidi, nine miles from their destination, and the evidence has satisfied me that it was commercially impracticable that they should do otherwise.

The effect of this state of things on the contracting parties and how they dealt with it can be seen from the correspondence to which I now turn. The shortage was beginning to be felt towards the end of January and the plaintiffs' Vakil, Mr. Narayanasawmi Aiyar, addressed a letter on the 22nd of January to the 1st defendant in the following terms:

"With reference to the letter dated 18th January 1917 addressed by Messrs. Holst and Nathan to my clients Messrs. Mahomed Ibrahim and Mahomed Jaffir & Co., carrying on business at No. 55 Kandappa Chetty Street, Georgetown, Madras, I have been instructed to state that though my clients have been going to Elephant Gate and making enquiries there and also of you for the last three days, they are informed that no boats containing the consignment referred to in the said letter have yet arrived at Elephant Gate Basin.

"My clients further instruct me to state that by agreement dated 30th November 1916 you have agreed that on obtaining permission from Inspector for removal of salt and for exporting the same to Calcutta you would despatch the salt to my clients, that you on or about 20th December 1916 obtained permission from Inspector for such removal and export and that you have not yet sent the salt stipulated for in the said agreement to my clients.

"My clients further state with each consignment of goods stipulated for you must send a certificate that it contains Covelong salt.

"My clients again instruct me to call upon you to deliver to them the balance of 4,660 bags of Covelong salt with the certificate referred to above and also send them the permission from Inspector mentioned above, and to give you notice that if you fail to comply with the said request on or before the 31st of this month, they will cancel the agreement entered into by them with you on 30th November 1916 and sue you for the damages incurred by them for breach of the said agreement."

That was answered by a letter from the 1st defendant on the 24th of January, of which the material passage is as follows: "We have come to understand that owing to there being no water in the Buckingham canal the passage of boats has become very difficult and we are not in the least responsible for the delay in transport of these bags, as we have no control over this contingency. We have to make you distinctly understand that we have not made any contract to supply the goods within any stipulated time."

It is quite true that there was no stipulated time for the performance of the contract, but it is not disputed that whatever the defendant was under an obligation to do under the terms of his contract, and that is a matter which I will discuss hereafter, he had to do it within a reasonable time. On the 30th of January another letter was sent by the plaintiffs' Vakil, which complained of the shortage of the supply of salt and threatened to cancel the contract if delivery of the outstanding balance of over 4,000 bags was not made within five days. That was answered by a letter from the defendant, which bears no date but was obviously written at the beginning of February, explaining that the failure of water in the canal was the cause of the shortage of supply and offering to give delivery at Papanchavidi and to make concession in the question of the cost of conveyance by land from Papanchavidi to Elephant Gate. On the 20th of February a letter was written on behalf of the plaintiffs, which in effect was a repudiation of the contract. It is not disputed that at that time no more than the first consignment of 740 bags despatched early in January had reached the plaintiffs and it is equally clear that upwards of 4,000 bags had been loaded by the defendant at Covelong. The question I have to decide is whether that

repudiation was justified or not. That again turns upon the question, whether the delay in transit under the terms of the contract and the course of dealing between the parties falls upon the plaintiffs or the defendant.

A point was taken for the defendant, which I suggested myself in the course of the argument and which I think being entirely a point of law on the construction of the contract was open to the defendant, *viz*, that he discharged his obligation when he shipped the goods on board the boats at Covelong. Clause 3 of the contract provides that the bags are to be despatched by boats from Covelong to Elephant Gate Basin, and it is urged that, when they were put on boats at Covelong, the obligation of the defendant in that respect was discharged, in other words, that this was in effect an *f. o. b.* contract. *Fragano* v. *Long* (1), *Tregelles* v. *Sewell* (2) and *Wiltshire Iron Company, In re, Pearson, Ex parte* (3) were cited as illustrating this position. But in the English shipping cases one usually has a bill of lading or a policy of insurance or both, the custody of which at any given moment of the transaction is a guide to help one in determining at what point of time the property passed, and in this case, of course, there is nothing of the sort. The plaintiffs relied upon the latter clauses of the contract, Nos. 7, 5 and 6, as showing that the property in the goods was not intended to pass until they were delivered on payment at Elephant Gate Basin. The defendant contends that these terms relate merely to payment and while conceding that the effect of the contract may be to disentitle him from suing for the price of the goods until they arrived at Elephant Gate Basin, argues that he is nevertheless not liable for damages for delay during transit. If that were the position in law, it would approximate to that in the well-known case of *Calcutta and Burmah Steam Navigation Company Limited* v. *De Mattos* (4). In that case De Mattos agreed to ship coal from London to Rangoon there to be delivered to the buyers. Half the price was to be paid on shipment against delivery of invoices and bills of lading and a policy for half the invoice amount. Some of the goods were lost during the voyage and it was held that the property passed to the buyers on shipment although, by the special terms of the contract, the vendor was not entitled to recover the price until the goods arrived at Rangoon. That state of things is admirably expressed in a passage of the judgment of Blackburn, J., at page 328, which runs as follows:—"But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that, when he has done so, he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination; and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser, as owner, as soon as the goods are shipped, that they shall then be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving; just as they might, if they pleased, contract, that the price should not be payable unless a particular tree falls; but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall. Where the contract is of this kind, the position of the vendor and purchaser, in case the goods do not arrive, is analogous to that of freighter and shipowner, in the ordinary contract of carriage on board a ship, in case the goods are prevented from arriving by one of the excepted perils. The shipowner is not bound to carry and deliver at all events; but, though he is excused if prevented by the excepted perils, yet no freight is earned or payable unless the goods are delivered." Certain facts relating to the course of business were proved in this case which, to my mind, preclude me from holding that the property passed to the buyer on shipment. The effect of that evidence is shortly this, when the salt was despatched on its journey, a watchman was sent with it who was responsible for its custody and who was employed and paid by the vendors. The despatch of the salt and its expected arrival at Madras was notified by the vendors from Covelong not to the purchaser but to their own agents in Madras; and

(4) (1863) 32 L. J. Q. B. (N. S.) 322; 11 W. R. 1024; 169 R. R. 752.

when it did arrive, the vendors in Madras either sent a delivery order to the purchaser or sent one of their men to meet the boats with the purchaser's representative and indicate that delivery was to be made to the purchaser. These facts appear to me to establish that the vendors effectually reserved to themselves the *jus disponendi* and that though the placing of the salt in bags marked with the purchaser's initials at Covelong was undoubtedly an appropriation of the goods, it was a conditional appropriation only. [See *Mirabita* v. *Imperial Ottoman Bank* (5), *Gabarrow* v. *Kreeft* (6) and *Moakes* v. *Nicolson* (7).] I am, therefore, of opinion that by this contract the property in the goods did not pass on shipment, but that the vendor kept them as his property until they should be paid for and delivered and that the appropriation at Covelong was conditional only.

It was next argued for the defendant that this case fell within the principle of what are called the Coronation cases, *Krell* v. *Henry* (8) and the rest, and that assuming the vendor to have taken the responsibility of carriage and delivery upon himself, he was excused by the impossibility of performance. I understand the Coronation cases and the older cases which they followed to *establish this proposition*, that where the contract between the parties is made wholly with reference to a state of things which was supposed to exist and on the supposition that that state of things does exist, the contractual obligation is dissolved if, in fact, the circumstances on which the whole contract is based do not exist. A contract to sing or play in a particular hall is dissolved if, unknown to the parties, the hall has been burned down. A contract with a hirer of seats to view a public ceremony is dissolved if that public ceremony is cancelled and cannot take place. I do not think that the principles enunciated in these cases have any application here. It seems to me impossible to say that these parties based their contract on the supposition that clear facilities of transport existed between Covelong and Madras in such a sense that their contract could be said to be deprived of its fundamental assumption and to become meaningless and insignificant if those facilities did not exist.

The last point taken by the defendant is to my mind conclusive. Accepting the position that he reserved the property in the goods to himself and that it did not pass on shipment, and admitting there was no such impossibility as would excuse him on the principle enunciated in the Coronation cases, he contends that he has substantially complied with the obligations cast upon him by the contract. His obligation on this footing no doubt was to deliver the goods at Madras, but the mode of transit contemplated by the parties was that he should ship the goods at Covelong on the boats ordinarily available for conveying salt from Covelong to Madras by the Buckingham canal. That being the method of transit contemplated by the parties, the defendant contends that he is not in default and that he has shewn his ability to deliver the goods "within reasonable time." The plaintiffs' repudiation was on the 20th of February. Had they not repudiated on that date, it is reasonably clear and I so find as a fact that they would have had delivery of the balance of the contract quantity at the end of March and the beginning of April. The question is whether that is delivery "within a reasonable time." On this point I shall refer to the well-known cases relating to a charter's liability for demurrage or damages for detention when he is under an obligation to discharge the ship according to the custom of the port with due despatch. [See *Postlethwaite* v. *Freeland* (9), *Hick* v. *Raymond* (10), *Carlton Steamship Company* v. *Castle Mail Packets Company* (11) and *Hulthen* v.

(5) (1878) 3 Ex. D. 164; 47 L. J. Ex. 418; 38 L. T. 597; 3 Asp. M. C. 591.

(6) (1875) 10 Ex. 274; 44 L. J. Ex. 238; 33 L. T. 365; 24 W. R. 146; 3 Asp. M. C. 36.

(7) (1865) 19 C. B. (N. S.) 290; 34 L. J. C. P. 273; 12 L. T. (N. S.) 573; 147 R. R. 600.

(8) (1903) 2 K. B. 740; 72 L. J. K. B. 794; 89 L. T. 328; 19 T. L. R. 711; 52 W. R. 246.

(9) (1880) 5 A. C. 599; 49 L. J. Ex. 630; 42 L. T. 845; 28 W. R. 833; 7 Asp. M. C. 302.

(10) (1893) A. C. 22; 62 L. J. Q. B. 98; 1 R. 125; 68 L. T. 175; 41 W. R. 384; 7 Asp. M. C. 233.

(11) (1898) A. C. 486; 67 L. J. Q. B. 795; 78 L. T. 961; 47 W. R. 65; 14 T. L. R. 469; 8 Asp. M. C. 402.

Stewart & Co. (12)]. These cases appear to me to lay down the principle that the question of what is a reasonable time for the performance of the contract is one to be decided not by general abstract considerations but by the particular circumstance of each case. The principle appears to me to be most clearly expressed in the words of Lord Watson in *Hick* v. *Raymond* (10), where his Lordship uses these words; "When the language of a contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implies that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably." The unsuccessful contention in each of these cases was that you could ascertain what was a reasonable time in normal circumstances for discharge of the ship and translate the indefinite words of the contract into terms of days and hours. The House of Lords throughout refused to accept this contention and laid it down that in every case you must have regard to the particular circumstances and conditions existing at the moment. Following that principle I think I must hold that I must have regard to the failure of water in the Buckingham canal at the material times, to the number of boats actually available and to the fact that no one attempted to carry salt cargoes beyond Pappanchavidi in February and March as indicating that *the delay in transit was attributable to causes beyond the control of the vendors and that they had acted neither negligently nor unreasonably.*

I must accordingly find that the defendant has discharged his obligations under the contract and is not liable in damages for delay in delivery to the plaintiffs. On the other hand, he cannot, in my opinion, retain the advance of Rs. 1,000 and the money paid for the gunny bags, except in so far as he can set off against them the price of the 740 gunny bags actually delivered. In the result there will be judgment for the plaintiffs for Rs. 2,491 with Vakil's fee and institution fees on that amount as costs. The whole case was fought on the question of damages, as to which the defendant has succeeded. I decline, therefore, to give plaintiffs the hearing fees. On the other hand the defendant did not bring into Court the money due on the deposit and the bags; and I must, therefore, decline to give him costs, though on the issue really fought he has succeeded. Interest at 6 per cent. on this amount.

The plaintiff must pay the costs of the 2nd defendant: but may add them to the costs he recovers from the 1st defendant. [See *Bullock* v. *London General Omnibus Company* (13)].

M. C. P.

Order accordingly.

(12) (1908) A. C. 389; 72 L. J. K. B. 917; 88 L. T. 702; 8 Com. Cas. 297; 9 Asp. M. C. 403; 19 T. L. R. 618.

(13) (1907) 1 K. B. 264; 76 L. J. K. B. 127; 95 L. T. 905; 23 T. L. R. 62.

PRIVY COUNCIL.

APPEALS FROM THE CALCUTTA HIGH COURT.

May 30, 1919.

Present:—Viscount Haldane, Lord Buckmaster and Lord Dunedin.

SUNITABALA DEBI—APPELLANT

versus

DHARA SUNDARI DEBI CHOWDHURANI AND ANOTHER—RESPONDENTS.

Mortgage to several tenants-in-common—Mortgagees, rights of—Pardanashin *lady, transaction with—Test to be applied in determining validity of transaction.*

Where a mortgage is made by one mortgagor to two tenants-in-common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of his debt failing the consent of the co-mortgagee, is to add the co-mortgagee as defendant, and ask for the proper mortgage decree, which in such case should provide for all necessary accounts and payments, except that there can be

no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor. [p. 134, col 2]

To validate transactions with a *pardahnashin* lady, it is not necessary to prove that she understood every detail of the matter. It is sufficient that she should understand its general effect, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise her to enter upon it. [p. 134, col. 2.]

Appeal and cross-appeal from a decree of the Calcutta High Court, dated August 26, 1915, modifying a decree of the Subordinate Judge, Rangpur.

FACTS.—This was a suit on a mortgage deed, details of which are given in their Lordships' judgment, executed by appellant in favour of respondents. The appellant was the daughter and the respondents the two widows of one Sarat Chandra Roy Chowdhury, and the mortgage was effected in compromise of sundry disputes as to the testamentary dispositions of the latter. By it appellant mortgaged the estate of the deceased in payment of two sums of Rs. 80,000 to the respondents.

The suit was brought by the first respondent only against appellant, the second respondent (Sarojini) and a prior mortgagee. In it the first respondent claimed Rs. 80,000 and interest and asked for sale of half the mortgaged property.

Appellant defended the suit on the grounds (1) that she had not understood the compromise to carry out which the mortgage was effected; (2) that under section 67 of the Transfer of Property Act no decree could be passed for sale of part of the mortgaged property.

The Subordinate Judge of Rangpur overruled these contentions and decreed the suit as framed, but on appeal the Calcutta High Court (Sharfuddin and Newbould, JJ.), while agreeing with the lower Court that the deed was binding on appellant, held that the suit was not properly framed, being barred by section 67 (*d*) of the Transfer of Property Act unless it were proved (which was not alleged) that Sunitabala, the mortgagor, gave her consent to the mortgagees to sever their interests under the mortgage. They allowed the plaintiff to amend her plaint and plaintiff thereupon applied for leave to amend by adding the following prayer:

"If in the opinion of the Court the plaintiff is held to be not entitled to a decree on the footing of mortgage for the principal sum of Rs. 80,000, then a usual mortgage decree may be passed in favour of the plaintiff and the defendant No. 3 for the amount found due up to the period of grace to be fixed by the Court on the basis of the entire mortgage money, that is, Rs. 1,60,000."

On the same date Sarojini Dabi, defendant No. 3, filed a petition in the High Court praying that a decree for sale for the whole amount of Rs. 1,60,000 be made in favour of her assignee and the plaintiff. The said High Court heard the applications together and delivered the following judgment on the 26th August 1915:—

"After hearing both sides we order that the plaint be amended in the lower Court in the following terms:—'If in the opinion of the Court the plaintiff is held to be not entitled to a decree on the footing of a mortgage for the principal sum of Rs. 80,000, then a usual mortgage decree may be passed in favour of the plaintiff and the defendant No. 3 for the amount found due up to the period of grace to be fixed by the Court upon the basis of the entire mortgage money, that is, Rs. 1,60,000.'

"The parties agree and it is directed that no party should be allowed in the lower Court to re open any question that has already been tried by the judgment of this Court, dated the 11th June 1915."

In the result the High Court made a decree remanding the suit to the said Subordinate Judge for trial according to law.

Sunitabala appealed to the Privy Council on the grounds (1) that the deed was not binding on her; (2) that the High Court were wrong in allowing an amendment of the plaint; while first respondent cross-appealed on the grounds (1) that the suit was maintainable as framed; (2) that having regard to Sarojini's application, the High Court should have made the proper decree for sale itself instead of remanding the suit.

Sir *W. Garth* and Mr. *DeGruyther*, *K. C.*, for the Defendant Appellant, submitted that the first thing to consider in judging

a compromise was the litigants' chance of success. Here respondents had practically no chance whatever, and the transaction amounted to a gift to them by appellant. The legal advisers avoided saying that they advised her to compromise and everything was left to her husband. It should be shown that she understood thoroughly what she was doing: of this there was no proof.

(The Board intimated that they considered appellant's case hopeless.)

Mr. *Dunne*, *K. C.*, for the Respondents, in support of the cross-appeal submitted that section 67 had nothing to do with the case. The High Court ought to have decided the matter themselves, instead of remanding it.

[VISCOUNT HALDANE.—That is a matter of discretion.]

The High Court should not have reversed the Subordinate Judge as to the form of judgment. Even if we were entitled to execution against the whole property, it has been held in India that a plaintiff can abandon a portion of his security.

(The Board intimated that they considered the cross-appeal hopeless. Mr. *Dunne*, thereupon abandoned it.)

JUDGMENT.

LORD BUCKMASTER.—The history of this case is the history of a family dispute between the appellant—a *pardanashin* lady, the daughter of one Sarut Chandra Roy Chowdhury, and the respondents, who are his two widows. After the death of Sarut Chowdhury, the respondents applied for a grant of Letters of Administration of his estate with a Will annexed, the Will being dated the 22nd November 1903, the date of his death. The appellant, as the daughter of the deceased and devisee under an earlier Will, opposed this application. The District Judge refused the grant, holding that the alleged Will was not genuine, and the respondents appealed to the High Court. While this appeal was pending, the Administrator-General of Bengal as executor applied for Probate of an earlier Will, dated the 21st September 1892. By the terms of this Will the appellant would take the whole property of the testator, subject to certain small provisions for maintenance in favour of the first respondent and of another wife. A caveat was entered by the respondents to this grant, and there was thus opened a prospect of litigation inviting indeed to all who enjoy quarrels themselves or profit by the quarrels of others, but of small service to those interested either by family or pecuniary considerations in the estate.

In these circumstances a compromise of the whole proceedings was an obviously sensible course to take, for apart altogether from strict rights under disputed documents, the parties in controversy were associated by close relationship to the deceased—the one as his daughter and the others as his widows. A compromise was, in fact, reached, and it might have been hoped the disputes were ended, but it is rash to entertain such an expectation, for it is out of that compromise that these proceedings have arisen.

The effect of the compromise was simple. The respondents' appeal against the judgment which declared against the alleged Will of 22nd November 1903, and the caveat against the grant of the earlier Will were both to be withdrawn, and the Probate of the earlier Will was to be granted to the Administrator General. As a consideration for this, and as a release of all claims against the estate, the appellant agreed to pay each of the widows an absolute sum of Rs. 80,000 with interest at 6 per cent. until payment, and to secure these sums by executing in their behalf a mortgage of the testator's estate, the value of which was stated to be Rs. 2,95,000.

Three documents were executed in pursuance of this arrangement—the one, an agreement of the 16th January 1907, between the respondents and the appellant, being the agreement of compromise; the second, a mortgage of the 5th March 1907, mortgaging the real and personal estate in payment of the two sums of Rs. 80,000; and the third, a release by the widows of their claims.

On the 25th March 1909, the first respondent instituted proceedings under the mortgage deed against the appellant, the other respondent and a prior mortgagee of the real estate asking for payment of the Rs 80,000, and interest, and sale of half of the mortgaged property.

This action was defended on two grounds —the one of substance and the other of form. The first that the compromise was not binding upon the appellant owing

to the disabilities attaching to a *pardanashin* lady, and the other that the proceedings were wrong in form: since by section 67 of the Transfer of Property Act of 1882 it is impossible to seek for sale of part only of mortgaged property.

The learned Subordinate Judge decided against the appellant on both contentions, and granted the relief claimed. On appeal to the High Court of Calcutta this decree was reversed so far as it depended upon the question of form; but confirmed on the question of substance, the High Court holding that it was not possible to obtain partial relief upon such a mortgage, and granting permission to the plaintiff to make the necessary amendments in the plaint, and sending the matter back for re-hearing when these amendments had been made.

In their Lordships' opinion, the High Court were quite right in the conclusion at which they arrived. It would, of course, be possible—though inconvenient—to execute in one document a mortgage of one-half of an entire property in favour of each of two mortgagees. By this means two independent mortgages would be combined in one deed, and in such a case independent relief might be granted to each mortgagee; but the present mortgage does not take that form. It contains no covenant for payment of the mortgage debt, but consists of a conveyance of the whole property to the two mortgagees as tenants-in-common and not as joint tenants, with separate provisos for redemption as to the real and personal estate in the same terms, *viz.*, that upon payment "by sums of equal amounts to each of the two mortgagees and their representatives of Rs. 80,000 with interest," and on payment of costs and incidental expenses "the said mortgagees, their respective heirs or assigns, will separately at the cost of the mortgagor" re-convey and re-assign the mortgaged property. This mortgage clearly effects the conveyance of the real estate to the mortgagees as tenants-in-common, and no redemption could be effected of part of the property by paying to one of the mortgagees her separate debt. It is not a mortgage to each of a divided half, but a conveyance to them of the whole property.

Where a mortgage is made by one mortgagor to two tenants in common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor. So far, therefore, as this appeal depends on maintaining the correctness of the form of the proceedings, it must fail. The proceedings were wrong in form, but were capable of being amended so as to constitute a properly framed suit. It was within the competence of the Court to make such an amendment, and indeed it was their clear duty to do it if thereby delay and expense would be avoided. In their Lordships' opinion, the amendment of the plaint as directed by the High Court is not appropriately worded and they consider that the trial Judge should on the re-hearing of the suit make such amendments as may be necessary and proper.

The remaining ground upon which this appeal depends is that the mortgage was in fact executed by a Hindu *pardanashin* lady, and it is, therefore, incumbent upon the plaintiff to show that she had independent and disinterested advice.

It is not necessary—indeed, it is undesirable—to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities. It is sufficient that the general result of the compromise should be understood, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed. The learned Subordinate Judge has applied the proper and necessary test for the purpose of examining the evidence. He has found that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed, and that there was no undue influence or misrepresentation. As

apparently it was only her husband who was blamed in the matter, it is satisfactory to find by the judgment of the learned Subordinate Judge that in his opinion he did his best to serve his wife. The High Court of Bengal confirmed this judgment, and, after examining the evidence, stated that the deed was executed with the full knowledge of the nature and effect of the transaction, and that the lady had independent and disinterested advice in the matter.

It is not in accordance with the practice of this Board to interfere with two concurrent findings of fact so clearly and definitely expressed and they, therefore, think that the second ground of appeal fails equally with the first, and that this appeal should be dismissed with costs.

The cross-appeal, as to whether the suit as originally framed was maintainable, raises no independent question and was not opened. It should also be dismissed but without costs. The costs of obtaining special leave to cross-appeal will, of course, be borne by the cross-appellant, and these will be set off against the costs of the main appeal.

Their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitors for Appellant.—Messrs. *T. L. Wilson & Co.*

Solicitors for Respondents.—Messrs. *Barrow, Rogers* and *Nevill.*

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 74 OF 1918.

February 12, 1919.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

RAOJI BABURAO—APPLICANT

versus

BANSILAL NARAYAN MARWARI—OPPONENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 89—Limitation Act (IX of 1908), Sch. I, Art. 166—Execution of decree—Sale—Deposit of decretal amount, whether application to set aside sale—Application to set aside sale made more than three years after confirmation of sale, dismissal of—Revision, maintainability of.

Where property is sold in execution of a decree, the mere deposit by the judgment-debtor of the amount of the decree within thirty days of the sale cannot be regarded as an application under Order XXI, rule 89, of the Civil Procedure Code to set aside the sale. [p. 136, col. 1.]

Where an application by a judgment-debtor to set aside a sale of his property in execution of the decree against him made more than three years after the confirmation of the sale was dismissed as time-barred:

Held, that there was no ground for the exercise of the powers vested in the High Court under section 115 of the Civil Procedure Code. [p. 136, col. 1.]

The policy of the Legislature in providing short periods within which applications should be made to set aside sales, is that titles arising from judicial sales should be settled as soon as possible. [p. 136, col 1.]

Extraordinary application against the decision of the District Judge, Nasik, in Miscellaneous Appeal No. 2 of 1917, confirming the order passed by the Subordinate Judge at Pimpalgaon, in Miscellaneous Application No. 2 of 1917.

Mr. *R. A. Jahagirdar*, for the Applicant.

Mr. *P. B. Shingne*, for Opponent No. 1.

Messrs. *M. R. Bodas* and *K. M. Bodas*, for Opponent No. 2.

JUDGMENT.—Less than thirty days before the 3rd of September 1915 the property of the applicant was sold in execution of a decree against him, and on the 3rd September, the applicant deposited in Court the amount of the decree together with interest on the purchase-money for the property sold. He obtained from the Nazir of the Court who received the money a receipt, which recorded that it was paid on account of the Darkhast and on account of interest. But no application was made at that time to set aside the sale. Presumably the intention was to do what was required under Order XXI, rule 89. No application having been made to set aside the sale, the sale was confirmed in January 1916, and thereafter the Court gave notice to the applicant as depositor to take away his money. He then applied that his deposit should be considered as an application to set aside the sale. That application was refused, and the applicant did not appeal, although he was represented by a Pleader. Then later he repeated his previous application which was rejected by the Subordinate Judge, and after that an appeal was preferred to the District Court, which was asked to deal with the matter under section 151 of the Code, for making such

order as might be necessary to prevent abuse of the process of the Court or for the ends of justice The learned District Judge having rejected the appeal, the applicant now comes here under section 115 of the Code for the interference of the High Court. It is difficult to see how this application will lie under section 115. There is no defect whatever in jurisdiction, no irregularity in the exercise of jurisdiction. All the irregularities are on the side of the applicant. The Code, with the Limitation Act, provides a short period within which applications specifying their object should be made to set aside sales, and the shortness of time allowed may be taken as indicative of the policy of the Legislature that titles arising from judicial sales should be settled as soon as possible. Now we have an application before us, three years after the confirmation of a judicial sale, to set it aside, the reason being that the applicant who ought to have applied to the Court did not apply to the Court when he deposited his money. We should be violating the principle under which the rules are framed for obtaining finality at an early date in such matters if we were to accede to the present application, even if we assume that it could be brought within the terms of section 115. The applicant's only remedy is to take back his money. The concession which is allowed to judgment-debtors is only allowed under certain conditions. Those conditions do not exist in the present case. We must, therefore, discharge the Rule with costs. One set of costs.

Rule discharged.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 203 OF 1918.

May 8, 1919.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

NIAMATULLAH KHAN—DEFENDANT—APPELLANT

versus

GAJRAJ SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Mortgage, suit on—Minority, plea of—Burden of proof.

Where a defendant alleges minority in order to escape liability under a mortgage, the burden lies upon him to prove that he was a minor at the time the transaction was entered into. [p 137, col. 1.]

Appeal from the decree of the District Judge, Hardoi, dated the 2nd April 1918, reversing that of the Subordinate Judge, Hardoi, dated the 8th September 1917.

FACTS appear from the following judgment of the learned Judicial Commissioner :—

"This appeal is up for admission under Order XLI, rule 11, of the Code of Civil Procedure and I have directed that notice may go. I think it advisable that the case should be dealt with by a Bench in view of an apparent conflict of opinion regarding a point of law which is of some importance.

"The suit was a suit on a mortgage, and the defence of the appellant here was that he was a minor at the time of the execution of the mortgage and that consequently there was no valid contract which could be enforced. The lower Appellate Court, relying upon a judgment of a Bench of this Court, as also on Select Case No. 265, has held that the burden of proving minority lay upon the defendant who asserted it. On the other hand, there is a reference to a Bench judgment reported as *Muhammad Husain* v. *Lalji Singh* (1), a judgment to which I myself was a party. I think I am entitled to say that it is very doubtful whether the judgment in that case is correct. However, I do not propose to say anything more on the subject, except that in view of the difference of opinion in the judgments just referred, it is desirable that this point should be considered by a Bench.

"Mr. Mumtaz Husain has also asked leave to add two new grounds of appeal to his petition. I allow him to do so."

Mr. *Mumtaz Husain*, for the Appellant.

Mr. *A. P. Sen* and Babu *Basudeo Lal*, for the Respondents.

JUDGMENT.—This was a suit for possession on the basis of a mortgage of the year 1901. The substantial defence and the only point argued in first appeal in the Court below and before us is that the defendant-appellant Mian Jan Khan was a minor on the date of the mortgage. The learned Judicial Commissioner referred the appeal to a Bench on the ground of there

(1) 25 Ind. Cas. 648; 1 O. L. J. 366.

being a conflict of authority in this Court on the question whether the burden of proving minority in such a case as this lay on the plaintiff or the defendant. It has now been settled by their Lordships of the Privy Council in *Jagannath Prashad Singh* v. *Abdullah* (2) that the burden of proof lies on the defendant who alleges minority, and the learned Counsel for the appellant admits that he cannot go behind this decision. The defendant has signally failed to discharge the burden of proof that lay on him, and we are unable to hold that there is any ground for going behind the finding of fact of the lower Court on this point. The appeal, therefore, fails and it is accordingly dismissed with costs.

Two additional pleas were inserted in the petition of appeal at the time when it was referred to the Bench, but they have not been pressed before us.

Appeal dismissed.

(2) 45 Ind. Cas. 770; 45 C. 909; 16 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 406; 22 C. W. N. 891; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192; 35 M. L. J. 46; 45 I. A. 97; 20 Bom. L. R. 851 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 574 OF 1919.

May 27, 1919.

Present:—Mr. Justice Bevan-Petman.

BHAN SINGH—DEFENDANT—APPELLANT

versus

GOKAL CHAND—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal, second—Time spent in obtaining copy of 1st Court's judgment, whether can be allowed—Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Failure to file copy of decree—Appeal, whether valid—Cross-appeals—Matter in issue same—Res judicata—Evidence Act (I of 1872), s. 92, prov. (2)—Entry in bahi—Evidence of oral agreement to pay interest, whether admissible.

Plaintiff sued defendant for the recovery of Rs. 825 principal and Rs. 412-8-0 interest on a *bahi* entry, alleging that the defendant owed him Rs. 725 on a previous *bahi* account, that that *bahi* had been lost and that Rs. 100 had been advanced at the time of the defendants signing the entry sued on. The Rs. 725 were made up of three items, *viz*, Rs. 150, Rs. 310 and Rs. 225. The 1st Court, holding that the items of Rs. 150 and 350 had not been proved, gave plaintiff a decree for Rs. 325 with interest at 2 per cent per annum making a total of Rs. 448.8.0. Both parties appealed. The District Judge wrote a judgment covering both appeals and dismissed the defendant's appeal and accepted that of the plaintiff, allowing him Rs. 825 principal and Rs 264 interest. Separate decrees were given in the two appeals The defendant preferred a second appeal to the High Court and attached copies of the judgment of the 1st Court, the two judgments in appeal and the decree in the plaintiff's appeal but no copy of the decree in his own appeal:

Held, (1) that the appellant was entitled to an extension of the period of limitation to the extent of the time occupied in obtaining a copy of the 1st Court's judgment; [p. 139, col. 1.]

(2) that inasmuch as no copy of the lower Appellate Court, decree in the defendant' sappeal to that Court had been filed, there was no valid appeal in the High Court from that decree; [p. 138, col. 2.]

Jogal Kishore v. *Chammo*, 85 P. R. 1905; 151 P. L. R. 1905, distinguished.

(3 that on the general principles of the doctrine of *res judicata* the present appeal was barred in respect of Rs. 448-8-0, inasmuch as the sum was directly in issue in the defendant's appeal to the lower Appellate Court; [p. 139, col. 1.]

(4) that the findings as to the items of Rs. 150 and 350 were conclusive and a mere alleged error in weighing evidence was not a sufficient ground for second appeal. [p. 139, col. 1.]

Evidence relating to an oral agreement entered in a *bahi* to pay interest is admissible under the 2nd proviso to section 92 of the Evidence Act, and the existence of such an agreement is a question of fact which cannot be considered in second appeal. [p. 140, col. 1.]

Kishore Chand v. *Gurditta Mal*, 10 Ind. Cas. 315; 52 P. R. 1911; 165 P. L. R. 1911; 162 P. W. R. 1911, distinguished.

Second appeal from the decree of the District Judge, Amritsar, dated the 4th December 1918, varying that of the Subordinate Judge, 2nd Class, Amritsar, dated the 6th July 1918, decreeing the claim in part with proportionate costs.

Sardar *Kharak Singh*, for the Appellant.

Lala *Praduman Das*, for the Respondent.

JUDGMENT.—The facts necessary to be mentioned for the purposes of this second appeal are that the plaintiff-respondent instituted a suit against the defendant appellant for the recovery of Rs. 825 principal and Rs. 412 8 0 interest on a *bahi* entry executed by the defendant. The plaintiff's case was that the defendant owed him Rs. 725 on a previous *bahi* account and that *bahi* had been lost, while Rs. 100 had been advanced to the defendant at the time of signing the entry of Rs. 825, now sued on. The Rs. 725 were made up of three items, namely, Rs. 150; Rs. 350 and Rs. 225. The first Court held that the plaintiff had failed to

prove the items of Rs. 150 and Rs. 350, and gave him a decree for Rs. 325 with interest at 2 per cent. per annum, making a total of Rs. 448-8-0. Both parties appealed; the appeal of the defendant being No. 345 of 1918 and that of plaintiff No. 351 of 1918. The lower Appellate Court wrote a judgment in Appeal No. 345 covering both appeals and thereby he dismissed the defendant's appeal No. 345 and accepted the plaintiff's appeal No. 351, allowing the latter Rs. 825 principal and Rs. 264 interest, or a total of Rs. 1,089. The usual brief judgment was also written in Appeal No. 351, wherein the plaintiff's appeal was accepted for the reasons given in Appeal No. 345. Separate decrees were given in the two appeals. To his grounds of second appeal in this Court the appellant attached copies of the judgment of the first Court, the two judgments in appeal and of the decree in Appeal No. 351, but no copy of the decree in Appeal No. 345.

For the plaintiff respondent various preliminary objections are raised. The first is that the appeal is barred by time. In reply it is contended that the appeal is not barred if the time occupied in obtaining a copy of the first Court's judgment is allowed, and it is prayed that this be allowed. Although at present the attaching of the copy of the first Court's judgment with the appeal is not a rule of Court, it is a practice which is observed and insisted upon. The advantages of having a copy of the first Court's judgment attached to the appeal are so obvious that it is probable that the matter will be provided for in the rules. Under section 5 of the Limitation Act I allow an extension of the period of limitation as prayed for.

The next preliminary objection is that there is no legal and valid appeal before this Court in respect of the decree passed in Appeal No. 345 in the lower Appellate Court, because a copy of that decree does not accompany the grounds of this appeal and that, therefore, the decree in that appeal is final and the items covered by that decree are *res judicata* and cannot be dealt with now. Reliance is placed on Order XLI, rule 1, of the Code of Civil Procedure and a number of authorities including *C.* v. *C. & B.* (1). For the appellant it is contended in reply that it is not necessary that copies of both the appeals should accompany the grounds of appeal in a consolidated judgment and reliance is placed on *Jogal Kishore* v. *Ohammo* (2).

It is clear that for the reasons urged by the respondent, there is no valid appeal in this Court from the decree in Appeal No. 345 but that, to my mind, does not conclude the matter. The decision in *Jogal Kishore* v. *Ohammo* (2), relied on by the appellant, is not on all fours with the present case. In that case two suits for pre-emption were instituted by two rival pre-emptors against the same defendant in respect of the same property. Both cases were tried together and disposed of by one judgment. One plaintiff was granted a decree giving her the right to pre empt within a certain time and the other was granted a decree giving him the same right on the failure of the first. The head-note is apparently wrong in stating that the same decree was given and that each pre-emptor was impleaded as a defendant in the suit of the other, but that is not material for the present purpose. The latter plaintiff appealed only from the decree in his own suit and the lower Appellate Court held that the existence of the other judgment and decree which had become final were a bar to the appeal and dismissed it. It was held by a Full Bench of the Chief Court of the Punjab, whilst admitting that the question was one of difficulty, that it was not necessary to appeal from both the decrees. But that case is distinguishable. In the present case the two appeals in the lower Appellate Court were distinct and related to different subject-matters. In Appeal No. 345 the defendant's claim was that the plaintiff was not entitled to the sum of Rs. 448 8-0 which had been allowed him by the first Court, and in Appeal No. 351 the plaintiff claimed that he was entitled to Rs. 500 and interest which the first Court had disallowed.

The law of *res judicata* in relation to two simultaneous decrees between the same parties is a difficult subject and the High Courts in India have not held the same views, and I may add that beyond merely referring me to the judgment in *Jogal Kishore* v. *Ohammo* (2), no attempt has been made to argue the point involved and no authority has been cited dealing with circumstances

(1) 22 P. R. 1903; 91 P. L. R. 1903.

(2) 85 P. R. 1905; 151 P. L. R. 1905.

similar to the present. It appears to me on the general principles of the law of *res judicata* that the present appeal in respect of Rs. 448-8-0 is barred. It would be convenient here to state that the decree in Appeal No. 351, a copy of which has been attached, is not merely for the further sum of Rs. 500 and interest claimed in that appeal, but includes the sum of Rs. 448-8-0 which is the subject-matter of Appeal No. 345, and grants a decree for Rs. 1,089. It might be argued for the appellant that the present appeal arises out of the original suit for Rs. 825 and interest and that the question in issue between the parties in both the first and the lower Appellate Courts was whether that money was due or not, and that a decree having ultimately been passed against him for Rs. 1,089, he is entitled to raise all questions permitted in second appeal included in, or covered by, that decree and that he is so entitled irrespective of the fact that there may be another simultaneous decree which purported to modify the decree of the first Court and dismissed his appeal No. 345. But in my opinion, the proper test is not the contents of a decree. We have to see what was the matter directly and substantially in issue in Appeal No. 345, and the only matter there in issue related to the sum of Rs. 448-8-0. The decision was against the defendant-appellant and as I have already held that there is no valid appeal before this Court in respect of Appeal No. 345, it follows that the decision is final and this appeal in respect of the Rs. 448-8-0 is barred as *res judicata*. The matter in issue in Appeal No. 351 was different, and it can make no difference that both matters were dealt with by the same judgment, though, as explained, there are two judgments, and the decree in Appeal No. 351 included the Rs. 448-8-0.

The third preliminary objection is that no second appeal lies in respect of the items of Rs. 150 and Rs. 350, that mere alleged error in weighing evidence is insufficient and that the findings as to these items are one of fact. The appellant contends that there is no evidence whatever on the record in support of the findings, inasmuch as the statement of the plaintiff relied on by the Court was not made as a witness but as a party and no opportunity was given to cross-examine him. The record does not bear out the contention. The plaintiff was examined after the issues were fixed, on a day fixed for evidence, he was given the number 1 and the real witness was numbered 2. He was not cross-examined but that is immaterial. I hold no second appeal lies in respect of these items.

There remains only the question raised by the appellant regarding the liability to pay interest. He contends that the *bahi* entry of Rs. 825 contains no reference to interest and that, under section 92 of the Evidence Act, the evidence of witnesses, who allege that it was settled at the time that interest was to be paid, is inadmissible, that there are no preceding transactions between the parties from which an agreement to pay interest can be implied, nor is there any direct evidence on the point and that the plaintiff has admitted that no interest was agreed to, or fixed, at the time of borrowing the Rs. 150 and Rs. 350. Reliance was placed on *Bura* v. *Mailia Shah* (3), *Raghu Mal* v. *Bandu* (4) and *Kishore Chand* v. *Gurditta Mal* (5). It is also urged that the circumstances were peculiar as the defendant was suspected of being a party to the destruction of the previous *bahi* and that the probabilities are that he was induced to sign a fresh account on the advance of another Rs. 100 and the promise that no interest would be charged and that, otherwise, there is no explanation of an omission to make any entry as to interest. The respondent contends that Rs. 123 out of the total amount of interest allowed is part of the Rs. 448-8-0 and cannot be gone into, and I hold that this contention is correct. He also contends that the item of Rs. 225 is admittedly made up of Rs. 220 principal and Rs. 25 interest, from which an implied agreement with regard to the payment of interest can be implied. The question of interest has been somewhat perfunctorily dealt with by both the lower Courts. The finding of the first Court is not very clearly expressed, but what it, apparently, found was that the plaintiff had proved that, at the time the entries relating to the Rs. 825 were made, there was an oral agreement between the parties that interest was to be paid, but that the rate of interest had either not been

(3) 104 P. R. 1901; 19 P. L. R. 1902.
(4) 110 P. R. 1908.
(5) 10 Ind. Cas. 315; 52 P. R. 1911; 162 P. W. R 1911; 165 P. L. R. 1911.

agreed upon, or had not been proved. The lower Appellate Court in effect accepts this finding and also holds that the rate of interest allowed is reasonable. The contention of the appellant that evidence regarding the oral agreement is inadmissible under section 92 of the Evidence Act is untenable. The judgment in *Kishore Chand* v. *Gurditta Mal* (5) relied on by him in support of his contention is inapplicable. The grounds of that decision are that the instruments sued on were *shah jog hundis* drawn with the utmost formality and could not be regarded but as documents of a very formal nature and that, therefore, the alleged oral agreement as to interest on which the *hundis* were silent, was not saved by the 2nd proviso to section 92 of the Evidence Act. The concluding words of that proviso, which are very material, are as follows:—"In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document." Entries in *bahis* cannot be said to bear any formal character and may be of various descriptions. I hold, therefore, that the evidence relating to an oral agreement to pay interest is admissible under the 2nd proviso to section 92 of the Evidence Act and that the existence of such an agreement is a question of fact which cannot be considered in second appeal.

For the above reasons I dismiss the appeal with costs throughout.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 95 OF 1918.

May 13, 1919.

Present :—Mr. Lyle, A. J. C.

Darogha IBAD ULLAH KHAN—DEFENDANT No. 3—APPELLANT

versus

RAM CHARAN SAH—PLAINTIFF,

Mahant GOBIND DAS AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Landlord and tenant—Lease, grant of—Prior lessee refusing to vacate—Subsequent lessee, remedy of—Ejectment of prior lessee, suit for, maintainability of.

Where a lessee is unable to obtain possession of the premises leased to him in consequence of a prior lessee being in possession and refusing to vacate, his proper remedy is to recover from the lessor the money advanced to him with reasonable interest through the Civil Court It is not open to him to sue the prior lessee in ejectment [p. 142, col. 2.]

Appeal from the decree of the Subordinate Judge, Kheri, dated the 10th August 1918.

25TH APRIL 1919.

Mrs. *A. P. Sen* and Syed *Zahur Ahmad*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra*, Babu *Bisheshwar Nath Srivastava* and Pandit *Suraj Narain Dikshit*, for Respondent No. 1.

7TH MAY 1919.

CASE RE-ARGUED.

Syed *Zahur Ahmad*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—The defendant No 1 gave a *zar-i-peshgi* lease of the land in suit in this case to the defendant No. 3 for ten years from 1312—1321 Fasli under a registered document, dated 30th of August 1904. On the 25th of January 1914 the defendant No. 1 gave the defendant No. 3 a further *zar i peshgi* lease of the land for a term of three years from 1322—24 Fasli. The term of the second lease in favour of the defendant No. 3 expired on the 5th June 1917. Ont he 22nd November 1915 the defendants Nos. 1 and 2 gave the plaintiff a *zar i peshgi* lease of the same land for thirteen years from 1325—37 Fasli. According to the terms of this lease the defendant No. 3 was to vacate the land at the end of Jeth 1324 Fasli and the plaintiff was to take possession of the land when vacated by the defendant No. 3. The defendant No. 3 failed to vacate the land on the determination of his lease and the plaintiff brought this suit for possession. The plaintiff stated in his plaint that when the defendant No. 3 heard that a lease had been executed in favour of the plaintiff, he persuaded the defendant No. 1 to execute on the 1st of August 1916 another lease in his own favour for seven years from 1325—1331 Fasli and that in the lease of the 1st of August 1916 in favour of defendant No. 3 there was a false recital to the effect that the lease was executed in pursuance of an agreement enter-

ed into between the defendants Nos. 1 and 3 on the 22nd of August 1915.

The defendant No. 3 among other grounds defended the suit on the grounds that the Civil Court had no jurisdiction, that the defendant No. 1 had agreed to lease the property in suit to him before the execution of the lease in favour of the plaintiff and that the plaintiff had notice of this agreement.

The learned Subordinate Judge has found that he had jurisdiction to try the suit. He has also found that no agreement was entered into betweent the defendant No. 1 and defendant No. 3 on the 22nd of August 1915. He has decreed the plaintiff's suit for possession and the defendant No. 3 now appeals.

Although several pleas have been taken in the grounds of appeal, the learned Counsel for the appellant has confined himself to a discussion of the finding on two only of the issues framed by the learned Subordinate Judge. These are issues Nos. 6 and 11.

"Did the defendant No. 1 agree to lease the property in suit to the defendant No. 3 before the execution of the lease in favour of the plaintiff and did he receive a consideration for such agreement from the defendant No. 3? If so, how does it affect the plaintiff?"

"Has this Court no jurisdiction to eject the defendant No. 3?" In his attempt to prove the alleged agreement the defendant No. 3 has, in addition to oral evidence, produced two documents Exhibits C1 and C2 Exhibit C1 is a letter, dated 22nd of August 1915, purporting to have been written by the defendant No. 1 to the defendant No. 3 containing the alleged agreement, and Exhibit C2, which is also dated 22nd of August 1915, purports to be a receipt for Rs. 200 executed by defendant No. 1 in favour of the defendant No. 3. The learned Subordinate Judge has discussed the whole of the evidence, both oral and documentary, and I may say at once that after hearing the arguments of both parties I have no hesitation in agreeing with the finding at which he has arrived. The story which is told by the defendant No. 3 and his witnesses is in the highest degree improbable. The defendant No. 1 is a resident of the Kheri district and it would appear that defendant No. 3 has also for a considerable time been residing in the village of Dhauraha in that district, for in both the leases executed in his favour by the defendant No. 1, dated 30th August 1904 and 26th January 1914, he is described as a resident of Dhauraha. Yet we are asked to believe that when nearly two years of the existing lease had still to run, the defendant No. 1 went to a village in the Bulandshahar district for the purpose of entering into the alleged agreement with the defendant No. 3 and of obtaining the paltry sum of Rs. 200 from the defendant No. 3. We are also asked to believe that the plaintiff, who is a Mahajan with full knowledge of this agreement and of the fact that the defendant No. 3 was actually in possession of the property in suit, was foolish enough to advance the large sum of Rs. 3,000 to the defendants Nos. 1 and 2. He must have known that it was most unlikely that the defendant No. 3 would willingly give up possession of the property and that he was lending his money on very poor security. It is alleged that the letter and the receipt for Rs. 200 were both written by Ismail Beg, D W No. 1, at the house of Mohammad Usuf Khan, D. W. No. 2, in the village of Bagrasi in the Bulandshahar district. No explanation whatsoever is given why the parties went to the house of Mohammad Usuf Khan for the purpose of having these documents written and executed. Ismail Beg is a retired Sub Postmaster who lives in a house belonging to the brother of defendant No. 3 and Phundan Lal, the only other witness who had been produced in an attempt to prove the incident, is a person who had no business whatsoever at Mohammad Usuf Khan's house but who apparently is under Mohammad Usuf Khan's influence, as he says that he goes every day there to make his Salam. In face of the inherent improbabilities in the story, I am certainly not prepared to accept the evidence of these witnesses as sufficient to prove the execution of the alleged agreement.

There remains the question whether the plaintiff respondent is entitled to get a decree for possession of the land in suit by ejectment of the defendant-appellant. The learned Subordinate Judge has held that as the contest is between two rival tenants, he had jurisdiction to eject the defendant-appellant. The learned Counsel for the appellant argues that as the appellant was in possession of the land in suit by virtue of his lease dated 26th January

1914 and is now in the position of a lessee holding over, he is not a trespasser and he cannot be ejected by a suit in the Civil Court. He argues that proceedings for ejectment should have been taken against him as a tenant in the Revenue Court and he relies on the ruling in *Mohammad Ali* v. *Isa Khan* (1). That ruling is authority for the view that a landlord who desires to eject a *thekadar* on the expiration of his tenancy must proceed by the issue of a notice of ejectment under section 55 of the Oudh Rent Act. The argument is that if the landlord could not eject the defendant-appellant, except by proceedings under the Oudh Rent Act, the plaintiff-respondent who gets his title from the landlord cannot, merely by virtue of the lease granted to him, assert that the defendant-appellant is a trespasser and sue for his ejectment in the Civil Court. In reply to this argument the learned Counsel for the plaintiff-respondent urges that he was not entitled to sue for ejectment in the Revenue Court, that as the appellant by his own action in taking a further lease has determined the lease of the 26th January 1914, he cannot now plead that he is holding over under that lease and as the plaintiff's lease is of an earlier date, he (the plaintiff) is entitled to get possession, and he further urges that he is in reality a mortgagee and as such is entitled to bring his suit in the Civil Court. The plaintiff respondent has himself pleaded that the lease granted to the defendant-appellant on the 1st of August 1916 was an invalid lease, and I have already held that as a prior lease had been granted to the plaintiff-respondent, the lease of the 1st of August 1916 is void and ineffectual. That being so, it follows that the defendant-appellant is not holding under the new lease of the 1st of August 1916, but is in possession by virtue of the lease of the 26th of January 1914, and until the defendant-appellant voluntarily relinquishes the property leased or is ejected by due process of the Revenue Court, the plaintiff-respondent is not entitled to take possession. And even if it be accepted that the document on which the plaintiff-respondent has based his suit is in reality a mortgage and not a lease, that document is in all essentials similar to the document by virtue of which the defendant appellant is in possession and in this view of the case the plaintiff-respondent ought to have brought a suit for redemption of the prior mortgage. The suit as brought is a suit for ejectment of a trespasser, and in no view of the case can it be held that the defendant-appellant is a trespasser. Had a suit for redemption been brought, the defendant-appellant might possibly have met the claim on other grounds, which in the present suit it was not open to him to argue. I may note that the plaintiff brought his suit as a lessee and not as a mortgagee and the plea that he is in reality a mortgagee has only been raised in the last stage of the case. In any view of the case it is clear that the plaintiff-respondent is not entitled to a decree against the appellant in the present suit.

It remains to consider whether the plaintiff-respondent is entitled in the present suit to any relief against defendants Nos. 1 and 2 by whom he was granted the lease of the 22nd November 1915. In his plaint, he has asked for an alternative relief against these defendants. It was their duty to put him in possession of the property leased [section 108 A (*b*) of the Transfer of Property Act], and it seems to me that the lease granted to him did not entitle him to sue for the ejectment of the appellant in the Revenue Court. That being so and as the defendants Nos 1 and 2 have failed to give possession to the plaintiff, the latter is, in my opinion, entitled to recover the money advanced by him with reasonable interest thereon from the defendants Nos. 1 and 2.

The result is, that I allow the appeal and set aside the decree of the lower Court. The plaintiff-respondent will be given a decree against the defendants Nos. 1 and 2 for the sum of Rs. 3,000 with interest thereon at 1 per cent. per mensem from the 22nd November 1915 to the date of payment. He will also be allowed his costs in both Courts against defendants Nos. 1 and 2. The suit against defendant No. 3 appellant will stand dismissed.

Appeal allowed.

(1) 2 O. C. 386.

PROMATHA NATH *v.* BEJOY MADHAR.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 437 OF 1917.

June 23, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

Raja PROMATHA NATH, RAI BAHADUR—PLAINTIFF—APPELLANT

versus

BEJOY MADHAB *alias* BEJOY KRISHNA MITRA AND OTHERS—RESPONDENTS.

Decree, whether binding on party who has no notice—Compromise signed by Pleader not having authority, validity of—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale—Proclamation, omission in, whether ground for setting aside sale.

A party who is privy to a decree is bound by the decree, whether he has or has not notice thereof. [p. 144, col. 1.]

A compromise signed by a Pleader on behalf of his client which has been acted upon and adopted, cannot afterwards be objected to on the ground that the Pleader had no instructions to enter into the compromise. [p. 144, col. 2.]

To render a sale liable to be set aside on the ground of an omission in the sale proclamation, it must be shown that the omission was a material one. It is not for every omission that a sale is liable to be set aside [p. 144, col. 2.]

Appeal against the decree of the Additional District Judge, Khulna, dated the 22nd of December 1916, affirming that of the Munsif, Additional Court at that place, dated the 31st of August 1915.

FACTS appear from the judgment.

Babu *Dwarka Nath Chuckerburtty* (with him Babu *Bireswar Bagchi*), for the Appellant, submitted that the Courts below had erred in not allowing plaintiff a decree for the full amount of rent claimed by him. The previous decree for rent obtained by the plaintiff against the predecessor-in-interest of the present defendant settled the rent of the *jama* and that decree was binding upon this defendant. The previous decree for rent operated as *res judicata*, and the question of the amount of rent could not be re-agitated now. The Courts below said that the defendant had no notice of the *solenamah*, but the question of notice could not arise at all because the previous decree operated as a *res judicata*. The defendant as auction-purchaser must have notice of the previous compromise decree. The contention of the defendant that the consent decree was not operative because the Pleader who had acted in that case had no authority to sign the compromise on behalf of all the co-sharers was baseless, because the compromise had been subsequently ratified by all the co-sharers.

Babu *Surendra Chandra Sen* (with him Babus *Khitish Chandra Sen*, *Probhat Chandra Dutt* and *Anilendra Nath Roy Chowdhury*), for the Respondents, contended that the *solenamah* in the previous rent suit was beyond the scope of that suit and so it was inoperative without registration, and the defendant who had no notice of the terms of that compromise could not be held bound by its terms. The *solenamah* was not binding, firstly, because it had not been registered as required by section 17 of the Registration Act, and, secondly, because it had not been made with the consent and authority of all the co-sharers. As a matter of fact one of the co-sharers did not give authority to the Pleader, who signed the *solenamah*, to compromise on his behalf. The defendant was a purchaser at a sale in execution of a rent decree, and the sale proclamation did not give any of the details of the terms of the *solenamah*, which should be regarded as a material omission. Under the above circumstances the Court of Appeal below rightly held that the defendant was not bound by the terms of the compromise.

Babu *Dwarka Nath Chuckerburtty*, for the Appellant, briefly replied.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the plaintiff against the decision of the learned Additional District Judge of Khulna, dated the 22nd December 1916, affirming the decision of the Munsif of the same place. The plaintiff brought the suit to recover rent. Originally the plaintiff was entitled to a one-fifth share of a certain estate in which the predecessor of the contesting defendant held a tenure. Whilst that condition of affairs existed, the plaintiff brought a suit for his share of the rent, estimating the area of the estate as being about 500 *bighas*. The result of that suit was that there was a compromise and the compromise was filed in Court. Under the terms of that compromise, the rent was settled at 13 annas 12½ *gandas* per *bigha* and the total rent was fixed at Rs. 68 odd. A decree was drawn up in accordance with the terms of the compromise

in these terms: "It is ordered that a decree be passed for Rs. 372-11-3 against the tenant-defendant and that the annual rental be fixed at Rs. 68 12-3 in accordance with the *solenamah*." That seems to have been clearly within the scope of the suit and that decree was an adjudication between the parties—it does not matter whether it was made by consent or otherwise—that the rent at which the tenant held was the sum of Rs. 68 odd.

It is not open to any of the parties to that decree or persons claiming under them to question that amount. That decree does not require registration under section 17 of the Indian Registration Act. The rights of the plaintiff do not rest in this case on the *solenamah* which is an unregistered document, but they rest on the adjudication—no doubt by consent—in the decree fixing the rent at Rs. 68-12-3. Subsequently, the estate was partitioned by the Collector. The tenure held by the defendant's predecessor was found to be 1,230 *bighas* and the portion of the tenure which fell to the plaintiff's lot was 566 *bighas*. The plaintiff subsequently brought to sale the interest of the tenant in execution of a rent decree and the defendant purchased that interest of the tenant. The sale proclamation gave the rent as Rs. 68-12-3. The plaintiff then brought the present suit against the purchaser—the present defendant—for rent, alleging that the rent had been settled by the compromise decree. The case made by the defendant was that he was not bound by the terms of the compromise. Obviously he is bound by the terms of the compromise, if he had notice of it and he is bound by the decree, whether he had or had no notice. This matter in the present case rests on the decree because a party who is privy to a decree is clearly bound whether he had or had not notice. The doctrine of *res judicata* clearly does not depend on whether the party had or had not notice. I think in this case the defendant is in fact bound by the consent decree. Moreover, all the probabilities of the case show that he must have known all about this, because the sale proclamation gives the rent as mentioned in the consent decree and everything suggests that enquiries were made by the intending purchaser as to how that sum came to find its place in the sale proclamation.

Two other points were raised. One is that the *solenamah* on which the compromise decree was based was signed by a Pleader, and it is not proved that one of the co-sharers had given authority to the Pleader, to compromise on his behalf. The learned Judge says that this co sharer never disputed the document. He might have given his reasons more fully. This compromise was entered into in 1897. It has been acted on and adopted ever since and whether the Pleader had instruction or not actually before the compromise was entered into, there can not be any doubt that the learned Judge was warranted in coming to the conclusion that either the Pleader had instruction or that his act was subsequently ratified by the co-sharer.

The other point dealt with by the learned Judge was that there was an omission in the sale proclamation in not giving the details of the compromise decree, but it is not shown that it was a material omission. The proclamation gives the amount of the rent, and it is not for every omission in the proclamation of sale that the sale is liable to be set aside. It is not shown in the present case that the omission was a material one and it is not shown that the present defendant—the purchaser—had not, in fact, notice of all the details relating to the proclamation.

I think we ought to set aside the judgment and decree of the learned Judge of the lower Appellate Court and in lieu thereof decree the plaintiff's suit in full with costs both here and in the lower Courts. Let the case be remitted to the Court of first instance for the ascertainment of the actual amount due to the plaintiff. Only the tenant-defendant is liable to pay the costs.

CUMING, J.—I agree.

Case remitted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 64 OF 1915.

May 11, 1915.

Present:—Sir Henry Drake Brookman, KT., J. C., and Mr. Prideaux, A. J. C.

HASNU—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Confession, evidentiary value of—Court, whether can accept part and reject part—Corroboration of part, effect of.

The ordinary rule is that a confession is evidence for the prisoner as well as against him and must be taken altogether. But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part can be accepted as true without accepting the whole. [p. 147, col. 1.]

Goloke Chunder Chowdhry v. *Magistrate of Chittagong*, 25 W. R. 15 Cr. and *Queen* v. *Sonaoollah*, 25 W. R. 23 Cr., followed.

If other evidence incompatible with a part of the confession is on record, it may be relied on in preference to that part. [p. 147, col. 1.]

Appeal from the judgment of the Sessions Judge, Nagpur, dated the 23rd April 1915.

Mr. *G. P. Dick* (Standing Counsel), for the Crown.

JUDGMENT.—The appellant Hasnu, Musalman, aged 25 years, has been convicted and sentenced to death for the murder of Karnia Dhangar, both the assessors considering his guilt established.

Karnia belonged to Mouza Aundha and on the afternoon of Sunday the 20th December last was grazing his goats in the adjoining village of Tironja. He was undoubtedly beaten to death that afternoon, though his body was not found till the next morning. The first information (Exhibit P.-1) was laid by the *kotwar* of Aundha (P. W. No. 11) at Warora, 20 miles distant, on the evening of the 21st December. The Circle Inspector (P. W. No. 19) and the Sub Inspector (P. W. No. 18) started at once for the spot, which they reached before dawn on the 22nd December. That evening they received information from Arkia Gond (P. W. No. 6) which led to Hasnu being arrested just two days later at Ratnapur, where he was found to have Rs. 17 odd on his person. At the same time Arkia was arrested at Tironja: he was sent next day to Warora for remand, but no order seems to have been passed regarding him till the 31st December when the Tahsildar, a Magistrate of the 2nd class, by warrant addressed to the local Sub-Inspector, ordered his detention in custody till the 4th January when he was to be produced before the Sub Divisional Magistrate, Warora. Meanwhile on the 28th December Hasnu had been produced before the last mentioned Magistrate at Nimdala, 19 miles from Warora, where he made a confession (Exhibit P.-7). In a note recorded on the back of his memorandum in English of the confession, the Sub Divisional Magistrate traced the movements of the Police with Hasnu from arrest to production before him. It seems that Hasnu had been brought *via* Chanda and Warora and at the latter place had been remanded by the Tahsildar but sent on to have his confession recorded. The Tahsildar acted so far in accordance with the standing order in paragraph 1, part II, of Criminal Circular No. 17, but the Police who had taken part in the investigation were improperly allowed to form part of the escort which conducted Hasnu from Warora to Nimdala, and we must here express a hope that the District Magistrate will take steps to prevent recurrence of such an irregularity.

The Magistrate who recorded Hasnu's confession began the commitment inquiry on the 4th January and concluded it on the 10th February. He discharged Arkia for reasons which he stated as follows :—

"None of the deceased's property was found on him and the axe he had in his hand all that day is free of blood. He no doubt was with Hasnu the whole day, because they are both servants of Paighambar. There is no evidence he was with Hasnu when the murder was committed. He says he stayed behind for a call of nature and reached the scene of murder as soon as he could after hearing the dying man's cry as did Gania. This is just possible."

Now Hasnu in his confession of the 28th December, which when read again to him on the 8th February he had admitted to be true, stated that Arkia committed the murder, while Gania Govari had deposed before the Committing Magistrate that he ran up on hearing a cry for help and found Karnia dying with both Hasnu and Arkia beside him. In such circumstances the Magistrate

would, in our opinion, have done better to commit both the accused.

Examined in the Sessions Court Hasnu reported the story of the murder and the disposal of the dead man's property which he told on the 28th December and 8th February. In his grounds of appeal to this Court, however, he denies all knowledge of the murder and alleges that the gold earrings which he got converted into a ring and then sold at Warora on the 23rd and 24th December, as related by Shamsher Khan, Sribari and Ragho (P. W. Nos. 12-14), were handed over to him by Arkia and Gania (P. Ws. Nos. 6 and 5). He describes Arkia and Gania as his servants, but they are not really so. Arkia is a field-servant employed by Paighambar Khan with whom Hasnu his son-in law lives. Gania is a grazier who looks after the goats of the *patel* and others. The appellant does not explain why Arkia and Gania together made over the earrings to him, or why if they did so he took the unusual course of first converting them into a ring and then selling the ring.

Both the assessors as well as the Sessions Judge believed Gania (P. W. No. 5), and it is noteworthy that both Hasnu and Arkia have all along described him as coming last to the scene of the murder, while there is no suggestion that Gania had an axe with him, though each of the others admittedly carried such a weapon. This witness, moreover, told his story to the Police the day after their arrival, *i. e.*, before Hasnu was arrested and the murdered man's earrings traced. In the Sessions Court he improved on his deposition before the Committing Magistrate by stating that he saw a blow struck as he ran up: this addition may be untrue, and his evidence must also be discounted on account of his failure to report to the village authorities at once; nevertheless we agree with the Sessions Judge and the assessors in accepting his story as in the main trustworthy. There seems to be no adequate reason for this man to be made a party to the murder, especially when so little was to be got by it, though Hasnu and Arkia were sufficiently connected to make a conspiracy between them alone intelligible. That Karnia was with Hasnu and Arkia on the afternoon of the murder is shown by independent and untainted evidence, namely that of Tania, Kanba and Goma (P. Ws. Nos. 2—4).

It is clear then that both Hasnu and Arkia, each with an axe in his hand, were besides the murdered man immediately after the fatal blows were struck and while he was still alive. One of these axes (art. in evidence H) is reported by the Imperial Serologist to be stained with human blood. The report is defective in that it does not state where the stains were detected, but from the evidence of the *mukaddam* (P. W. No. 17) we gather that one was on the blade and two on the handle of H on the 23rd December. The appellant has wavered as to whether H is the axe he carried on the 20th December, but looking to all the evidence including Arkia's, we think it must have been. The *mukaddam* shows that Arkia gave up the other axe (K) as his first and that H was found later. The Circle Inspector (P. W. No. 19) also deposed that the axe first given up was claimed by Arkia and that the one afterwards discovered was stained. The Sessions Judge thought the axe H might have been stained after the murder and before its recovery by the Police, or that the stains referred to by the Imperial Serologist may not be those noticed by the *mukaddam* and the Circle Inspector: he also suggests in his judgment that the stains might have been caused in the mortuary where Karnia's corpse was examined by the Sub-Assistant Surgeon, whose evidence unfortunately could not be obtained at the trial. There is certainly some improbability in the theory that Hasnu left his axe unwashed, if he used it on Karnia, for the prosecution put forward a witness *Musammat* Maini (P. W. No. 7) to show that he washed himself soon after the murder in a tank never used by bathers. On the whole we consider it safer to ignore the bloodstains for the purpose of deciding whether the appellant is innocent or guilty.

Turning to the appellant's confession, we have no doubt of its truth in so far as it admits disposal by him of the murdered man's ornaments. The question we next have to consider is whether we should nonetheless reject, as the Sessions Judge has done, that part which makes out that Arkia did the killing without the connivance or assistance of the appellant and handed over the proceeds to him as soon as he came up.

RAHMAT ALI v. EMPEROR.

The ordinary rule is that a confession is evidence for the prisoner as well as against him and must be taken altogether. But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part can be accepted as true without accepting the whole; see *Goloke Chunder Chowdhry* v. *Magistrate of Chittagong* (1) and *Queen* v. *Sonaoollah* (2). If other evidence incompatible with part of a confession is on record, it may be relied on in preference to that part; see *Reg.* v. *Amrita Govinda* (3). Now in the present case we know that although Gania ran to the spot on hearing the victim's cry, he found both Hasnu and Arkia already there. It is, therefore, most unlikely that Hasnu had been following Arkia and only came up after the crime had been committed; also that the earrings had already been made over to Hasnu when Gania arrived. Nor can we believe that Arkia with his master's son-in-law close behind him would have fallen upon Karnia unless he knew for certain that his act was approved. In this connection it has to be remembered that Karnia too had an axe and was not more than 40 years old, also that the medical evidence (Exhibit P 10) shows a great number of blows to have been struck and so favours the hypothesis that the deceased had 2 assailants, not one only. Some weight, too, must be attached to the possession by the appellant of all 3 earrings, though possibly Arkia may have thought such articles would be more safely disposed of by his employer's son-in-law than by himself. The appellant and Arkia had spent the afternoon together cutting down a tree, and so are not likely to have been appreciably apart when both followed Karnia. Each adopts the obvious line of declaring that he lagged behind the other. But we think that the facts all taken together are incompatible with the appellant's story that he had no concern with the murder. If he did not commit it single-handed as alleged by Arkia, he must have joined in planning it and assisted at least by his presence in its commission. In either case we think his conduct to present no such extenuating feature as would justify refusal to confirm the capital sentence passed by the Sessions Judge.

Appeal dismissed.

(1) 25 W. R. 15 Cr.
(2) 25 W. R. 23 Cr.
(3) 10 B. H. C. R. 497 at p. 500.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 334 OF 1919.

May 22, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, Kt.

RAHMAT ALI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Extradition Act (XV of 1903), ss. 9, 18—Extradition of fugitive criminal of Chandernagore—Procedure, summary—Treaties of 1815 and 1876—Extradition proceedings, nature of.

The East Indian possessions of France and Britain are entirely excluded from the Treaty arrangements of 1876. In regard to them the arrangement established between the two countries by the Treaty of 1815 is preserved. Consequently the provisions of Chapter II of the Extradition Act have no application to a fugitive criminal of Chandernagore. In accordance with the terms of the Treaty of 1815 procedure for the extradition from British India of a fugitive criminal of Chandernagore is to be summary and no preliminary enquiry is necessary before his extradition. [p. 149, cols. 1 & 2.]

Extradition on any condition is an invasion of the common law right and when there is a Treaty followed by a Statute recognising the Treaty, the procedure must be in accordance with the Treaty and Statute and no further condition can be imposed by the Courts. [p. 149, col. 2.]

Criminal revision against an order of the Sub-Divisional Magistrate, Serampore, dated the 6th April 1919.

Babu *Manmathanath Mukherji*, for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.

WALMSLEY, J.—This Rule raises an interesting question. It was obtained on behalf of one Rahmat Ali, who says that he is a British subject residing at Tilinipara in the district of Hooghly. The necessary facts are as follows:—

On April 4th a Jamadar of the French Police came tothe Sub-Divisional Magistrate of Serampur with a 'delegation' from the *Juge d' Instruction* at Chandernagore. The

'delegation' directed the Jamadar, or Adjutant de Police, to proceed to Telinipara and, with the assistance of the British Police, to arrest Rahmat Ali on a charge of theft. The Magistrate directed the Sub-Inspector of Bhadreswar to assist in arresting Rahmat Ali, and on April 5 the petitioner was arrested and next day he was produced before the Magistrate who remanded him to custody, and ordered a letter to be written to the Bengal Government asking for an extradition warrant. On April 7th the Magistrate wrote a letter to the Bengal Government reporting that the Police had arrested one Rahmat Ali on the requisition of the French authorities at Chandernagore, and saying that the man would be handed over to the French authorities on receipt of the formal sanction of Government to his extradition. On April 8th the Administrator of Chandernagore wrote to the Government of Bengal enclosing a warrant of arrest issued by the *Juge d' Instruction* against Rahmat Ali and two others, and asking for their extradition.

'On April 14th the Bengal Government sent a copy of the Administrator's letter with the warrant to the District Magistrate of Hooghly, directing him to take the necessary steps for arresting Rahmat Ali and making him over to the authorities at French Chandernagore under proper escort. This letter was forwarded to the Sub-Divisional Magistrate of Serampore on April 17th. By that time the petitioner had again been remanded to custody, and the date fixed for his production was April 29th. On April 22nd this Rule was issued by us, and in the meantime the petitioner was released on bail under the orders of the Sessions Judge.

The present position then is that the petitioner has been arrested but released on bail, and that the Government of Bengal has directed the Magistrate of Hooghly to make over the petitioner to the French authorities.

It was urged before us that the procedure was not in accordance with the provisions of Act XV of 1903, in particular because there was no enquiry held by the Magistrate of Serampore.

'Cause has been shown by the Sub-Divisional Magistrate in a letter, and by Mr. Orr, verbally, on behalf of the Crown. Unfortunately, they do not take up the same line of reasoning. The learned Magistrate contends that his procedure is in accordance with sections 3 and 4 of the Act, while Mr. Orr says that those sections are not applicable to the circumstances.

It will be convenient to deal first with Mr. Orr's arguments, for, if he is right, it will not be necessary to consider the Magistrate's explanation. His argument is based on the first five paragraphs of part I of Mr. Muddiman's book on "The Law of Extradition from and to British India." It is as follows:—A Foreign State as defined by the Indian Extradition Act means a State to which, for the time being, the Extradition Acts 1870 and 1873 apply. Those Acts may be made applicable, by an order in Council, to any State with which an arrangement has been made with respect to the surrender to such State of any fugitive criminals. Such an arrangement was made with France by the Treaty of 1876, and an Order of Council, dated May 16th, 1878, made the Extradition Acts applicable to France. France is, therefore, a Foreign State. But it is argued that the East Indian possessions of France are not a Foreign State because a Treaty was made in regard to them in 1815, and in the Treaty of 1876 there was a clause excluding them from the operation of the later Treaty. The saving clause is the last clause of Article XVI of the Treaty. Mr. Orr urges, in accordance with Mr. Muddiman's view, that the effect of that clause is to place the French possessions in British India entirely outside the Treaty of 1876. The same view is expressed by Sir Francis Piggot at page 187 of his work on Extradition, where he says: "In the Treaty with France, the arrangement established in the East Indian possessions of the two countries by the Treaty of 1815 is preserved." I think that an examination of the Treaty of 1876 shows that view to be correct. Article 1 sets out that the High Contracting Parties make an engagement; then follows an exception for native born and naturalised citizens, then an enumeration of extraditable offences, then a stipulation as to the fugitive being tried for the offence in respect of which he has been surrendered,

and then a saving as to political offences. Beginning with Article VI is a series of articles as to the manner in which the extradition shall take place, first on the part of the French Government in France, and then in the dominions of Her Brittanic Majesty, other than the Colonies or Foreign Possessions of Her Majesty. Then Article XVI deals with the manner of proceeding in the Colonies and Foreign Possessions of the two High Contracting Parties, and Consuls and Governors are substituted for Ambassadors and Ministers, but the methods are to be, as nearly as possible, according to the provisions set out in the earlier articles. The last clause of that article, however, runs: "The foregoing stipulations shall not in any way affect the arrangements established in the East Indian possessions of the two countries by the IXth Article of the Treaty of the 7th March 1815."

We have been asked to hold that the meaning of this clause is nothing more than that the reference to the Chief Consular Officer shall not apply in the case of the East Indian Possessions of the two countries. Such a construction is opposed to the plain meaning of the words, and I have no doubt that by that last clause in Article XVI the East Indian Possessions of the two countries are entirely excluded from the Treaty arrangements of 1876.

That being so, the provisions of Chapter II of the Extradition Act have no application here, and we have to turn to Chapter III. Sections 7, 8, 8A contemplate States where there is a Political Agent and therefore cannot apply to Franch Chandernagore. The ninth section, however, is general, it directs that a requisition from a non-Foreign State shall be dealt with in the same manner as a requisition from a Foreign State. This direction seems to obliterate the difference between Foreign and non-Foreign States, but section 18 lays down that nothing in this chapter shall derogate from the provisions of any Treaty for the extradition of offenders, and the procedure provided by any such Treaty shall be followed in any case to which it applies, and the provisions of this Act shall be modified accordingly. The question then is whether Article IX of the Treaty of 1815 is of such a nature as to exclude the East Indian Possessions from the scope of section 9. It is true that the Article has none of the detail to be found in the Treaty of 1876, but that I have no doubts is to be explained by the fact that the two Governments did not intend the procedure to be elaborate; the words are 'shall be delivered up' on the part of the British Government, 'shall be delivered up on demand being made' upon the part of the French Government. I think these words clearly mean that the procedure was to be summary. A comparison of the words in the Treaty of 1815 with the words used in the Treaty of 1802 concluded between Great Britain and France confirms this view, for in the Treaty of 1802 provision is made for a preliminary enquiry on the part of the authorities of the country where the fugitive is residing, and this fact warrants the inference that the omission to provide for such an enquiry in the Treaty of 1815 was intentional. The reasons for a difference in procedure are too obvious to need mentioning. In my opinion, therefore, the procedure that has been adopted in the present instance is in accordance with the terms of the Treaty of 1815. In this view it is unnecessary to deal with the explanation furnished by the Magistrate.

An argument was advanced that even if we hold that extradition proceedings with Chandernagore are governed by the Treaty of 1815, the subject has a right at common law to a preliminary enquiry before surrender. I think this view is fallacious. Extradition under any condition is an invasion of the common law right, and when there is a treaty, followed by a Statute recognising the Treaty, the procedure must be in accordance with the Treaty and Statute and no further condition can be imposed by the Courts.

I think, therefore, that the Rule should be discharged.

SHAMSUL HUDA, J.—I agree

Rule discharged.

LACHMI NARAIN v. EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION No. 120 OF 1919.

May 2, 1919.

Present:—Mr. Justice Das.

LACHMI NARAIN AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 103, 190 (1) (a), 200, 537—Search without witnesses, validity of—Complaint, cognisance of—Complainant, failure to examine, whether illegality—Irregularities in procedure—Prejudice to accused—Burden of proof—Opium Act (I of 1878), ss. 9 (c), 14, 20—Illegal possession of opium—Search after sunset without witnesses, validity of—Failure to forward opium seized to nearest Police station, effect of.

A Sub-Inspector of Excise entered the premises of the accused after sunset where he suspected contraband opium had been secreted; after entering the premises he sent for two search witnesses. A search was made and some opium was found. The Sub-Inspector thereupon arrested the accused and took him to the Police station, but conducted the investigation himself and retained the opium found on the premises, which he produced in Court when he made his statement. He submitted a report and charge sheet, and the Deputy Magistrate of the District took cognizance of the case, treating the report of the Excise Sub-Inspector as a Police report, and convicted the accused under section 9 (*c*) of the Opium Act. On appeal the Sessions Judge upheld the conviction, pointing out that the Excise Sub-Inspector's report was wrongly treated by the Magistrate as a Police report, and that he must have taken cognizance of the case under section 190 (1) (*a*) of the Criminal Procedure Code. The accused moved the High Court on revision:

Held, (1) that the proceedings before the Magistrate were irregular, inasmuch as he was not properly in seizin of the case—there was no regular complaint before him, and, even if there was, his omission to examine the complainant on oath as required by section 200 of the Code of Criminal Procedure was an illegality which vitiated the proceedings. [p. 151, col. 1.]

(2) that apart from the foregoing, the conviction could not be maintained by reason of the following serious irregularities committed by the Excise Sub-Inspector, namely:—

(*a*) his entry of the premises after sunset in contravention of section 14 of the Opium Act; [p. 151, col. 2.]

(*b*) his entry of the premises without search witnesses in disregard of section 103 of the Criminal Procedure Code; [p. 151, col 2.]

(*c*) his keeping the investigation in his own hands and not delivering up the opium found to the nearest Police station, in spite of the peremptory provisions of section 20 of the Opium Act. [p. 152, col. 1.]

Where proceedings bristle with irregularities, it is for the prosecution to show that the accused was not prejudiced thereby. [p. 151, col. 2.]

Criminal revision against the order of the Sessions Judge, Patna, dismissing the appeal of the petitioners against the order of the Deputy Magistrate in charge of the Patna City, convicting the petitioners under section 9 (*c*) of the Opium Act.

Messrs. *Younus*, *P. S. Varma* and *Rajendra Prasad*, for the Petitioners.

The Government Pleader, for the Opposite Party.

JUDGMENT.—The petitioners have been convicted under section 9 (*c*) of Act I of 1878 by the Deputy Magistrate in charge of Patna City and sentenced to undergo rigorous imprisonment for six months. The appeal to the learned Sessions Judge of Patna was dismissed. Shortly stated the facts are as follows:—

On the 27th October 1918, Tirbeni, who is an Excise Sub-Inspector, happened to pass an opium shop in which the petitioners served as salesmen. He entered the shop, checked the opium and found that the opium in the premises tallied with the account-books. He says that he had some suspicion that there might be opium in an adjoining house and in company with another Sub Inspector, who happened to come on the scene, he entered the adjoining house and then sent the other Sub-Inspector, whose name is Waraeat Hussain, to get two search witnesses, and then they went to a particular room, found five cakes of opium weighing two Seers six Chbataks, and arrested one of the petitioners Lachmi Narayan, the other petitioner Paras Singh having run away. He took Lachmi Narain to the Police station, but conducted the investigation himself and submitted a report and a charge sheet upon which the learned Deputy Magistrate took cognizance.

The first question that has been argued before me is that the learned Deputy Magistrate was not properly in seizin of the case. As I have mentioned before, the prosecution was started on the report of Tirbeni and the learned Magistrate expressly states that he took cognizance on the report of Tirbeni, treating that report as a Police report.

This is wrong, as the learned Sessions Judge in his appellate judgment points out. But the learned Sessions Judge, making entirely a new case on behalf of the learned

Deputy Magistrate, says that he must have taken cognizance under section 190 (1) (*a*) of the Code of Criminal Procedure. But it appears that if the Deputy Magistrate took cognizance of this case under section 190 (1) (*a*) of the Code, he did not in fact examine the complainant as, in my opinion, he was bound to do under section 200 of the Code. It has been urged before me by the learned Government Pleader that omission to examine the complainant on oath is a mere irregularity which does not vitiate the subsequent criminal proceedings. I have dealt with this identical point this morning in *Mangu Koeri* v. *Emperor* (1) (Criminal Revision No. 88 of 1919), and I have come to the conclusion that the examination of the complainant on oath is not a mere formality, but a condition precedent which must be strictly complied with. In my opinion the filing of a petition of complaint is the act of the party, and it is incumbent on the Magistrate to show in some way that he intends to proceed with the matter, and the only way in which he can express that intention is by examining the complainant on oath. If authority is needed for the proposition, it will be found in the latest decision of this Court reported as *Jhuna Lal Sahu* v. *Emperor* (2). As a single Judge I am bound by the decision of this Court and agreeing with that decision I hold that the learned Deputy Magistrate was not properly in seizin of the case and that, therefore, all proceedings must be set aside.

But I do not rest my judgment on my view of law in this matter, because I am clearly of opinion that on facts there should not have been a conviction. The whole case must rest upon the evidence of the two Excise Sub-Inspectors, and it has been shown that they have been guilty of a series of irregularities which, in my judgment, have seriously prejudiced the petitioners. The whole judgment of the learned Sessions Judge is as serious an indictment of the methods adopted by Tirbeni as I have seen in the course of my experience and for the reasons which I shall presently give, it was, in my opinion, for the prosecution to show that having regard to the serious irregularities the accused were not prejudiced and that it was not for the accused to show that they were prejudiced.

In the first place, in contravention of the provisions of section 14 of the Opium Act the Sub-Inspector entered the premises after sunset, which he had no right to do. In the second place, in contravention of section 103 of the Criminal Procedure Code he entered the premises without any search witnesses. The learned Sessions Judge himself says that unless the accused can show how he has been prejudiced by these irregularities, the conviction should stand. In my opinion these are statutory safeguards for the protection of accused persons so that it may not be in the power of Excise Officers or, for the matter of that, in the power of Police Officers to smuggle an article into a house and bolster up a false case against the persons with whom they may be on terms of enmity. It is with some object that the Legislature has provided the safeguards and when they are deliberately broken it is, in my opinion, not for the accused to show that they have been prejudiced. The prejudice is, in my opinion, on the face of the record. They should not have entered the premises without search witnesses, the object being that it may not be in their power to smuggle articles into the house and bolster up a false case against them.

But I am not setting aside the conviction on this technical ground. I have got to examine whether the evidence on which the petitioners have been convicted is evidence which should have been relied upon by the Courts below. No doubt they have been guilty of very serious irregularities, as I have mentioned above, but that is not all. Section 20 of the Opium Act provides that "Every person arrested, and thing seized, under section 14 or section 15, shall be forwarded without delay to the officer in charge of the nearest Police station; and every person arrested and thing seized under section 19 shall be forwarded without delay to the officer by whom the warrant was issued.

"Every officer to whom any person or thing is forwarded under this section shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or thing". The provision as contained in section 20 of the Opium

(1) 51 Ind. Cas. 465; 20 Cr. L. J. 481.
(2) 41 Ind. Cas. 1002; 2 P. L. J. 657; 2 P. L. W. 152; 18 Cr. L. J. 890.

Act is peremptory and it gave no option to the Excise Sub-Inspector to keep investigation in his own hand, or to keep the things seized in his custody. The object of the section is plain. The object is that it may not be in his power to produce false evidence afterwards against the accused persons. But in this case he did not forward the opium seized to the nearest Police station either without delay or at all. He did not produce the opium seized until he gave his evidence in Court. Nor is this all. He kept investigation in his own hand, took a recognition bond from Lachmi Narain, whom he arrested, and which recognition bond contained a full confession of the guilt of Lachmi Narain. It has been found by the Court below that the thumb impression purporting to be the thumb impression of Lachmi Narain in the recognition bond in fact is not his thumb impression. The conclusion is that the document has been forged by somebody and as it has been produced by Tirbeni for the purpose of securing the conviction of the petitioners, very grave suspicion must attach to the part played by Tirbeni in the matter of arrest of the petitioners.

And yet the petitioners have been convicted on an admission alleged to have been made by Lachmi Narain to Tirbeni. It seems to me that it is impossible to rely upon the evidence of Tirbeni, having regard to the fact that the learned Sessions Judge has himself recorded a finding that the document produced by Tirbeni is not the document to which Lachmi Narain affixed his thumb impression. That being so, in my opinion the conviction must fail, both on facts and on law.

I would, therefore, set aside the conviction and the sentence passed on the petitioners.

Sentence set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 37 OF 1919.

April 9, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

BALKARAN SINGH AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR THROUGH SHEOAMBER KHAN AND ANOTHER—COMPLAINANTS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 423—Appeal—Appellant, absence of, effect of—Procedure—Appellate Court, duty of.

In dealing with the petition of appeal of a person convicted of a criminal offence, the Appellate Court is bound, in all cases where the appellant is not represented personally or by Pleader, to peruse the petition of appeal and the copy of the judgment accompanying it, and determine upon such perusal whether the appeal should be admitted or summarily rejected, and if the appeal is admitted, to consider whether there is any ground for interfering with the conviction or sentence It is illegal to record an order dismissing an appeal "in default," as such an order is not contemplated by the provisions of section 423 of the Criminal Procedure Code. [p. 153, col. 1.]

Criminal revision against the order of the District Magistrate, Partabgarh, dated the 18th December 1918, upholding that of the Magistrate, 3rd Class, Partabgarh, dated the 6th November 1918.

Babu *Rudra Datt Sinha*, for the Applicants.

Syed *Ali Muhammad* holding brief of the Government Pleader, for the Crown.

JUDGMENT.—The accused-applicants were charged in this case for committing offences under sections 426 and 447 of the Indian Penal Code. The trying Magistrate convicted them. They appealed to the District Magistrate, who, without saying whether the appeal was admitted or not, directed notice to issue to the complainants and fixed the 18th December 1918 for the hearing of the appeal, at a place called Ram Ganj. The appeal was, however, taken up for hearing at a place called Saifabad, which is about four miles from Ram Ganj. The accused persons were not present there and were not represented. The complainants were present. The learned District Magistrate, without considering the petition of appeal or the judgment of the trial Court, dismissed the appeal "in default." On the next day he was

moved to restore the appeal but he refused to re-hear the appeal, observing that as a matter of fact he had reason to believe that the accused persons were present in Saifabad on the previous afternoon and that they were not represented because they did not pay their Pleader his full fee.

It does not appear whether the statement that the accused persons were present on the previous day in Saifabad is based on a surmise or on an allegation made by the complainants or some one else. There is no evidence on the record to show that the accused persons had deliberately absented themselves. In any case even if the accused persons were absent, it was the duty of the learned District Magistrate to have considered the petition of appeal and the judgment of the trying Court and to have either summarily rejected the appeal, if it had not till then been admitted, in case that was his view, or to have gone into the evidence and considered the case on the merits. His order merely states that the appeal was dismissed for default. But such an order is not contemplated by section 423 of the Code of Criminal Procedure.

As pointed out in *Koura* v. *Queen-Empress* (1) and *Queen-Empress* v. *Pohpi* (2), the Appellate Court is bound in all cases, where the appellant is not represented personally or by Pleader, to peruse the petition of appeal and the copy of judgment accompanying it and determine upon such perusal whether the appeal is to be admitted or summarily rejected, and if it decides to admit the appeal, to consider whether there is any ground for interfering with the conviction or sentence. As the order of the learned District Magistrate does not indicate that this had been done, this application is allowed and the case sent back to the Court below with a direction to restore the appeal under its original number and to dispose of it after hearing the Counsel for the accused or the accused, if they appear, in the manner required by law.

Revision accepted;
Case sent back.

(1) 21 P. R. 1895 Cr.
(2) 13 A. 171 (F. B.); A. W. N. (1891) 48; 7 Ind. Dec. (N. S.) 107.

PATNA HIGH COURT.
CRIMINAL REVISION No. 171 OF 1919.
July 3, 1919.
Present:—Mr. Justice Coutts and
Mr. Justice Adami.
LALU PANDIT AND ANOTHER—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Opium Act (I of 1878), ss 9 (c), (e), 14—Illegality in exercise of right of search, whether invalidates conviction.

Mere illegality in the exercise of the right of search under the Opium Act is not in itself a sufficient ground for setting aside a conviction under the Act. [p. 154, col. 2; p. 155, col. 1.]

Criminal revision against the order of the Sessions Judge, Muzafferpur, dated the 27th May 1919, affirming in appeal the conviction of the petitioners by the Deputy Magistrate, Motihari, under section 9 (*c*), (*e*) of the Opium Act I of 1878, by his order dated the 21st March 1919.

FACTS.—This case was originally heard by Atkinson, J., who in view of the decision of Das, J., in Criminal Revision No. 120 of 1919 *Lachmi Narain* v *Emperor* (1)] referred the case to the Divisional Bench by the following order, which fully states the facts: "The petitioners in this application in criminal revision were convicted of offences under section 9, sub-sections (*c*), (*e*) of the Opium Act of 1878. The learned Deputy Magistrate of Motihari, Mr. Ritchie, convicted both the accused and sentenced them to one year's rigorous imprisonment coupled with a fine of Rs. 200 each. The order of Mr. Ritchie was dated the 22nd March 1919.

The accused appealed and the appeal came before the learned Sessions Judge of Muzafferpur. The learned Sessions Judge affirmed the conviction of both the accused and imposed a sentence of three months' rigorous imprisonment upon each of the accused and a fine of Rs. 200 upon the petitioner Lalu Pandit and a fine of Rs. 25 upon the petitioner Ali Raza.

When Mr. Justice Jawala Prasad and myself were sitting as the Criminal Bench of this Court, we allowed notice to issue on the petitioners' petition herein for the purpose of showing cause why the order of the learned Sessions Judge in appeal should not be set aside, and the ground on which we were pleased to allow notice to issue

(1) 53 Ind. Cas. 150.

was because it was stated to us that the provisions of section 14 of the Opium Act of 1878 had not been complied with by the authorities charged with the duty of enforcing the provisions of the Opium Act and that the search contemplated by section 14 of the Opium Act had not been duly and regularly made in accordance with the requirements of the Act, inasmuch as the search that was made in this particular case was effected at hours other than between sunrise and sunset; and consequently we were of opinion, having regard to the ruling of my learned brother Das, J., in Criminal Revision No. 120 of 1919 [*Lachmi Narain* v. *Emperor* (1)] that notice should issue for the purpose of testing the validity of the conviction of the accused.

Had it not been for the decision of my learned brother Das, J., I would have little hesitation in disposing of this case myself but out of respect for the authority which I entertain for the opinion of my brother Das, J., I think it desirable that this case should be disposed of by a Division Bench of this Court.

Mr. Justice Das laid down, in the criminal revision application to which I have referred, that if the authorities charged with administration of the Opium Act are guilty of any illegality in exercise of the right of search conferred upon them by the provisions of section 14 of the Opium Act that such illegality *per se* renders it impossible, as a proposition of law, to bring an offender against the provisions of the Opium Act to justice in respect of a crime committed and substantiated by clear and convincing evidence *aliunde*, and that in such case, and in such event, the accused must be acquitted of the established crime which he has committed.

I cannot subscribe to the expression of this *dictum*, as a proposition of law, laid down by my learned brother and it seems to me to be in conflict with general legal principles and with the established current of recent authority in this country.

The rulings reported as *Emperor* v. *Allahdad Khan* (2), *Emperor* v. *Madho Dhobi* (3) and *Emperor* v. *Ravalu Kasigadu* (4) lead to the conclusion that mere illegality committed in the exercise of a right of search does not of necessity destroy the fact of criminality, if a crime be proved otherwise to have been committed by a person against whom a crime is charged under the Opium Act or any kindred Act.

If the right of search be illegally performed and executed, this may constitute a civil injury for which damages may be recovered, but it cannot, in my opinion, wholly destroy or render nugatory the act or fact of criminality if a crime be otherwise proved to have been committed.

In my opinion it is, therefore, desirable that the law should be conclusively decided and settled on this point in this Province, and consequently at the wish of the parties I transfer this case to be decided by the appropriate Bench of this Court".

Mr. *S. P. Varma*, for the Petitioner.

Mr. *Sultan Ahmad*, Government Advocate, for the Crown.

JUDGMENT.

COUTTS, J.—This is an application in revision by two persons Lalu Pandit and Ali Raza, who have been convicted of offences under section 9, sub-sections (*c*) and (*e*) of the Opium Act, Act I of 1878, and sentenced respectively to three months' rigorous imprisonment and a fine of Rs. 200, or in default one month's further rigorous imprisonment and three months' rigorous imprisonment and a fine of Rs. 25, or in default two weeks' rigorous imprisonment.

The only point which is urged before us is that the conviction is illegal because the provisions of section 14 of the Opium Act have not been complied with in this case, and reliance is placed upon an expression of opinion by Mr. Justice Das in an unreported* case in this Court. On examining this judgment, however, it appears that this is not the basis of Mr. Justice Das' decision and the decisions of other High Courts in India appear to be against the contention of the learned Counsel for the petitioners. The matter has been fully considered in *Emperor* v. *Allahdad Khan* (2), *Emperor* v. *Madho Dhobi* (3), *Emperor* v. *Ravalu Kesigadu* (4) and *Emperor* v. *Vinayak Damodar Savarkar* (5), and these decisions are clear authority for the view that mere

(2) 19 Ind. Cas. 332; 35 A. 358; 11 A. L. J. 442; 14 Cr. L. J. 236.

(3) 31 C. 557; 7 C. W. N. 661; 1 Cr. L. J. 535.

(4) 26 M. 124; 1 Weir 630.

(5) 10 Ind. Cas. 956; 35 B. 225; 13 Bom. L. R. 296; 12 Cr. L. J. 356.

*See *Lachmi Narain* v. *Emperor*, 53 Ind. Cas. 150.—*Ed.*

illegality in the exercise of the right of search is not in itself sufficient ground for setting aside a conviction.

We have been asked to consider the question of sentence. In my opinion the sentence in neither case is excessive. I would, therefore, reject this application.

ADAMI, J.—I agree.

Application rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 115 OF 1915.

July 13, 1915.

Present:—Sir Henry Drake-Brockman, KT., J. C.

GULZARSHA FAKIR—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Conviction—Proof—Moral conviction, whether sufficient.

A finding based on a theory not merely unsupported by, but opposed to, the direct evidence available is bad in law. Similarly a moral conviction of guilt is no sufficient foundation for a verdict of guilty, unless it is based on substantial facts which lead to no other reasonable conclusion than that the person charged is guilty. [p. 156, cols. 1 & 2]

Queen v. *Sorob Roy*, 5 W. R 28 Cr, approved.

Appeal from the judgment of the Additional Sessions Judge, Wardha, dated the 24th May 1915, in Sessions Trial No. 13 of 1915.

JUDGMENT.—The appellant Gulzar Shah, a Mahomedan aged about 40, along with Godria Kunbi, aged about 20, was tried by the Additional Sessions Judge, Wardha, on a charge of raping Kisni Loharin, aged 25 years. Both were acquitted of that charge, but the appellant alone was convicted of having indecently assaulted Kisni with intent to outrage her modesty and sentenced under section 354, Indian Penal Code, to rigorous imprisonment for six months.

In an exhaustive judgment the learned Judge has given convincing reasons for holding that Kisni's story is untrue. Both the assessors held the same view, and further gave it as their opinion that no indecent assault was committed. In convicting the appellant under section 354 the Additional Sessions Judge has been greatly influenced by the difficulty of explaining, in the defence set up, how an entirely false story came to be told by Kisni to the constable at her village the same night and again to the Sub-Inspector next day at noon.

There can be no doubt that Kisni started from Alipur on the evening of Saturday the 20th March last. She sat with the appellant in his cart while Godria drove. Her account of how she came to do this has been rightly disbelieved. As to Gulzar there is perfectly credible evidence to support his story that his own object was to bring *kutar* from Eranwari, a village 2 miles from Alipur. Eranwari containe a shrine of the goddess Debi, and Gulzar says that Kisni took a lift in his cart to go there. No evidence whatever is forthcoming to show that Kisni reached Eranwari that evening. On the other hand, Walia Khatik and Aba Simpi (P. Ws. Nos. 3 and 2) support Kisni in her story that she returned to Alipur with them from a spot only 1¼ miles from that village. Aba went to that spot on hearing a woman's cry for help, but saw no act amounting to an offence being committed: both Kisni and Gulzar were arranging their clothes and the former alleged that Gulzar had dishonoured her *majhi izzat ghetli*: whereupon he scolded Gulzar, who without speaking got in to his cart and drove on with Godria towards Eranwari. Walia professes to have seen Gulzar on Kisni, but on this point he is undoubtedly lying: according to him Aba on coming up said nothing to anyone and Gulzar drove off at once towards Eranwari. Neither man lends any support to Kisni's allegation that Godria held her hand while Gulzar had connection with her.

The Additional Sessions Judge has believed Aba's evidence in the main. Nevertheless he has come to a conclusion as to what happened in the cart, which is not supported by Aba's account of how Kisni described the incident immediately after its occurrence. According to that account Gulzar dragged Kisni out of the cart. The learned Judge's finding is:—

"Gulzar began taking liberties with Kisni. She resented it, not because her morals were all correct or because she

was unaccustomed to such treatment, but because there was another man in the cart. Even depraved women have the ideas of decency. Gulzar, knowing her past history, did not expect an opposition from her and counted too much upon her loose character. Kisni, not liking the liberties which Gulzar was taking, got down. He too got down after her and began to lay his hands on her. She raised a cry and Walia and Aba arrived. Gulzar does not appear to have done anything more than this or gone beyond an ordinary indecent assault."

Now even Kisni herself did not suggest at the trial that any liberty was taken with her in the cart beyond preventing her from getting out. She deposed that she jumped out and was followed by Gulzar. That any violence was used or impropriety attempted in the cart seems to me most improbable, in view of the fact found by the Judge that Godria was there and that by mere accident, not by design connected with any evil intention of Gulzar towards Kisni. If a finding not supported by positive evidence is to be adopted, it may very plausibly be urged that Walia, in his search for his lost sheep, came suddenly on Kisni and Gulzar in a compromising position and that Kisni invented her story to excuse herself. That Walia and Kisni are anything but strangers to each other is shown by Aba and believed by the Additional Sessions Judge

Having given all the evidence my careful consideration, I conclude that it would be unsafe to uphold the conviction under section 354, Indian Penal Code, based as it is on a theory not merely unsupported by, but opposed to, the direct evidence available. The Additional Sessions Judge seems to have acted upon moral conviction that the appellant must have done something improper and thus to have been led into punishing him for a definite offence without being really able to indicate a definite act established by satisfactory evidence and constituting that offence. As remarked by Macpherson and Glover, JJ., in *Queen* v. *Sorob Roy* (1), a moral conviction of guilt is no sufficient foundation for a verdict of guilty, unless it is based on substantial facts which lead to no other reasonable conclusion than that the person charged is guilty.

The appellant is accordingly acquitted, and will forthwith be set at liberty.

Appeal allowed.

(1) 5 W. R. 28 Cr.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 66 OF 1919.

June 25, 1919.

Present :—Pandit Kanhaya Lal, J. C.

RAMESHWAR TEWARI—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Defence witnesses, credibility of—Insinuation as to relation with accused unsupported by record, value of—Court, duty of.

The mere fact that some of the witnesses for the defence are fellow-castemen of the accused is no ground for discrediting their evidence. [p. 158, col.1.]

A Court ought not to permit the making of insinuations by the Police as to the defence witnesses being related to the accused, especially when there is nothing on the record to support such insinuation, and the witnesses have not been questioned with reference thereto. [p. 158, col 1.]

Application against the order of the District Magistrate, Sultanpur, dated the 24th February 1919, upholding that of the Deputy Magistrate, 1st Class, Sultanpur, dated the 15th November 1919.

Mr. *A. P. Sen*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—The applicant, Rameshar, has been bound over to be of good behaviour for a period of one year under section 110 of the Code of Criminal Procedure.

The charge against him is that he habitually commits thefts and house-breaking. He has had no previous conviction. His history sheet was started in 1913 but was closed soon afterwards.

In July 1917 the brother and the uncle of Rameshar filed a complaint against two constables, stating that the said constables had come to their house to enquire where Rameshar was and that on their telling them that he had gone to another village they abused them, tied their hands behind their backs and took them to the Police station under confinement. This charge was subsequently

withdrawn. The history sheet of Rameshar was started afresh three months before the present trial began. On the 12th September 1918 he was arrested under section 55 of the Code of Criminal Procedure. On the next day he was produced before the Sub-Divisional Magistrate, who, acting on a report made by the Police, passed an order under section 112 of the Code of Criminal Procedure requiring him to show cause why he should not be bound over to be of good behaviour for a period of one year. No time was allowed to him to show cause against the proceeding or to make an adequate arrangement for his defence. The trial began at once with the examination of the Sub-Inspector and was continued on the next day at a place where the Magistrate was in camp, when the remaining witnesses for the prosecution were examined. The Pleader for Rameshar was, however, unable to be present and, beyond such questions as the applicant had himself chosen to put, no proper cross-examination of those witnesses took place. A date was then fixed for the examination of the witnesses for the defence.

Meanwhile, Jokhan stood surety for the appearance of the applicant, who was thereupon released from custody. On the 24th September 1918 the applicant was asked by the District Magistrate whether he was willing to be recruited for field service and told that if he was ready, the case would be withdrawn. But the applicant refused to go. On the same day Jokhan filed an application withdrawing his suretyship. The applicant was thereupon remanded to custody and the prosecution directed to proceed. Dwarka Dube subsequently offered to stand bail for the applicant. His surety bond was accepted and the applicant was released, but about a month later Dwarka also withdrew his bail and the applicant was again remanded to custody. On the same day another person named Babu Chaube offered to stand bail for the applicant. He too withdrew a week later. Rae Shambhu Nath, the Sub-Government Pleader of Sultanpur, then offered to stand bail for him and he was released.

The learned Counsel for the applicant has referred to these incidents to show how far his client was hampered in his defence. In fact he suggests that the witnesses for the prosecution, who were examined on the 14th September 1918, were examined in the morning, so that it was not possible for the Pleader for the accused to have been present at the time of the examination of those witnesses. The evidence for the prosecution was completed within a day of the service of the notice.

Except Khunkhun Tewari, not one of the witnesses produced for the prosecution is a resident of Gobindpur where the applicant resides. There has been an ill-feeling for some time between the applicant and Khunkhun Tewari. A theft was committed at the house of Khunkhun in Magh last, of which a report was made to the Police. Khunkhun suspected the applicant. The house of the applicant was searched but nothing incriminating was found. The applicant stated that he had been named out of enmity and asked for the prosecution of Khunkhun under sections 182/211 of the Indian Penal Code, but his application was disallowed. Khunkhun now states that his wife had seen her stolen box being burnt in the house of *Musammat* Ramjhari and that the applicant was present in her house at the time But his wife has not been produced and no value can be attached to his statement.

The other witnesses for the prosecution are residents of other villages. Their evidence is of little value, when it is remembered that the witnesses belonging to the village tell a different tale, and the Police had decided to close the history sheet of Rameshar as far back as 1914, shortly after it was opened. Balli, a cultivator of Gobindpur and a co-sharer in Muhammadpur, states that he lived at the distance of one *bigha* from the house of the applicant and knew him from 20 or 25 years, that he cultivated land and had three ploughs and that his character was good. Sarju Prasad, the headman of Gobindpur, deposes that the applicant cultivated land and had three ploughs and was of good character, that he heard no complaints against him and that the Sub-Inspector made no enquiry into the village about his character. Bhaudat, another cultivator of the village paying Rs. 100 per year, similarly gives the applicant a good character. Sampat Lal, the Patwari of the village, says the same. Bisheshar, Ramrup and Kanhaiya, co-sharers of Gobindpur, depose that the applicant was of good character and

that they never heard any complaints against him. Three residents of adjoining villages, one of whom pays a land-revenue of Rs. 150 per year, give similar evidence.

The Circle-Inspector told the District Magistrate that six of the defence witnesses were related to the applicant, but it does not appear whether his statement was based on personal knowledge or on a result of an enquiry made privately by him. If it was based on the latter, it is surprising that no question was put with reference thereto to the witnesses when they were under cross-examination. He further stated that the applicant helped several influential Kayasthas in the Zamindari affairs, in consequence of which pressure was brought to bear upon Sarju Prasad, the headman of Gobindpur, who was a Kayastha himself, to give evidence in support of the defence, but no question was put to the Patwari to ascertain how many Kayastha Zamindars were there in the village and a general insinuation of that character ought not to have been allowed to be introduced into the evidence, particularly during the hearing of the appeal, based not on personal knowledge but on the enquiries which the witness is alleged to have made. As pointed out in *Miharban Singh* v. *Emperor*(1) and *Gur Bakhsh Singh* v. *Emperor* (2), the evidence of persons produced in defence is not to be discredited merely because some of the witnesses produced are fellow-castemen of the accused. There is nothing to show that they were related to the applicant. The circumstances in which the history sheet of the applicant was re opened before the trial began may have had no connection with the offer made to the applicant during the course of the trial that the prosecution would be withdrawn, if he was willing to be recruited for field service. But the evidence adduced for the prosecution is far from convincing and no sufficient ground for taking proceeding under section 110 of the Code of Criminal Procedure has been made out.

The application is, therefore, allowed, the order of the Courts below is set aside and the security bond filed, if any, will be discharged.

Application allowed.

(1) 31 Ind. Cas. 821; 13 A. L. J. 1046 at p. 1048; 16 Cr. L. J. 805.

(2) 12 Ind. Cas. 518 at p. 520; 12 Cr. L. J. 542.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 419 OF 1919.

August 6, 1919.

Present:—Mr. Justice Wallach

SHEO SAHAI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 117 (4) —Joint enquiry, whether permissible—Prejudice to accused.

Although in cases of joint inquiries there is a danger of one accused being prejudiced through the evidence against another, which does not directly affect him, being on the record, the law nevertheless allows joint inquiries under section 117, clause (4), of the Criminal Procedure Code.

Criminal revision from an order of the District Magistrate, Fatehpur, dated the 17th June 1919.

Mr. *S. C. Mukerji*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application by one Sheo Sahai for revision of an order of a Magistrate of the first class binding him over under section 110 of the Code of Criminal Procedure. The order was upheld in appeal by the District Magistrate of Fatehpur. The learned Advocate for the petitioner complains that his client has been tried jointly with one Attal Singh; that legally no case has been made out under section 117, clause 4, of the Code of Criminal Procedure justifying such joint trial, as it has not been shown that Attal Singh and the petitioner have been associated together in the matter under enquiry. It is further argued that even if on a strictly technical interpretation of the section the joint trial was legal, nevertheless the applicant has been greatly prejudiced in consequence of the evidence of five witnesses who gave evidence against Attal Singh alone. It is quite true, as Mr. Satya Chandra Mukerji remarks, that in cases of joint enquiry there is danger of one accused being prejudiced through the evidence against another accused, which does not directly affect him, being on the record. The law, however, does allow joint trial under section 117, clause 4, of the Code of Criminal Procedure, and I am not prepared to say that the trial Court and the District Magistrate were wrong in their appreciation of the evidence before them. I, therefore, dismiss this application.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 134 OF 1915.

August 31, 1915.

Present:—Mr. Batten, A. J. C.

HARISING—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 234, 236, 237—Offences of same kind, what are—Joint trial of offences, when permissible—Penal Code (Act XLV of 1860), ss. 379, 380.

It is illegal, with reference to section 234 of the Criminal Procedure Code, to charge a person in the same trial and convict him in the same trial of two offences not of the same kind, as *e. g*, one under section 379 and the other under section 380 of the Penal Code [p. 159, col. 2.]

Under clause (2) of section 234 of the Code offences are of the same kind when they are punishable with the same amount of punishment under the same section and where this is not the case, neither section 236 nor section 237 can be read with section 234 of the Code. [p. 159, cols. 1 & 2.]

Bal Gangadhar Tilak, In re, 2 Ind. Cas. 277; 33 B. 221; 10 Bom. L. R. 973; 4 M. L. T. 45; 9 Cr. L. J. 226, distinguished.

Emperor v. *Bisahu Panka*, 15 C. P. L. R. 53 Cr. and *Subrahmania Ayyar* v. *Emperor*, 25 M. 61; 5 C. W. N. 866; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 8 Sar. P. C. J. 160; 2 Weir 271, followed.

Appeal from the judgment and finding of the District Magistrate of Narsingpur, dated the 22nd June 1915.

Mr. *G. P. Dick* (Standing Counsel), for the Crown.

JUDGMENT.—The learned Standing Counsel has in this case been asked to argue the question whether the trial was legal with reference to the terms of section 234, Criminal Procedure Code. The appellant has been charged in the same trial and convicted in the same trial of two offences, one being under section 379, Indian Penal Code, and the other being under section 380, Indian Penal Code. Under section 234, Criminal Procedure Code, two offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code. Offences under section 379 and 380 do not come under this description: they are not punishable with the same punishment under the same section. The learned District Magistrate has adopted a definition of his own, that offences are of the same kind when they are both cattle thefts of cattle stolen in the same district within the space of a month and sold at the same cattle market. This definition cannot take the place of that given in the Criminal Procedure Code.

None of the cases cited by the learned Standing Counsel are relevant, except the case of *Bal Gangadhar Tilak, In re* (1). The following remarks at page 238* may be quoted: "If the exceptions are mutually exclusive, the provisions of sections 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

"For example, if *A* were charged with three thefts in buildings within the year and the evidence established that in one case the theft was committed on the roof and not in the building, the accused could not be convicted of simple theft under the powers conferred by section 237, because the applicability of section 236 would be negatived by the mere fact of the joint trial under section 234. We find it difficult to believe that the Legislature intended that a joint trial of three offences under section 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of."

Supposing the above remarks to express a correct view of the law, they do not apply in the present case. There is here no question, in regard of either offence, of a conviction of a minor or alternative offence to that charged. It is not a question of two charges under section 380, and a conviction for one offence under section 380 and for the other under section 379. But as regards one offence the accused has been charged under section 380 and convicted under that section, while as regards the other, he has been charged and convicted under section 379. He has not been convicted under section 379, though charged under section 380. And in neither case was he charged in the alternative under section 379 or 380. Thus neither section 236, Criminal Procedure Code, nor section 237, Criminal Procedure Code, can be read with section 234, Criminal Procedure Code, in this case.

(1) 2 Ind. Cas. 277; 33 B. 221; 10 Bom. L. R. 973; 4 M. L. T. 45; 9 Cr. L. J. 226.

*Page of 33 B.—*Ed.*

The accused has been charged and tried in the same trial for two offences not of the same kind, and I cannot distinguish this case from that in *Emperor* v. *Bisahu Panka* (2), in which it was held that the accused could not be charged with and tried at one trial for three offences respectively under sections 380, 454 and 457 of the Penal Code, and that with reference to *Subrahmania Ayyar* v. *Emperor* (3) the whole trial was vitiated. I have, therefore, no alternative but to set aside the convictions and sentences, and to order a re trial, which must be by the District Magistrate, as there is no other Magistrate in the District with section 30 powers. In retrying the case the District Magistrate may well record the evidence in somewhat greater length and detail. Also I consider the evidence as to previous conviction extremely unsatisfactory. Even if finger prints are not available some more recent evidence than that produced is surely available, and some enquiry seems desirable as to whether the accused was really convicted of rape as he says, and whether the person convicted of rape was the same person as was convicted in the other cases. The convictions are set aside and a retrial ordered.

Retrial ordered.

(2) 15 C. P. L. R. 53 Cr.
(3) 25 M. 61; 5 C. W. N. 866; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 8 Sar. P. C. J. 160; 2 Weir 271.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 3 OF 1919.

February 14, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

PEARY LAL MULLICK—2ND PARTY—PETITIONER

versus

SURENDRA KRISHNA MITTER AND OTHERS—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 137—Removal of obstruction—Bona fide *claim of right—Order directing institution of Civil suit within certain period, legality of—Evidence not taken, effect of.*

In a proceeding under section 133, Criminal Procedure Code, for the removal of an obstruction from a riverside *ghat* as being part of public way, the second party claimed the *ghat* as his private property, and the Magistrate, while declaring the good faith of the second party's claim, directed without taking any evidence that unless the second party sought to establish his right in the Civil Court within six months, his *bona fides* would be questioned again by the Magistrate:

Held, that the Magistrate's conditional order was bad in form and that he should not have made it without taking evidence from one side or the other.

Rule against the order of the Sub Divisional Magistrate, Barrackpur.

Babus *Monmotha Nath Mukerjee* and *Irobodh Chundra Chatterjee*, for the Petitioner.

Babus *Dasrathi Sanyal*, *Kanaidhat Dutt* and *Hari Charan Bannerjee*, for the Opposite Party.

ORDER.—This Rule relates to an order made in proceedings initiated under section 133 of the Criminal Procedure Code. By a conditional order made under that section, the petitioner was directed to remove an obstruction from a riverside *ghat* as being part of a public way. In showing cause against the order under section 137, the petitioner claimed that the *ghat* was his private property and denied that the public had a right of way over it. The question so raised was a question of title and, therefore, as the Magistrate very properly recognised, the further question arose whether the petitioner's claim was a *bona fide* claim or whether it was in the usual phrase "a mere pretence to oust the Magistrate's jurisdiction". He decided that further question, however, as a preliminary question without going into evidence. His conclusion was in favour of the petitioner's good faith, and he made an order so declaring and further directing that unless the second party sought to establish his right in the civil Court within six months, "his *bona fides* will be questioned again by this Court."

The petitioner does not complain of this order so far as it upholds his good faith, but he objects to so much of the order as throws upon him the burden of establishing his claim in the Civil Court.

In our opinion, regard being had to the circumstances, the Magistrate should not have made this order in the form which he made it without taking such evidence as might be adduced before him by one side or the other.

We, therefore, set aside the order and remit the case to the Magistrate to be taken up from the point at which it stood before the order was made, and disposed of in accordance with law.

Order set aside.

MADRAS HIGH COURT.

CIVIL APPEAL No. 167 OF 1917.

October 9, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Spencer.

ADDAGANTI CHINNA VENKATA SUBBA ROW, MINOR, BY MOTHER AND NEXT FRIEND NARASAMMA, AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

YEMMANUR VENKATRAMAYYA AND OTHERS—DEFENDANTS NOS. 1 TO 10, 12 TO 16 AND LEGAL REPRESENTATIVE OF THE DEFENDANT NO. 11—RESPONDENTS.

Inam—*attached to hereditary office, enfranchisement of, effect of—Registration, effect of—Persons in whose names* inam *registered, whether can sue for recovery of lands attached to office without impleading other members of family.*

The effect of the enfranchisement of an *inam* attached to a hereditary office is to disannex the *inam* from the property and to convert it into ordinary property, with the result that the lands, after enfranchisement, are held by the family which was entitled to the office [p. 162, col 2.]

The registered holders of an hereditary office, whose names had been registered before enfranchisement, represent the *inam* for the purpose of recovering it after enfranchisement and are entitled to institute a suit for the purpose without joining the other members of the family as parties to the suit. [p. 162, col. 2.]

Appeal against the decree of the District Court, Cuddapah, in Original Suit No. 13 of 1915.

Mr. *T. Narayanmurthy*, for the Appellants.

Messrs. *T. V. Venkatrama Aiyar* and *O. Rama Rau*, for the Respondents.

This appeal coming on for hearing on the 11th and 12th February 1918 and having been posted to be spoken to on the 14th February 1918, the Court delivered the following

JUDGMENT.—This is an appeal from the judgment of the District Judge of Cuddapah in a suit brought by the plaintiffs, who were the registered holders of the Karnam's office in this particular Inam village, to recover from the Shrotriemdars certain lands which, they contend, were emoluments of the Karnam's office. The District Judge has found, and his finding has not been and could not be seriously disputed, that these lands were Karnam's Inam and that they were excluded from the Shrotriem lands when the Shrotriem Inam was confirmed by the Inam Commission. *Prima facie*, the title to these lands was undoubtedly before the enfranchisement in the holders of the Karnam's office for the time being. The Karnam's office was a hereditary office, and these lands were annexed to the office for its emoluments and the holders of the office for the time being were entitled to them. The District Judge has, however, found in this case that the plaintiffs' suit is barred by limitation on the ground that these lands have, for a very long time, been in possession of the Shrotriemdars. On the other side, reliance is placed upon the fact that the Shrotriemdars have all along been making payments of Rs. 25 annually to the Karnam in office, and the Shrotriemdars have not proved by affirmative evidence that they were trespassers and in possession as such. Having regard to the fact that this was a Karnam's Inam and to the annual payments to the Karnam for the time being and to the fact that they might very well have got into possession by some arrangement as to management owing to the incapacity of the Karnam, we think that the District Judge has placed the onus on the wrong side, and that the onus is strongly upon the Shrotriemdars to show that their possession was not permissive but adverse and they failed to discharge that onus. It is not necessary to rely on the oral evidence on either side which, in a case like this, is often exceedingly inconclusive. There is a document, Exhibit P1, which throws considerable light upon this case. It is an order by the Settlement Officer for the enfranchisement of the Karnam's Inam, and it affords evidence of certain transactions of which other evidence is not forthcoming. It is found by the Settlement Officer that, for 21 years from 1877 to 1898, Narasinga Row was the Karnam, that, under Regulation VI of 1831, he sued the Shrotriemdars for possession of these very lands and that he obtained a consent judgment in a summary suit in a Revenue Court. It is said that this was never executed because all the Shrotriemdars were not parties, but the fact that many of them consented to the restoration of the lands goes far to support the case for the plaintiffs that their occupation was permissive. We have been referred to Exhibits K and L, but they do not help us. Exhibit K is simply a

takid from the Tahsildar to the Shrotriemdars telling them to see that the Karnam, who had acted during the suspension of the holder of the office, should be paid by the principal Karnam for his work out of the Inam Taram. Similarly Exhibit L is a receipt given by the acting Karnam to the Karnam for such a payment. It is said on the other side that it is unlikely, if there had really been a lease and if the possession had been permissive, the Shrotriemdars would have been allowed to continue in possession for such a small payment as Rs. 25 annually. There is no doubt some force in this contention, but the facts of the case are very obscure, and, as we have said, we do not think that this is sufficient to rebut the inference which arises from some of the outstanding facts that the defendants' possession was permissive.

The other question is that of misjoinder or non-joinder. It is said that this suit ought to have been brought by the mother of the plaintiffs, who was the daughter of Narasinga Row, the last Karnam. That is a complete misconception. The office under the Madras Regulation II of 1894 devolves upon the next male heirs. Therefore this woman, the plaintiffs' mother, never succeeded to the office. At the time of the enfranchisement, the plaintiffs were minors, but the office had been registered in their names, omitting their elder brother, who was entitled to some other Karnam's office and was held not capable of holding two Karnam's offices at the same time. The plaintiffs were minors and the effect of the registry was only to keep alive their claims to the office as soon as either of them became capable of filling it. In these circumstances the Karnam's Inam was enfranchised, but it was in their favour. As we have said, up to the time of enfranchisement, the lands were annexed to the Karnam's office and enjoyed by the holder of the office for the time being, who was the only person who had any right to them. In a Full Bench case in *Pingala Lakshmipati* v. *Bommireddipalli Chalamayya*(1) overruling several other cases, and following the judgment of Bhashyam Aiyangar, J., in *Gunnaiyan* v. *Kamakchi Ayyar* (2), it was held that "the enfranchisement disannexes the Inam from the office, converts it into ordinary property and releases the reversionary rights of the Crown in the Inam, but does not confer on the persons named in the title deed any right in derogation of those possessed by other persons in the Inam at the time of the enfranchisement." Applying that to this case, the result is that the land which had been an endowment of a hereditary office came to be held by the family which was entitled to the office. The registered holders of the Inam were plaintiffs and there can be no doubt that they would have been entitled to sue to recover the Inam before the enfranchisement. We do not think that they ceased by virtue of the enfranchisement to represent the Inam for the purpose of recovering it. As we hold that the possession was permissive on the date of the suit, there will be no question of limitation. As regards the question of mesne profits, Mr. Venkatarama Aiyar has pointed out that, on the date of the enfranchisement, the plaintiffs' elder brother was a major and would have been entitled to sue to recover the Inam and also to recover mesne profits, and that so far as mesne profits are concerned, time should be considered to have run as against him and against the plaintiffs also, and, therefore, their claim for mesne profits must be considered to be barred except as to three years before the suit. We accordingly give judgment for possession with mesne profits for three years before suit and subsequent mesne profits until delivery of possession.

As there is no finding on the 5th issue we have decided to call for a finding on that issue on the evidence on record, and also for a finding as to the rate of mesne profits as to which fresh evidence may be taken. Findings should be submitted in two months. Seven days are allowed for objections.

In compliance with the above order in the judgment, the District Judge of Cuddapah submitted the following

FINDING.—I am directed to record a finding on the evidence on record on the fifth issue: "Whether the plaintiffs are entitled to the *madava* rights claimed in the plaint schedule for the plaint lands or any of them" and also on the issue "What is the rate of mesne profits to which the plaintiffs are

(1) 30 M. 434; 17 M. L. J. 101 (F. B.); 2 M. L. T. 101.
(2) 26 M. 339.

entitled per year." On this issue the parties were allowed to adduce further evidence.

2. The issue as to mesne profits can be easily disposed of. Plaintiff witness No. 5, the 2nd plaintiff's uncle, says that during the three years before suit and the three years after the institution of the suit, the net income of the lands has been Rs. 75-0-0 per annum. The 1st defendant, in the witness-box, says the net income has been about Rs. 70 to 75, not more than Rs. 75. There is no more evidence. I find that the rate of mesne profits to which the plaintiffs are entitled per year is Rs. 75.

3. The other question is not so easy. The *madava* right is claimed only for item No. 8, *i.e.*, wet Paimash number 17. The plaintiffs aver that this land is entitled to irrigation, under the Dasabandham channel. The defendants now admit this, though nothing is said about this in the written statements. But the plaintiffs in their schedule have described the channel as No. 3 channel and the defendants in their written statements deny that plaintiffs are entitled to any right in that channel, and some of the defendants specifically say that No. 3 channel is a private channel belonging to the Shrotriemdar. Defendants Nos. 6 and 7 say that there are two channels for the wet Inams, namely, Dasabandham channel and their own channel, and the Dasabandham channel ceased to flow, and, therefore, the defendants alone are entitled to the private channel.

4. The question, therefore, seems to be whether the No. 3 channel is a private channel of the Shrotriemdars or whether it is the Dasabandham channel.

5. I do not think the documentary evidence throws much light on this question. It shows that the land is double crop wet, but it does not show that the source of irrigation is No. 3 channel. Exhibit I requires some consideration. This is a maintenance deed and it shows that Vengamagari Madi, the Paimash number in question, is under No. 3 channel. But the defendants point out that the land referred to in Exhibit I is dry land and they say that the grant of the *madava* right in that case was a mere matter of grace in favour of a relation. They also point out that the source of irrigation for the wet land referred to in Exhibit I is the river channel and they want me, therefore to infer that the river channel is the Dasabandham channel as distinct from the No. 3 channel. But I do not think it is safe to draw that inference. It cannot be presumed that the river channel is the Dasabandham channel.

6. The defendants rely upon Exhibit XIV, an endorsement given by the Tahsildar stating that the Dasabandham channel is in a ruined condition, but that endorsement is scarcely sufficient by itself. The facts contained therein should be properly proved. Moreover, that Dasabandham channel is one that feeds the blacksmith Inam lands and may be a different channel.

It is necessary, therefore, to examine the oral evidence to determine the question. The parties do not seem to have made a real effort to thresh out this question properly. P. W. No. 1 in examination in-chief says that the Dasabandham channel irrigates the wet land. In cross-examination he says that this channel is otherwise known as No. 3 channel. He is the only witness on the side of the plaintiffs who speaks about this matter.

8. Defendants' witness No. 1 is 1st defendant. He says that the channel which now runs through the Shrotriem is their own channel and not a Dasabandham channel. In November 1903 the Dasabandham channel, he says, became ruined and silted up on account of floods and is not in use now. Then he refers to Exhibit XIV. With regard to Exhibit I he says that number 77 therein is a mistake for 73.

9. In cross-examination he says that the Shrotriemdars were given Dasabandham Inam by the Sircar and they are still enjoying that Inam which was granted for keeping the channel in good repair He says the Sircar gave them notice to repair the channel and they spent about Rs. 2,000 but the repairs are not complete, but the Inam has not been resumed. He says the Dasabandham channel is in the river itself and the private channel starts from the bank of the river, and that is how it was not silted up at the time of the flood.

10. There is no other evidence on this subject.

11. The plaintiffs claim *madava* right in No. 3 channel only for item No. 8. They assert that No. 3 channel is the same as Dasabandham channel. Exhibits I, IX, X, XI show

that in connection with the irrigation of Vengamagari Madi, which is partly wet and partly dry cultivated wet, three channels are mentioned, *i. e.*, No. 3 channel, a river channel, and a Dasabandham channel. But considering the unsatisfactory nature of the evidence it is not possible to say if these are three separate channels or branches of the same channel or the same channel under different names. P. W. No. 1 swears that the Dasabandham channel is otherwise known as the "third channel." The 1st defendant tries to meet this by saying that the Dasabandham channel is out of repair, but I do not think he has proved it properly. The alleged notices issued by Government have not been produced. Under these circumstances, I find that plaintiffs are entitled to the *madara* right in No. 3 channel as claimed in the plaint for item No. 8 alone.

This appeal coming on for final hearing after the return of the finding of the lower Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and allow mesne profits at Rs 75 per annum, and declare that plaintiff is entitled to *madara* right as regards item No. 8 from channel No. 3. These provisions will be incorporated in our decree.

Respondents will pay the costs throughout.

M. C. P.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 1129 OF 1915.

April 10, 1919.

Present:—Sir Basil Scott, KT.,
Chief Justice, and Mr. Justice Hayward.

BAI KANKU—APPELLANT

versus

BAI JADAV—RESPONDENT.

Hindu Law—Widow, decree against, whether binding on reversioner—Burden of proof—Appeal, withdrawal of, effect of.

In a suit by a reversioner on the death of a widow, in which he challenges the binding nature of a decree against the widow, the onus is on him to prove that there has not been a fair trial of the right in suit. [p. 165, col. 1.]

Where a decree is passed against a widow on a ground personal to herself, and which would not have been passed but for an admission made by her, her admission is not binding upon her reversioner. [p. 166, col. 1.]

The withdrawal of an appeal has the effect of making the decree appealed against final. [p. 166, col. 1.]

Appeal from the decision of the District Judge, Broach, in Appeal No. 4 of 1915, confirming the decree passed by the Joint Subordinate Judge at Broach, in Civil Suit No. 221 of 1911.

Mr. *G. S. Rao*, for the Appellant.

Messrs. *Coyajee* and *H. V. Divatia*, for the Respondent.

JUDGMENT.

SCOTT, C. J.—This is a suit by a reversioner to redeem a mortgage created by a Hindu widow Bai Bonji.

The original mortgage was in 1854. It was for the debts of the husband of Bonji. It was renewed in 1857 for the existing debts and certain further debts contracted by this widow. The latter mortgage is that in question in this suit. It contained among other provisions a Gahan Lahan clause that if the money was not paid within a year, the mortgagee should become the owner.

In 1865 a suit was filed by the widow Bonji to redeem the mortgage. It was dismissed by the Munsif, on the ground that the plaintiff had admitted in 1859, in a deposition given in a suit filed by the mortgagee against a tenant, that the mortgagee had become owner of the property by the operation of the Gahan Lahan clause. For this reason the Munsif did not apply to the case the decision in *Ramji* v. *Chinto* (1) decided in the previous year by the Bombay High Court, to the effect that notwithstanding a Gahan Lahan clause the doctrine 'once a mortgage always a mortgage' prevails in this Presidency.

Against the Munsif's decision an appeal was filed, but it was not heard, as before the hearing it was recorded as 'adjusted'. Bonji died in the year 1902. The reversioner sued within twelve years of her death for redemption. The defendant-mortgagee contends that the right of redemption is gone, and relies on the decree in the suit of 1865 in support of the plea of *res judicata*.

(1) 1 B. H. C. R. 199.

That a decree against a widow in relation to her husband's property may bind reversioners is well established, provided certain conditions exist. The leading case is *Katama Natchier* v. *Raiah of Shivagunga* (2). The doctrine applicable to the present suit is to be found at page 603 of that volume in the following passage: "It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Mootoo Natchiar's lifetime, would have bound those claiming the Zemindary in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Anga Mootoo Natchiar. For assuming her to be entitled to the Zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." It would appear from these remarks that the onus is on a reversioner challenging the conclusive nature of the decree against the widow on whose death he claims to prove that there has not been a fair trial of the right in suit. The question arises owing to the appeal filed by the widow, whether the termination of the suit in the manner in which it was disposed of can operate to bind the plaintiff. It is argued that the widow appealed, relying upon the decision of the Bombay High Court in the case of *Ramji* v. *Chinto* (1) and the inconclusive nature of her previous admission, and that, then, without apparent cause she abandoned the appeal. It is contended, as was found by the learned Judge in the trial Court, that Bonji cannot reasonably be said to have fairly and honestly contested the right and taken the steps necessary to protect the estate of which she was in charge for the time being as a Hindu widow. The learned Judge of the lower Appellate Court has, however, considered the effect of the withdrawal of the appeal, and his finding is expressed in the following paragraph:— "There was no allegation in the pleadings that the withdrawal of the appeal was due to fraud, collusion, or compromise, and there is no legal proof either. It would be profitless to speculate as to the cause of the withdrawal. It was suggested that the first Court having in its judgment stated that Bonji had perjured herself, she must have got frightened lest the Court of Appeal should sanction her prosecution, if it came to hear the appeal. But this is mere conjecture and conjecture, however wellfounded, cannot be accepted as legal proof. It was also suggested that as the property was worth considerably more than the amount raised on it, and as the Munsif's decision was manifestly wrong, Bonji was unlikely to have withdrawn the appeal unless it was made worth her while to do so. But this, again, is mere suspicion which, though it may be well founded, cannot be acted upon. I, therefore, find that it is not shown that the withdrawal of the appeal was due to fraud, collusion, or compromise." He, therefore, held that the withdrawal of the appeal had the effect of making the decree of the first Court final, and as that decree was fairly and properly obtained in a suit contested up to decree, it fulfilled the conditions of the rule laid down in the *Shivagunga's case* (2) as amplified in the later cases. The later cases material to this point are *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (3), in which the daughter who represented the estate in a litigation had been negligent in applying for leave to appeal in *forma pauperis* against a decree which had been passed against her, and it was held that the

(2) 9 M. I. A. 539; 2 W. R. (P. C.) 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R. 843.

(3) 20 I. A. 183; 21 C. 8; 17 Ind. Jur. 481; 6 Sar. P. C. J. 334; 10 Ind. Dec. (N. S.) 638.

dismissal of her application, with the result that she was unable to appeal at all for want of funds, was binding upon the reversioners. The case can only be put on the ground that the negligence of the person representing the estate may be relied upon by the opposite party for the purpose of barring the right of a reversioner subsequently to agitate the point which it was in the power of the negligent party to have had tried out in appeal. Other and later cases are *Ghelabhai* v. *Bai Javer* (4), very similar to the present case, and *Risal Singh* v. *Balwant Singh* (5), the passage chiefly in point being at page 179*.

Being bound in second appeal to accept the finding of fact of the learned Judge of the lower Appellate Court, which has been above set forth, I am of opinion that on that basis the learned Judge was right in holding that the withdrawal of the appeal has the effect of making the decree of the first Court final. The learned Judge, however, did not decide the case against the plaintiff, for he held that the decree in the Munsif's Court was given against the widow on a ground personal to herself inasmuch as the Munsif would not have so decided but for her admission, and that her admission in the litigation could be no more binding upon the reversioner than an alienation by her of her equity of redemption otherwise than for necessity. The question is whether the learned Judge is right in this conclusion.

In my opinion he is right. The suit was decided by the Munsif on the ground that notwithstanding the decree in *Ramji* v. *Chinto* (1), which had established for Gahan Lahan mortgages the principle of 'once a mortgage always a mortgage', the widow Bonji was concluded by an admission in a previous deposition to the effect that the mortgagee had become the full owner by operation of the Gahan Lahan clause. Such a decision cannot be rested on the doctrine of estoppel, for the mere admission of the widow in a deposition raised no estoppel although the Munsif seems to have treated Bonji as estopped from pleading that the equity of redemption remained in her. It was not an estoppel binding on Bonji's representatives, assuming that the reversioners of her husband can in the circumstances be treated as her representatives. The suit was dismissed in consequence of an unguarded statement by Bonji which could affect no one but herself. The plaintiff's case can, therefore, be put at least as high as that of the reversioner in *Braja Lal Sen* v. *Jiban Krishna Roy* (6), where a suit by a widow to set aside a sale had been dismissed mainly on the ground that the sale had been confirmed with the consent of the widow given upon receipt of Rs. 2,040 by her and the learned Judges Maclean, C. J., and Banerjee, J., said that having regard to the ground of dismissal, it would not be right to hold it a bar to the reversioners' claim. The only remaining question, therefore, is whether the suit is barred by limitation. Here again I think the learned Judge is right, for if the equity of redemption was only suspended during Bonji's lifetime, the reversioner being within sixty years would, even according to the Limitation Act of 1859, clause 15, be within time.

The decree of the lower Court must be affirmed and the appeal dismissed with costs.

HAYWARD, J.—The plaintiffs sued defendants to redeem a possessory mortgage, dated 22nd December 1857. It was executed by the widow of the last male holder and contained a "Gahan Lahan" clause providing that the mortgagee should in default of due payment of the loan become owner of the property. It was admitted by the widow on 21st October 1859 in proceedings between the mortgagee and the tenants that the mortgagee had under the "Gahan Lahan" provision become owner of the property. She nevertheless sought some years later to repay the loan Rs. 2,300 and redeem the property valued at Rs. 13,000, but her suit was on the strength of her previous admission dismissed on 31st October 1865. It was, however, conceded in the judgment that otherwise the 'Gahan Lahan" provision would not have had the effect of making the mortgagee the owner of the property in view of the decision in *Ramji* v. *Chinto* (1). The widow appealed on the grounds that she was not bound by her

(4) 17 Ind. Cas. 866; 14 Bom. L. R. 1142; 37 B. 172.

(5) 48 Ind. Cas. 553; 45 I. A. 168; 24 M. L. T. 361; 28 C. L. J. 519; 40 A. 593; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511 (P. C.)

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(6) 26 C. 285 at p. 297.

admission in other proceedings and that the decision was directly opposed to the ruling in *Ramji* v. *Chinto* (1). The appeal was filed on 30th November 1865, but was withdrawn on payment of costs on 23rd January 1866. It was endorsed "adjusted" on 3rd February 1866. No further proceedings were taken and the widow died in 1902. The representatives of the reversioners brought the present proceedings for redemption against the representatives of the mortgagee in 1911. There was no question as to the propriety of the mortgage, nor on the other side was it disputed that the debt had long been liquidated out of the profits of the property. The substantial questions were whether the reversioners were bound by the decree against the widow and whether they were barred by limitation.

The Subordinate Judge came to the conclusion that the reversioners were not bound as there had not been a fair trial of the right of the reversioners within the ruling in the *Shivagunga's case* (2) in that the widow had compromised the appeal. He thought the widow could not "under the circumstances be reasonably said to have fairly and honestly contested the right and taken the steps necessary to protect the estate of which she was in charge for the time being as a Hindu widow." The District Judge came to the same conclusion but by a more direct route. He considered that "the ground on which Bonji's (the widow's) suit was dismissed was her admission that the breach of the 'Gahan Lahan' clause had made the mortgagee owner" and that it was thus "dismissed on a ground personal to herself," and did not bar the reversioners. He considered that it was "not shown that the withdrawal of the appeal was due to fraud, collusion or compromise" and that "the case must be dealt with as if no appeal had been preferred." He thought that the ruling in the *Shivagunga's case* (2) did not support the proposition that "where the decree appears to be manifestly wrong, it is the widow's duty to appeal from it, and if she fails to do so, or having appealed fails to press the appeal to a decision, she shall be considered to have failed in her duty to protect the estate and the decree in that case will not bind the reversioners." It would seem, therefore, that he held that there had not been a fair trial of the right of the reversioners quite apart from what happened to the appeal. Both the Subordinate Judge and the District Judge held the reversioners were not barred by limitation.

We have, therefore, these established facts. The loan of Rs. 2,200 on mortgage of property worth Rs. 13,000 was permitted by the widow, on an admission extracted from her in other proceedings in direct opposition to the equitable rule "once a mortgage always a mortgage" recognised in *Ramji* v. *Chinto* (1), to result in the enlargement of the mortgagee's interest into full ownership without dispute in appeal. It seems to me impossible for us to say on these established facts that there was no justification for the view that there had been no fair trial of the right of the reversioners within the ruling in the *Sivagunga's case* (2)—the view held notwithstanding some differences of opinion as to what happened to the appeal by both the lower Courts. It seems to me that this case and indeed every other of this nature must be decided on its own particular merits. The admission of the widow here was apparently without consideration and without legal necessity. It was inconclusive and it would seem to have been insufficient even to bind her own limited interest in the equity of redemption. It was obviously ineffectual to transfer the important interest therein of the reversioners. The behaviour of the widow and the widow's interest were the subjects mentioned in the judgment. There was no reference whatever to the important interest of the reversioners. There was in effect a trial only of the right of the widow. There was not a fair trial, indeed there was no trial of the right of the reversioners. It seems to me that would be sufficient to exclude the trial from the rule in the *Shivagunga's case* (2) without going further and establishing fraud in the withdrawal of the appeal. It has somewhat similarly been held that suits against the widow for arrears of rent or maintenance chargeable to the estate were personally against the widow and did not involve the rights of the reversioners. There was no necessity, therefore, in those suits to establish fraud. They were *Nugendrochunder Ghose* v. *Sreemutty Kamines*

Dossee (7) and *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (8). It has also somewhat similarly been held that suits in which arbitration awards or compromises have been accepted by the widow would, quite apart from the fraud, not bind the reversioners. These have been detailed at pages 92 to 94* of *Khunni Lal* v. *Gobind Krishna Narain* (9). These rulings were there held inapplicable (at page 103*) but were not disapproved by their Lordships of the Privy Council. It would seem, therefore, that if there should be no real trial of the rights of the reversioners, it would be unnecessary to establish fraud to exclude the trial from the rule in the *Shivagunga's case* (2). If there should be a real trial of the rights of the reversioners, the effect would, of course, be nullified by proof of fraud. But there must be a real trial of the rights of the reversioners and there must also be freedom from fraud in order to provoke the rule in the *Shivagunga's case* (2). Such was not the case here. There was no practical trial of the rights of the reversioners and there was no necessity to establish fraud. This case was, therefore, distinguishable from those of *Jugul Kishore* v. *Jotendro Mohun Tagore* (10), *Hari Nath Chatterjee* v. *Mothurmohun Goswami* (3) and *Risal Singh* v. *Balwant Singh* (5). It has, moreover, to be remembered that, as pointed out in the last mentioned decision, the rule is a special rule applicable to the peculiar position of limited holders under Hindu Law, and not the general and strict rule of *res judicata* prescribed by section 11 of the Civil Procedure Code of 1908. This special rule has to be applied with due regard to the peculiar precautions necessary in this country to prevent the exercise of pressure over limited female holders to the prejudice of the rights of reversioners. The rule has, therefore, not to be interpreted with reference to the strict rules regarding fraud and irregularities required to invalidate decrees otherwise binding under the general law of procedure.

It seems to me that the question of limitation has also been decided rightly by the lower Courts. The suit by the widow affected only her own right to redeem, and did not, in view of what has been said, affect the right of the reversioners. They had sixty years to redeem under section 15 of Act XIV of 1859, and their right would not have become barred in any case either under that Act or Act IX of 1871 by reason of section 2 of Act XV of 1877. But, as a matter of fact, they brought their suit within twelve years of the death of the widow and within sixty years of the mortgage, and their right to redeem would not, therefore, be barred either by Article 141 or 148 of the Schedule to the Limitation Act, 1908.

Appeal dismissed.

(7) 11 M. I. A. 241 at p. 261; 8 W. R P. C. 17; 2 Suth. P. C. J. 77; 2 Sar. P. C. J. 275; 20 E. R 92.

(8) 2 I. A. 275; 1 C. 133; 24 W. R. 306; 3 Suth. P. C. J. 207; 3 Sar. P C. J. 541; 1 Ind. Dec. (N s) 86.

(9) 10 Ind Cas. 477; 38 I. A. 87; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 33 A. 356 (P. C.).

(10) 11 I. A. 46 at p. 73; 10 C. 985; 8 Ind Jur. 455; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. s.) 657.

*Pages of 38 I. A.—*Ed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 433 OF 1918.

June 2, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

Saiyid MUHAMMAD ABBAS AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

Musammat NASIBAN AND OTHERS— DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 134, 148 —Transfer by trustee or possessory mortgagee, effect of— Consideration—Good faith—Transferee, position of.

In determining whether Article 134 of Schedule I to the Limitation Act applies to a suit for the recovery of immoveable property transferred by a trustee for valuable consideration, the question of good faith is very material, for if the transferee has acquired the property from a trustee in good faith for a valuable consideration without having notice of the trust, he acquires an immediate title to the property under section 64 of the Trusts Act. But if he has not acted in good faith and has paid valuable consideration, he acquires a title after the lapse of the period necessary for extinguishing the rights of the beneficiary to follow the trust property in his hands, and to this class of cases Article 134 applies. To the former class no occasion for applying that Article arises. [p. 170, col. 1.]

MUHAMMAD ABBAS *v.* NASIBAN.

The transfer by a possessory mortgagee of the mortgaged property as if it were his own stands, however, on a different footing If the transferee has notice that the transferor has no higher interest than that of a mortgagee, he cannot, by reason of any misrepresentation which had not the effect of misleading him or by dint of any collusive misdescription of the interest conveyed, acquire a higher right than that which the transferor actually possessed within his knowledge or curtail the period of limitation provided for a suit for redemption by Article 148, for no secret compact between two persons can affect or alter the law of limitation to the prejudice of a third party. Where the transferee purchases in good faith and for a valuable consideration without having any notice that the transferor had no higher interest than that of a mortgagee, Article 134 protects him from a claim by the mortgagor, unless the mortgagor enforces his right as against such transferee within 12 years from the date of the transfer. [p 170, col. 1.]

Appeal from the decree of the First Subordinate Judge, Bahraich, dated the 19th October 1918, upholding that of the Munsif, Kaisarganj, dated the 26th March 1918.

Messrs. *Ali Mohammad* and *Mohammad Ayub*, for the Appellants.

Pandit *Brij Narain Chakbast*, for Respondents Nos. 4, 5 and 6.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants for the redemption of a half share of grove No. 729, old *Khasra*. The grove in question belonged to two brothers, Muhammad Husain and Muhammad Abbas. On the 18th October 1880 they mortgaged it with possession by way of conditional sale in favour of Ghasite in lieu of Rs. 275. The grove contained at that time 100 trees (Exhibit 2).

On the 12th July 1882 Muhammad Husain sold the entire grove to Ghasite in lieu of Rs. 400, out of which Rs. 125 were paid in cash by the vendee and Rs. 275 were credited in satisfaction of the previous mortgage of the 18th October 1880 (Exhibit 3). In the sale deed Muhammad Husain described himself as the owner of the entire grove, but the effect of the sale merely was to transfer the equity of redemption in half the grove to the mortgagee. The remaining half share belonging to Muhammad Abbas remained unaffected. Ghasite removed the trees in the grove in his lifetime.

On the 15th April 1895 the heirs of Ghasite, other than *Musammat* Ghuran who is said to be missing, sold their 14-annas 3-pies share of the land of the grove in question to Samsam Ali, the ancestor of Muzaffar Ali and Iqbal Ali, describing the same as having been purchased by Ghasite under a sale-deed of the 12th July 1882 (Exhibit A 5). Muzaffar Ali and Iqbal Ali have since made simple mortgages of the said land in favour of Dhani Ram, Puttu Lal and Bal Gobind.

Muhammad Abbas has sold half of his interest in the grove in question to Mansab Ali. Muhammad Abbas and Mansab Ali jointly seek to redeem their half share of the grove from the persons in possession, alleging that the value of the trees removed by Ghasite was more than sufficient to satisfy the mortgage money. They also seek to recover Rs. 112 8-0 on account of the balance of the price of the trees cut and removed. Their claim has been dismissed by the Courts below on the ground that it was barred by Article 134 of the Indian Limitation Act (IX of 1908).

Neither of the Courts below has determined whether Samsam Ali had any notice of the mortgage in suit. The mortgage in question was registered. It was referred to in the sale deed executed by Muhammad Husain in favour of Ghasite on the 12th July 1882 as having been satisfied by a set off against the consideration money payable by the vendee (Exhibit 3). A reference is made to that sale-deed in the subsequent conveyance made by the heirs of Ghasite other than *Musammat* Ghuran in favour of Samsam Ali on the 15th April 1895 (Exhibit A5). Had Samsam Ali taken care to examine the successive title deeds, he would have discovered that Ghasite was originally a mortgagee and that only one of the mortgagors had transferred the equity of redemption to him. Whether these facts would be sufficient to charge him with constructive notice of the right of Muhammad Abbas to redeem the mortgage cannot, however, be determined until an opportunity is given to the parties to produce evidence to show whether the name of Muhammad Abbas was entered in the revenue papers and, if so, in what capacity, and whether any enquiries were made by Samsam Ali at the time of his purchase. The question of good faith is not, as the Courts below suppose, immaterial for the purpose of determin-

ing whether Article 134 or Article 148 is applicable to the case.

Article 134 of the Indian Limitation Act (IX of 1908) allows for a suit to recover possession of immoveable property, conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration, a period of 12 years from the date of the transfer. Where the transfer is made by a trustee for a valuable consideration, the question of good faith becomes practically material, for as pointed out in *Prasanna Venkatachella Reddiar* v. *Collector of Trichinopoly* (1), if the transferee has acquired the property from a trustee in good faith for a valuable consideration without having a notice of the trust, he acquires an immediate title to the property under section 64 of the Indian Trusts Act, but if he has not acted in good faith and has paid valuable consideration, he acquires a good title after the lapse of the period necessary for extinguishing the right of the beneficiary to follow the trust property in his hands. Article 134 is intended to apply only to the later class of cases. To the former class no occasion for applying it can arise.

The transfer by a possessory mortgagee of the mortgaged property as if it were his own stands, however, on a different footing. If the transferee has notice that the transferor has no higher interest than that of a mortgagee, he cannot, by reason of any misrepresentation which had not the effect of misleading him or by dint of any collusive misdescription of the interest conveyed, acquire a higher right than that which the transferor actually possessed within his knowledge or curtail the period of limitation provided for a suit for redemption by Article 148, for no secret compact between two persons can affect to alter the law of limitation to the prejudice of a third party. Where the transferee purchases in good faith and for a valuable consideration without having any notice that the transferor had no higher interest than that of a mortgagee, Article 134 protects him from a claim by the mortgagor, unless the mortgagor enforces his right as against such transferee within 12 years from the date of the transfer.

There is no distinction in principle between a person purchasing a mortgage as a mortgage, that is, with a distinct understanding that it was nothing more than a mortgage, and another who acquires a mortgage, knowing that it was a mortgage but giving it a false description in order to serve some ulterior end. As observed in *Mahabir Singh* v. *Rana Sheoraj Singh* (2) and *Ramchandra Vithal Rajadhiksha* v. *Sheikh Mohidin* (3), when the purchaser from the mortgagee is under the belief that he is purchasing an absolute title, there must be an enjoyment of possession for the statutory period to validate his purchase as against the original mortgagor. Where he has notice, the Court will not help him to perpetuate a fraud.

On behalf of the contesting defendant-respondent reliance is placed on the decision in *Dal Singh* v. *Gur Prasad* (4), but the finding in that case was that the transferee believed that he was purchasing an absolute interest. Article 134 of Act IX of 1871 provided that a suit to recover possession of immoveable property conveyed in trust or mortgaged and afterwards purchased by the trustee or mortgagee in good faith and for value could not be brought after the lapse of 12 years from the date of the transfer; but as the reference to "good faith" was strictly inapplicable to cases of transfers by trustees it was omitted from the succeeding Limitation Acts. In *Drigpal Singh* v. *Kallu* (5) it was held that a person who purchased with full knowledge that his vendor's title was merely that of a mortgagee was not entitled to the benefit of Article 134.

As the Courts below have not decided the question of good faith and the other issues raised in the case, the appeal is allowed with costs and the suit remanded to the Court of first instance with a direction to reinstate it under its original number and to dispose of it in the manner required by law.

Case remanded.

(1) 33 Ind. Cas. 45; 38 M. 1064 at p. 1067.

(2) 9 O. C. 373.
(3) 23 B. 614 at p. 619; 1 Bom. L. R. 102.
(4) 2 Ind. Cas. 250; 12 O. C. 84.
(5) 30 Ind. Cas. 156; 37 A. 660; 13 A. L. J. 945.

GADIRAJU SOMARAJU *v.* DANDU VENKIAH.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1838 OF 1917.

October 24, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

GADIRAJU SOMARAJU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DANDU VENKIAH AND OTHERS—DEFENDANTS NOS. 1 TO 4 AND 6 TO 8—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 125—Alienation by Hindu widow—Reversioners, right of suit of—Limitation—Compromise by female owner, whether amounts to alienation.

There is only one cause of action for a declaratory suit for all reversioners, next and remote, and when that cause of action once becomes barred under Article 125 of Schedule I to the Limitation Act, by the failure to bring a suit by any of the reversioners within the period fixed by that Article, no reversioner, whether in existence or not at the date of the alienation, can afterwards bring such a suit. [p. 172, col. 2; p. 173, col. 1]

The compromise of a litigation entered into by a female owner, with rights over property, her title to which is disputed by the opposite party, the compromise recognising the disputant's title to the property, does not amount to an alienation of the property in the disputant's favour by her and the disputant does not hold the property thereafter under any new title derived from, or created by her. [p. 173, col. 2]

The daughter of a Hindu widow brought a suit to set aside an alienation by her mother and the suit was compromised. Subsequently, the reversioners brought a suit impeaching the same alienation:

Held, that the period of limitation for such a suit was that prescribed by Article 125 of Schedule I to the Limitation Act, and that as the compromise by the daughter did not amount to a fresh alienation, no fresh cause of action accrued to the reversioners. [p. 173, col. 1; p. 174, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge at Ellore, in Appeal Suit No. 106 of 1916, preferred against the decree of the Court of the Additional District Munsif, Kovvur at Ellore, in Original Suit No. 1126 of 1912.

FACTS appear from the judgment.

Mr. *V. Ramesam*, for the Appellants.—The suit is not barred. Computing time from the date of the first alienation in 1893 by the mother, Venkayya, the claim is, no doubt, barred. But the daughther of Venkayya brought a suit in 1901 and compromised it. The compromise was embodied in the decree that was passed. Under that decree she recognised the right of Chandra Raju, the alienee to the property. This must be treated as a fresh alienation by the daughter giving a new cause of action to the reversioners. And these latter have 12 years from the date of this fresh alienation to bring a declaratory suit. *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (1).

Under the terms of the compromise Exhibit I, the alienee, Chandra Raju must be deemed to have abandoned his title under the original alienation by the mother and got a fresh title under the compromise by the daughter, *i.e.*, the mother of the plaintiffs.

Mr. *P Narayanamurthy*, for the Respondents.—There is only one cause of action for all reversioners, near and remote. There was only one alienation by the plaintiffs' grandmother, Venkayya, and that has to be got rid of. The compromise in the suit by the plaintiffs' mother only ratified the action of her mother, the alienor. That will not amount to a fresh alienation so as to enlarge the limitation period. Even a suit to declare that compromise invalid on the ground of fraud would be barred under the six years' rule. The plaintiffs' only cause of action is to declare Venkaya's alienation illegal. See Full Bench decision in *Challagundla Varamma* v. *Madala Gopaladasayya* (2). In *Akkineri Seerramulu* v. *Mullapudi Ramayya* (1) it was not expressly stated that the withdrawal of the suit in that case was a new alienation. It was only understood as a confirmation of the earlier alienation. In *Timmaji Amma Garu* v. *Subbarau* (3), where a limited owner compromised a similar suit recognizing the disputant's title, it was held that the effect of the compromise was not to make the disputant hold the property under a new title derived from the plaintiff. See also *Khunni Lal* v. *Gobind Krishna Narain* (4).

(1) 25 M. 731.

(2) 46 Ind. Cas. 202; 41 M. 659; 35 M. L. J. 57; 24 M. L. T. 115; 8 L. W. 62; (1918) M. W. N. 461.

(3) 5 Ind. Cas. 640; 33 M. 473; (1910) M. W. N. 60; 20 M. L. J. 204; 7 M. L. T. 340.

(4) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).

GADIRAJU SOMARAJU v. DANDU VENKIAH.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. They and the 6th defendant are the sons of the 7th defendant, who is the daughter of one Soma Raju, who died about 30 years ago leaving a widow Venkayya as his heir with the limited powers of a Hindu female heir. She died in 1901, having alienated the plaint properties in 1893 to one Chandra Raju, whose widow is the 1st defendant under whom the defendants Nos. 2 to 5 claim. The plaintiffs' mother (the 7th defendant) as the next reversionary heir brought a suit in 1901 very soon after her mother's death to set aside the alienation by her mother in favour of Chandra Raju. She, however, compromised that suit by the compromise agreement set out in the decree, Exhibit I, dated August 1902. Under that compromise, Chandra Raju was to enjoy the alienated lands as of right (and there were other terms not necessary to be mentioned in detail), the 7th defendant receiving Rs. 165-5-0 to compensate her for the costs of the suit and for giving up her claim to the possession of the lands.

This decree, as I said before, was in 1902, when one of the 7th defendant's sons (the 6th defendant) was about 20 years old, his younger brothers, the plaintiffs, being then minors. The present suit was brought in 1912 for two reliefs: (1) that the plaintiffs' maternal grandmother's (Venkayya's) alienation of the plaint properties to Chandra Raju in 1893 might be declared invalid against the plaintiffs' and the 6th defendant's reversionary rights; (2) that the plaintiffs' mother's (the 7th defendant's) alienation by the compromise, Exhibit I, of 1902 of the plaint properties might also be declared not binding upon the plaintiffs and the 6th defendant.

The lower Courts dismissed the plaintiffs' suit, the lower Appellate Court basing its decision solely on the point of limitation, which it decided against the plaintiffs on the ground that the 6th defendant could and ought to have brought a suit of this nature on behalf of himself and the plaintiffs within 6 years from August 1902, when his mother (the 7th defendant) entered into the compromise, Exhibit I. He relied upon the decision in *Krishnier* v. *Lakshmiammal* (5) in support of this opinion. The learned Subordinate Judge's reference to 6 years as the period of limitation is probably based upon the dictum in *Narayana Aiyar* v. *Rama Aiyar* (6), where it was held that Article 125 providing a limitation period of twelve years did not apply to a suit brought by a remoter presumptive reversioner *after the death of the alienating female*, his right to bring such a suit being based on the circumstance that the collusion or negligence of the next living female reversionary heir with limited interest had precluded the latter from bringing the suit. It was further held in that case that Article 120 applied to such a suit and that the period of 6 years provided for in that article was to be calculated from when the next female reversioner precluded herself by her laches or conduct from herself bringing such a suit at the time when the remoter reversioner brought it. But the view above propounded in *Narayana Aiyar* v. *Rama Aiyar* (6), following *Krishnier* v. *Lekshmiammal* (5), proceeds on the footing that each successive reversioner or set of reversioners has got a separate cause of action which arises when the preceding reversioner (or set of reversioners standing in the same degree) has (or have) lost his (or their) rights by laches or conduct to bring the suit. This view, however, which was held until 1917, [See *Venkata Row* v. *Tuljaram Row* (7)] has now been overruled by the decision of the Full Bench of five Judges reported in *Chullagundla Varamma* v. *Madala Gopaladasayya* (2). That Full Bench decision held that there is only one cause of action for a declaratory suit for all reversioners, next and remote, and that when that cause of action once becomes barred under Article 125 by the failure to bring a suit by any of the reversioners within the period fixed by Article 125, no reversioner (whether in existence or not at the

(5) 18 M. L. J. 275; 3 M. L. T. 319.
(6) 20 Ind. Cas. 625; 38 M. 396; (1913) M. W. N. 588; 14 M. L. T. 89; 25 M. L. J. 219.
(7) 38 Ind. Cas 270; (1917) M. W. N, 30; 5 L. W. 483.

date of the alienation) can afterwards bring such a suit. The Subordinate Judge should, therefore, have relied upon Article 125, and not on Article 120 on the question of limitation, so far as the relief related to the declaration of the invalidity of the plaintiffs' grandmother's alienation.

It is, however, argued by the learned Vakil who appeared for the appellants that it is only the alienation by the plaintiffs' grandmother Venkayya in 1893 that could not be questioned by the plaintiffs because it was barred by limitation, but that they could question the alienation made by the plaintiffs' mother, the 7th defendant through the compromise Exhibit I, that alienation being a new alienation of 1902 (though by way of confirmation of the alienation of 1893 made by plaintiffs' grandmother) and that they have got 12 years from the date of this fresh alienation, *i.e.*, from 1902, to bring a suit to declare that alienation invalid as against the plaintiffs and the 6th defendant.

The question thus raised is rather a difficult one to decide. The appellants' Vakil relied on the case reported in *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (1) as in his favour. There the widow made the alienation in 1874. The daughters sued in 1892 to set aside that alienation, evidently during the widow's lifetime. They then withdrew that suit "on the ground that the alienation was valid." Their sons then brought the suit [decided as *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (1)] in the year 1893 to declare that both the alienation of 1874, and what they called "the alienation made by way of confirmation" by their mothers (defendants Nos. 3 and 4 in the suit) in 1892 through their withdrawal of the suit of 1892 were not binding on the plaintiffs. The learned Judges (Bhashyam Aiyangar and Moore, JJ.) held that so far as the claim related to the relief of a declaration that the widow's alienation of 1874 was bad, the suit was barred, but that, in respect of the claim based on the withdrawal by the plaintiffs' mothers (defendants Nos. 3 and 4) of the suit of 1892 the suit brought in 1893 was not barred. The judgment of the learned Judges is (if I may say so with respect) rather too brief and hence, naturally there is some obscurity as to the precise propositions of law laid down therein. The judgment does not definitely state that the withdrawal of the plaintiffs' mother's suit is, in the eye of the law, a new alienation made by the plaintiffs' mother, as alleged by the plaintiffs. It merely recites the prayer in the plaint which treats such withdrawal as a substantive new alienation. At the end of the judgment, such withdrawal is referred to as "a confirmation of the alienation of 1874," and it is stated that such "confirmation gives a fresh cause of action" and hence the claim for the relief based on that cause of action was not barred. As the suit was brought in 1893 (the next year after the so-called "confirmation"), the suit was rightly held not to be barred, but the learned Judges do not state what Article of the Limitation Act applied to the claim for such relief. If the learned Judges really intended to lay down that the withdrawal of a declaratory suit brought by presumptive reversioners is, in the eye of the law, a substantive alienation by them of the properties already alienated by the widow, I dissent with great respect. In *Timmaji Amma Garu* v. *Subbaraju* (3) Miller and Munro, JJ., held that the compromise of a litigation entered into by a female owner with limited rights in respect of a property, her title to which was disputed by the opposite party, the compromise recognising the disputant's title to the property, did not amount to an alienation of the property in the disputant's favour by her and that the disputant did not hold the property thereafter under any new title derived from or created by her. Of course, such a compromise might be attacked in a proper suit brought by a person interested on the ground that it was fraudulent or collusive, but such a suit would not be a suit to set aside the alienation by a female owner with limited rights, to which Article 125 would apply. The correctness of the decision in *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (1) can of course be upheld, if it merely decided that the claim held in that decision not to be barred by limitation was a claim merely for declaring void as against the plaintiffs (by reason of fraud or collusion) the withdrawal of the previous suit brought by the plaintiffs' mother in that case. In *Narayana Aiyar* v. *Rama Aiyar* (6) the opinion was expressed that

the Article of the Limitation Act applicable to such a suit by a reversioner who is not the next reversioner was six years under Article 120, the term to be calculated from when the plaintiff's right accrued. In *Khunni Lal* v. *Gobind Krishna Narain* (4) their Lordships of the Privy Council state that a compromise which recognises the title of the disputant does not confer a new distinct title on the disputant, but is merely an acknowledgment of and a definition of the disputant's title and does not, therefore, amount to a new alienation in favour of the disputant. The appellants' learned Vakil, however, sought to distinguish these decisions on the ground that the terms of the compromise Exhibit I in the present case indicated an abandonment by Chandra Raju of his title under the alienation of 1893 (made by the plaintiffs' grandmother) and the obtaining of a fresh title under a fresh alienation of 1902 made by the plaintiffs' mother (7th defendant). After anxious consideration of the terms of Exhibit I, I have come to the conclusion that this contention cannot prevail. I can find no expression in Exhibit I indicating that Chandra Raju relinquished his title obtained under the alienation of 1893 (which, according to his contention in that suit, was binding on the reversioners), nor anything to show that he acknowledged that the plaintiffs' mother was then entitled to make a fresh alienation ignoring the plaintiffs' grandmother's alienation or to give him a fresh title in supersession of the title which he claimed to have obtained under the alienation of 1893. The mere fact that he paid some money to obtain the acknowledgment by the plaintiffs' mother (7th defendant) of the validity of his title to the plaint lands and house created under the document of 1893 does not, in my opinion, amount to any such relinquishment of the title which he claimed in that suit under the document of 1893. The test to see whether the compromise itself amounted to an alienation is to find out whether the property alleged to have been alienated by the compromise was one not claimed by the disputant as held by him on an existing title, created prior to the compromise, but was property to which he could have derived his title for the first time (according to the pleadings in the case or according to any admissions in the compromise itself) only under the compromise and on the date of the compromise. Several cases of the Allahabad and Patna High Courts were quoted by the appellants' learned Vakil, but the decisions in most of them depended on the particular facts which were held to have shown an intention on the part of the female heir to make a first or fresh alienation through the instrumentality of a nominal compromise, a nominal arbitration or some such bogus proceeding. There are, no doubt, some cases in which language of a wider character has been employed apparently supporting the appellants' contention, but I feel myself bound by the decisions of this Court and of the Privy Council to apply the test I have above indicated as the correct one; and so applying that test, I am satisfied that there was no new alienation intended or effected under Exhibit I.

Even if the claim in the plaint in this suit to obtain the relief of a declaration as to the invalidity of this new alleged alienation of 1902 is amended as one to declare the compromise agreement invalid against the plaintiffs and the 6th defendant on the ground of fraud or coercion practised upon the 7th defendant (see paragraph 7 of the plaint), the claim for such a relief is barred under the 6 years' rule.

In the result, the second appeal fails and is dismissed with costs.

SPENCER, J.—In *Bangarayudu* v. *Perayya Sastry* (8) to which decision I was a party, it was observed that, in some instances, compromises by a limited owner may amount to family settlements, while in other cases, they cannot be placed on a higher footing than alienations, and a number of decisions were quoted to illustrate both classes of transactions. No doubt it is true that there is no well-marked line of demarcation between the class of transactions which are compromises in the nature of family settlements and the class of compromises which are alienations. The recent Privy Council decision in *Amrit Narayan Singh* v. *Gaya Singh* (9) does not throw

(8) 30 Ind. Cas. 927; (1915) M. W. N. 810; 2 L. W. 1025.

(9) 44 Ind. Cas. 408; 45 C. 590; 23 M. L. T. 142; 22 C. W. N. 409; 27 C. L. J. 296; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 306; 7 L. W. 581; 20 Bom. L. R. 546; 35 I. A. 35 (P. C.).

much light on the subject, as the compromise and the reference to arbitration during the widow's life in that case was made by the minor reversioner's father purporting to act on behalf of his wife and his infant son. In an earlier Privy Council case in *Khunni Lal* v. *Gobind Krishna Narain* (4) their Lordships applied the test, to a transaction challenged by reversioners as an alienation, of seeing whether the alienee derives title from the holder of the limited interest or not, and in *Ranga Row* v. *Ranganayaki Ammal* (10) Phillips, J., on the same principle examined the facts to see whether the widow's action had, as a necessary result, the transfer of the property or whether she materially contributed by her action to the transfer, and he decided that the mere withdrawal of her defence in the suit would not amount to such an act of transfer. So in the present case, the plaintiffs' mother G. Venkayya brought a suit to declare the alienation made by their grandmother A. Venkayya to be invalid. When the former withdrew her claim to the lands under the terms of the compromise, she did not purport to transfer any further interest in the suit property beyond what their grandmother A. Venkayya had already alienated. The decision in *Akkineri Sreeramulu* v. *Mullapudi Ramayya* (1) was strongly relied upon by the appellants' Vakil as an authority for holding that a fresh cause of action would arise upon a compromise of the suit by the plaintiffs' mother G. Venkayya. The learned Judges who decided that case did not expressly state what kind of action the withdrawal of the previous suit without leave to sue again would give rise to. If they had in contemplation a suit by the daughters' sons to set aside the decree in the former suit as having been arrived at by fraud and collusion on the part of their mothers, for which the limitation period would be 6 years under Article 120 of the Limitation Act, the statement that the withdrawal of the suit of 1892 gave rise to a fresh cause of action and that the suit of 1893 was not barred by limitation is quite intelligible; and I think that this is what was intended, as I find that one of the defences to the suit was a denial that there had been any collusion. But if it was intended that the second suit in that case should be treated as one governed by Article 125, then I should be inclined to respectfully doubt the correctness of that decision, and I would follow the decision in *Timmaji Amma Garu* v. *Subbarayu* (3), which laid down that a widow entering into a compromise with a person, who disputes her right to property, when she merely undertakes to make no further claim to the property, does not thereby alienate the property and the property is not in consequence held under any title derived from her. In the case now before us, the suit was not instituted within six years of the compromise of the earlier suit.

I agree with my learned brother that the suit is time-barred and that this second appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

(10) 47 Ind. Cas. 578; 35 M. L. J. 364; 8 L. W. 455; (1918) M.W. N. 789.

CALCUTTA HIGH COURT.

INSOLVENCY JURISDICTION No. 150 OF 1911.

February 17, 1919.

Present: - Mr. Justice Rankin.

Re RAI MOHAN SHAW AND OTHERS.

Presidency Towns Insolvency Act (III of 1909), ss. 9 (b), 55, 56 Insolvency proceedings—Mortgage by insolvent on eve of bankruptcy, validity of—Good faith —Intention to delay or defeat creditors, absence of—Mortgage, whether act of insolvency—Preference to mortgagee.

The Official Assignee in an insolvency applied to have it declared that a mortgage executed by the insolvent on the eve of his bankruptcy was inoperative as against him. The mortgage was executed by the insolvent's son and wife in addition to himself, the wife and son joining as they also mortgaged their interest in the mortgaged property. It purported to secure an antecedent debt, which was established, as also a new advance:

Held, (1) that the matter was properly brought forward by way of motion in the bankruptcy, as the Official Assignee claimed to set aside the mortgage affecting the property of the insolvent and this was a claim on a title higher than that of the insolvent; [p. 176, col 2; p. 177, col. 1.]

(2) that the intention to delay or defeat other creditors not having been established, the mortgage was not an act of insolvency under section 9, subsection (*b*), of the Presidency Towns Insolvency Act; [p. 177, col. 1.]

(3) that as there was no ground for disputing the good faith of either party, the mortgage could not be said to be a voluntary transfer under section 55 of the Act. [p. 177, col. 2.]

(4) that as it was not established that the mortgage was executed with the object of giving the mortgagee a preference over other creditors as contemplated in section 56 of the Act, it could not be said to be inoperative against the Official Assignee. [p. 178, col. 1.]

JUDGMENT.—This is a motion to have it declared that two mortgages executed by an insolvent are inoperative as against the Official Assignee. The insolvent in this matter is one Durga Charan Shaw, one of 16 persons against whom an adjudication order was made in this Court as being the partners in certain businesses carried on in Calcutta and at Naraingunge under the styles of Haridas Gopal Kristo and Bhairab Chunder Khetter Mohan. In addition to these businesses it appears that the parties interested therein carried on private money-lending businesses; how many of such businesses there were is not at all clear.

The acts of bankruptcy upon which the adjudication was founded, and of which in these proceedings the adjudication order is conclusive proof, relate to the two Calcutta businesses, and are, shortly, that the *munib gomasthas*, through whom these were carried on, had departed from their usual place of business on the 23rd June 1911, and that on the same date another *gomastha* had given a verbal notice of suspension of payment. The petition was filed by a Calcutta creditor on the 26th June 1911, the adjudication order was obtained *ex parte* on the 5th July. The two mortgages are in fact dated respectively 5th and 8th Assar (Bengali year 1318), dates which I am told correspond to the 20th and 23rd June 1911. They are, therefore, on the very eve of the acts of bankruptcy established. The later mortgage was for Rs. 6,000 and was executed by the insolvent Durga alone. The respondent says that this mortgage has been paid off by a member of the family and that he is no longer concerned. In these circumstances, it has not been enquired into before me and beyond the fact that it was made and was for a fresh advance, I know little or nothing about it. The first mortgage was for Rs. 15,000; it was executed by Durga's wife and son in addition to himself. It purports to secure an antecedent debt Rs 14,034, and a new advance of the balance, Rs 966; it provides for interest at eight annas per cent. per month, the previous rate, according to the evidence, having been nine annas. The wife and son joined for the reason (as stated in the deed) that the mortgagee would not accept a mortgage of the building and tin sheds without the land on which they stand, and the wife and son mortgaged their interest in the Patni right.

Now as to this mortgage two things are clear; the respondent, who carries on a money-lending business, has adduced evidence of the reality of the debt of Rs. 14,034, he has produced his books of account, he has proved the dates and amounts of his advance he has shown payments regularly every year of interest, and the Official Assignee very properly admits that the case must be taken on the footing that the antecedent debt has been established.

I am also satisfied that the further advance was made; the only comment that can be made on the antecedent debt is that the insolvent having paid the interest regularly, the money lent has been outstanding—as regards the bulk of it at least—for some 11 years, a fact which is not very surprising, as it is the business of the respondent to lend money, it no doubt suited him very well to leave it on loan as long as his interest was regularly paid.

In the second place, I have no evidence before me to the effect that the property mortgaged by the wife and son was not their own property or that it belonged in any way to the insolvent. These two considerations are important points in the respondent's favour. Against him on the other hand I must take account of the fact that the insolvent and the respondent were relations, in the sense that the respondent's daughter had married the insolvent's son.

The Official Assignee claims to set aside the mortgage so far as it affects the property of the insolvent, and as this is a clear case of claim by a higher title than the insolvent himself would have possessed, the matter is properly brought

forward by way of motion in the bankruptcy.

Now, there are three possible ways in which such a case may be framed: First—The mortgage may be said to be an act of bankruptcy under section 9, sub-section (*b*), of the Presidency Towns Insolvency Act of 1909. If so, the title of the Official Assignee would relate back to the transaction by section 57 and unless the respondent could bring himself within section 57 (which is the protecting section), the mortgage would be void as regards the insolvent's property. If it were proved that the property mortgaged by the insolvent was his whole property, the question would arise whether the present advance of Rs. 936 was sufficient to save the transaction. There is, however, no evidence before me that the mortgage comprised the whole of his property; the only evidence is the other way. Even if I bring in the later mortgage of Rs. 6,000, the position is no better; the amount of the present advance then comes to something in the neighbourhood of Rs. 7,000. Treating the mortgage as comprising part only of the debtor's property, the law requires me to find an intention to defeat and delay creditors proved as a matter of fact before I can bring section 9 (*b*) into force. On the other hand, apart from the question of fraudulent preference which depends upon separate considerations and with which I will deal presently, there is no case here of any other fraud. There is, for example, no evidence whatever that the mortgage was made as a covinous or as a Benami transaction or for the purpose of defeating for the moment some form of execution. Section 9 (*b*), therefore, adds nothing to the case of the Official Assignee.

Secondly, in my opinion, the same is true of the voluntary transfer section 55, which is relied upon in the Official Assignee's petition. If it were shown that this was a voluntary transfer in the sense that it was not a transfer made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, then the transfer would be void. The protecting section 57 does not apply, but if the transaction was entered into by the transferee in good faith, then section 55 does not avoid it. Here, again, it is sufficient to say that, subject to the question of fraudulent preference, I can see no ground for disputing the good faith of either party, and the voluntary transfer section is not really in point.

Thirdly, the only real issue upon the first mortgage is the issue under section 56, whether the transfer was made by Durga with a view to giving the respondent preference over the other creditors. If this has to be answered in the affirmative, it matters nothing whether the respondent acted in good faith or not. Section 57 does not apply, and sub-section 2 of section 56 does not apply either. The question is as to the dominant view of the insolvent at the time. For reasons which may just possibly be nobody's fault, I am enquiring now as to the insolvent's state of mind in 1911 nearly 8 years ago. There can be no doubt also that the onus of proving this sort of fraud is upon the person alleging it. However often the onus may shift from side to side upon proof of particular facts in the end, I have to be satisfied that the insolvent had this as his dominant view when he granted the mortgage. Now, if the debtor's real object was to procure a further advance for himself, or to satisfy the demands, or escape the pressure of the creditor, or if he had both these objects as the mainspring of his action, then the transaction is not fraudulent preference. The mere proof of a demand by the creditor is not in the least conclusive. A demand may be made, and yet the circumstances of the debtor may be such that the demand cannot be the explanation of the transfer. A debtor with numerous writs already issued against him which he has not attempted to satisfy cannot be supposed to be much influenced by the prospect of another; but if, in fact, it is a demand, or a threat to sue, or a threat of any sort, or a desire to avoid evil consequences to himself, that has brought about the transfer, the suggestion of fraudulent preference is ousted altogether. I am not speaking now of transfers of the whole debtor's property for an antecedent debt, which comes under section 9 (*b*) and to which different considerations apply. Apart from that class of cases, the creditor is perfectly entitled to press for his debt and to take

payment or security for it right up to the time when he has notice of an act of bankruptcy or an adjudication order supervenes. Now, in this case, the fact of the fresh advance, and the fact that the wife and son joined to mortgage their own property, put much difficulty in the way of a case of a fraudulent preference. The fact of the later mortgage for another new advance of Rs. 6,000 (standing as it does by itself and without any evidence to attach it) is much more against such a case than in its favour. It seems to show that Durga was making the usual desperate efforts to struggle on.

I have not got, in this case, any evidence at all of the sort which the Court is accustomed to expect in "fraudulent preference" cases as to other creditors having already instituted suits against, or served process on, the insolvent, or of demands by other creditors. The petitioning creditors' debt was not a judgment debt, and their petition reads as though they had continued dealing with the Calcutta firm right up to the day before the petition.

There is, too, the further fact that Durga at Naraingunge might or might not know immediately how bad the state of the other businesses had become; how sudden or how gradual the collapse was, and what finally precipitated the fall, are matters on which I have no evidence at all. How many of the 16, or perhaps it ought to be 11, partners were actively concerned in supervising the *munib gomasthas* of the Calcutta businesses I do not know. It was put in cross-examination to the Official Assignee's witness, Haridas Roy Chowdhury, that the Naraingunge business continued in fact sometime after the adjudication order. No confirmation or contradiction was given of the suggested fact and the matter was left there.

Now, in that position, the next thing I have to consider is the evidence under section 36 of Lal Mohan Poddar. Now, Lal Mohan Poddar says, shortly, that at the time of the first advance the bankrupt was in need of money, but he does not accept the statement that the bankrupt was in difficulty. His evidence is as follows:—

"The first talk about the mortgage of the 5th Assar was when we demanded payment of the money due to us. At the time (stopped). That was about a month before the execution of the mortgage. When we demanded for payment, Durga Charan made the proposal. He volunteered it. Up to that date he had never offered to execute a mortgage. Before he made the proposal we had never asked him to execute a mortgage. When we demanded for payment he proposed we should execute a mortgage. He said I want further sum and I propose to execute a mortgage for the whole amount. We refused to advance any further amount without a mortgage."

Later, he said:—

"Durga Charan proposed to execute mortgage. We never wanted the mortgage. It was after we had demanded for payment."

Now, upon that evidence being given, a rather amusing state of things supervenes. On that evidence if it is true, it is, of course, absolutely impossible to base a case of fraudulent preference at all. His case is that the creditor demanded payment from the debtor, that the debtor not only could not pay it but wanted a further loan and, therefore, he proposed that the mortgage should be executed. That is just as many miles away from a possible fraudulent preference case, if that be the truth, as are cases of threats of posting at a club, or of threats of evil consequence from the Criminal Law: but the respondent and his advisers seem to have taken fright at the fact that the witness, when he was cross-examined, was induced to accept the expression "he volunteered it." There can be no doubt whatever what the witness means. He says that the suggestion was produced by two things, the demand for payment and his desire for a further loan. On that evidence, if it stood alone, I should have no hesitation in saying that there was no case of fraudulent preference here. But the respondent, for reasons which I really cannot appreciate, has made up his mind to throw over that witness altogether and to set up another case, namely, that the witness Kailash Chunder Poddar, having discovered that the insolvent firm was not meeting their bills as regularly as they should, went sometime before the mortgage was executed and proceeded to threaten the insolvent. He says that he

threatened him with an attachment of his property, that he threatened to ruin him and that he said that he must pay down in cash on the spot and all that sort of thing. I am perfectly satisfied that those picturesque expressions on the part of Kailash Chunder Poddar are absolutely unfounded. I think that the respondent has abandoned what was really good evidence in order to touch up a case which is inconsistent with his original case, in order to touch it up in a way that I cannot accept. In his affidavit Kailash Chunder Poddar says that the respondent, in addition to himself, threatened the insolvent. In his evidence he says that all the threats were made by himself, and in this case I think it extremely unlikely that a person, in the position of Kailash Chunder Poddar, would go and attempt to treat so roughly the insolvent who was a senior member of his master's family, namely, the father-in-law of his master's daughter. I think all that has been trumped up for the purpose of the case upon this motion, and I think that it has been very foolishly trumped up. It has been trumped up entirely because the advisers of the respondent have foolishly taken fright at a phrase or two in the evidence of Lal Mohan Poddar, when his evidence was really perfectly sound and perfectly good from their point of view. The witness Kailash Chunder Poddar also tells me that Lal Mohan Poddar, his master's second son, was crazed. I can see from the notes of his examination that that is utterly untrue, and, therefore, although the Official Assignee seems to me to have come into Court with little or no case, the respondent has done his best to give him a case by throwing over the evidence of Lal Mohan Poddar and setting up an inconsistent case, a case which, as regards many points, I do not believe. That has been my only difficulty in dealing with this matter. I have to consider whether the right view to take is, that there must be something fishy about this transaction or the respondent would never have gone to the extent he has of producing this new kind of evidence and trying to throw over the evidence of his son, and that has given me a great deal of trouble. In the end, I have come to this conclusion. I think that, in enquiring into the state of the debtor's mind, as long as eight years ago, on evidence which relates to a deed where the wife and son joined as well as the insolvent, and where there was a fresh advance, it would be wrong of me, merely because I think that the respondent has foolishly endeavoured to support his case by exaggeration and untrue statements, to fine him to the extent of depriving him of the mortgage for Rs. 15,000. My view of the facts is, that what Lal Mohan Poddar said is perfectly right in substance, with this exception that, as the debt had been outstanding for a long time, I am quite satisfied that the respondent knew that the business of Durga was getting into difficulties. Only on that supposition is there any explanation why a sudden demand, after all those years, for payment of a security should have been made. I think that what has happened is the usual thing that a certain amount of touching up, of manufactured evidence, is brought in into this case by the respondent although he has got a good case, and, therefore, what I am going to do is to find that I am not satisfied that this mortgage was made with the dominant view of preferring the respondent to uphold the mortgage; but to refuse to allow the respondent any costs of this motion.

It only remains to say a single word about the first mortgage. As regards that, before this motion was launched the respondent had by his son told the Official Assignee that that mortgage was paid off and that he claimed no interest in it. That being so, I cannot understand why the Official Assignee should be entitled to a declaration which implies that not only such a thing is true, but also that the other person was asserting the contrary. There may be cases where you require a declaration in order to clear your title to land; in a proper case, it is possible to get that. It could not possibly be said that the respondent here, having stated before the motion was launched that he had nothing to do with that mortgage, should be made to pay the costs of obtaining a declaration with which he had nothing to do What I propose to do on that is this, that I shall recite in my order that the respondent, alleging that he is not now interested in the mortgage by reason of the fact that he has

been paid off, the motion is dismissed, but no order as to costs.

Mr. Avetoom.—The Official Assignee to retain his costs of, and incidental to, this application out of the estate?

COURT.—The ordinary practice is that he applies and obtains an order before he starts the motion and that order provides for his costs. If it has not been done, an application may be made later.

Motion dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1247 OF 1917.

August 15, 1919.

Present:—Mr. Justice Jwala Prasad and Mr. Justice Foster.

E. W. C. MOORE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAKHAN SINGH—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 106, 117—Lease, expiry of—Lessor holding over, position of—Notice to quit, whether necessary—Agricultural lease, applicability of s. 106 to.

A lessee, who, after expiry of the term of his lease, holds over with the consent of the lessor, occupies the same character as he did under the expired lease, and has no right to set up any title adverse to that of the lessor and in derogation of the rights of the latter. [p. 181, col. 2; p. 182, col. 1.]

The mere consent of a landlord to a tenant holding over after the expiry of the term of his lease, during the pendency of negotiations for a fresh lease, does not create a contract of tenancy. [p. 182, col. 1.]

Except in so far as its provisions may be made specially applicable by the Local Government to agricultural leases, section 106 of the Transfer of Property Act has no application to such leases. [p. 182, col. 2; p. 183, col. .]

A tenant who holds over against the wishes of the landlord is not entitled to any notice to quit before a suit for ejectment is filed against him. [p. 183, col. 1.]

Appeal from a decision of the Additional Subordinate Judge, Muzufferpore, dated the 27th August 1917, reversing that of the Munsif, Sitamarhi, dated the 21st December 1916.

Messrs. *S. C. Mitter* and *S. K. Mitter*, for the Appellants.

Mr. *L. N. Singh*, for the Respondent.

JUDGMENT.

JWALA PRASAD, J.—This appeal arises out of a suit brought by the landlord to eject the defendants from the lands in suit, said to consist of 4 *bighas* of Zerait land.

On 4th March 1898, on behalf of the plaintiff his mother gave to the defendants a lease called Sadhana Patawa Theka of 5 annas 6 *gandas* 2 *cowries* 2 *karants* Pucca Patti bearing Touzi No. 5510/2 in Mouza Tandaspur Joka, Pergana Nezam ud-dinpur Bogra, along with the shares owned by the plaintiff in other Mouzas. The share leased in the Mouza included some lands in the direct possession of the lessor. The lease was for a term of 9 years from 1306 to 1314 F. S. After the expiry of the lease the defendants, upon the requisition of the plaintiff, gave up possession of the leasehold property from the month of Kartick 1315 F. S. with the exception of 4 *bighas* of the Zerait land in dispute. The plaintiff's case is, as stated in paragraph 5 of the plaint, that the defendants continued in possession and occupation of the land in suit on the pretext of obtaining a fresh lease in respect of the shares in the Mouzas as mentioned in the Sadhana Patawa lease referred to above, and upon that pretext they obtained permission of the plaintiff to continue in possession of the land in suit during the pendency of the negotiations regarding the renewal of the lease in the village. The negotiations, however, fell through. The plaintiff then demanded possession of the land in suit from the defendants, but the defendants declined to give up possession of the land.

In 1911 the plaintiff instituted a suit No. 730 of 1911 for ejectment of the defendants from the lands in suit, upon the ground that the defendants were trespassers upon the lands and that the said lands were the Zerait of the plaintiff.

The defendants in that suit pleaded that they were in possession of the lands in pursuance of an oral agreement arrived at between the parties, whereby the plaintiff had agreed to allow the defendants to hold over the disputed lands on payment of the rents at the rates prevailing in the locality.

That suit was dismissed by the Munsif, who held that the defendants had held the lands as tenants thereof and were not trespassers at all. On appeal the Subor-

dinate Judge upheld the decision, holding that the defendants were holding over the lands with the permission of the plaintiff and were thus licensees in respect of the lands in suit. The status of the defendants was left undetermined. The judgment of the Appellate Court is dated 11th July 1913. The present suit was brought soon after that on the 2nd March 1914, after giving notice to the defendants to quit the lands in suit. The lower Appellate Court has held that the notice was served on the 4th August 1913 and the present suit was filed on the 2nd March 1914, that is after the expiry of six months of the term of the notice.

The defendants denied that the land was the Zerait of the plaintiff and alleged that they were in possession of the same by virtue of an oral agreement with the plaintiff after the expiry of the lease in 1314 F. S, on the condition of their paying the rents at the rates prevailing in the vicinity. The Munsif upheld the plea of the defendants and dismissed the suit of the plaintiff.

On appeal, the Subordinate Judge by his judgment, dated the 27th August 1917, reversed the decision of the Munsif and decreed the suit of the plaintiff, holding that the defendants were tenants holding the lands from year to year and hence the tenancy was terminated by the service of notice to quit given to the defendants by the plaintiff. Aggrieved by the said decision the defendants appealed to this Court. The case was remanded to the lower Appellate Court for determination of the following issues framed by this Court:—

"(1) Are the lands in suit Zerait lands within the meaning of the Bengal Tenancy Act; and

(2) Was the defendant holding under a lease for a term of years or under a lease from year to year?"

The Court below has now remitted its finding upon the aforesaid issues. As to the first issue the Court below has held that the plaintiff failed to prove the lands in suit to be the Zerait lands as defined in sections 166 and 120 of the Bengal Tenancy Act. As to the 2nd issue the Court below, in agreement with the view taken by the Appellate Court in Suit No. 730 of 1911 already referred to, has held that the defendants were holding over the lands as mere licensees. The finding has been made clear towards the end of the judgment, where it has been clearly held "that there was no formal agreement between the parties after the expiry of the lease in 1314 F. S., but that there might have been some talk about the renewal of the lease with respect to the disputed lands. There is nothing to show that the defendant got any extension of the lease. He was simply holding over the lands pending the completion of the negotiations with the tacit, if not express, permission of the plaintiff." The Court has distinctly held that "the defendants were holding over from year to year."

Under section 51 of the Bengal Tenancy Act as well as under section 116 of the Transfer of Property Act, the defendants upon the aforesaid finding would be deemed to have been occupying the lands in dispute upon the same conditions as those contained in the original lease, by virtue of which they were admitted into the occupation of the lands in suit as part and parcel of the share of the plaintiff leased to them in the village in question. Section 116 of the Transfer of Property Act says that if a lessee remains in possession of the property leased to him after the termination of the lease and the lessor or his legal representative accepts rent from him or otherwise assents to his continuing in possession, in the absence of an agreement to the contrary the lease shall be considered to have been renewed from year to year or from month to month according to the purpose of the property leased. Section 51 of the Bengal Tenancy Act embodies the principle of section 116 of the Transfer of Property Act. It is obvious that if a lessee holds over after the expiry of the term of his lease with the consent of the lessor, as in this case, he, the lessee, occupies the same character as he did under the expired lease. The status of the defendants in the present case is undisputed to be that of a tenure-holder as defined in section 5 of the Bengal Tenancy Act. The share in the village belonging to the plaintiff and formed into a separate Patti was leased to the defendants for the purpose of collecting rents or bringing the lands under cultivation by establishing tenants

thereon. The land in suit was described in the lease as Zerait. Whether the defendants are bound by the description, or whether the description would be accepted by a Court as conclusive evidence of the character of the land being Zerait, is immaterial. The description shows at least that the land was in direct possession of the landlord and it has been so recorded in the Survey Record of Rights in which the land has been described as *bakasht*, *i.e.*, under the direct cultivation of the landlord. The defendants, after the expiry of the term of the lease, had no right to set up any title in these lands adverse to that of the lessor and in derogation of the rights of the latter. The defendants were fully cognizant of their own status. In Suit No. 730 of 1911 all that the plaintiff expressly claimed was that the land in suit was his Zerait. The defendants did not controvert that statement and tacitly accepted it by alleging that they had acquired the right to hold over the land as tenants by virtue of an oral agreement after the expiry of the lease in question. If the defendants can prove that they held over the lands under the oral agreement set up by them, the principle of holding over will not at all affect their title and their case will then come under the provisions of the Bengal Tenancy Act governing the incident of a tenant, whether occupancy or non occupancy. The finding of fact of the Court below has concluded this point. It has been held that the oral agreement set up by the defendants has not been proved; all that has been proved is that the landlord consented to their remaining in possession of the lands during the pendency of the negotiations in respect of the disputed lands, but that consent does not create a contract of tenancy. The consent was with the object of giving them the rights under section 116 by holding over. Accepting the finding of the Court below, we hold that the defendants were tenure-holders in respect of the lands in suit and were not *raiyats* within the definition of the term in the Bengal Tenancy Act There fore, the contention of the learned Vakil on behalf of the appellants that the suit of the plaintiff is barred by the provisions of section 44 of the Bengal Tenancy Act, must fail. That section applies to non-occupancy *raiyats*, and the defendants not being such *raiyats* the section has no application to the present case.

It is now unnecessary to consider the objections of the learned Vakil appearing on behalf of the respondent as to the finding on issue No. 1, namely, that the lands in suit are not the Zerait lands within the meaning of the Bengal Tenancy Act. It would be sufficient to mention that all the objections appear to have been disposed of by the Court below and that there is nothing to show that the view taken by the Court below is not correct. The plaintiff has not been able to prove within section 120 of the Bengal Tenancy Act that the land in suit is the Zerait land of the proprietor. No doubt the defendants ought to have denied the character of the land as Zerait in their written statement in Suit No. 730 of 1911. But it is more than doubtful whether the scope of that suit was such as to make the omission of the defendants to make an express denial of the allegation of the plaintiff operate as *res judicata* on the question as to whether the land is the Zerait of the Malik.

The learned Vakil on behalf of the appellants contends that the defendants cannot be ejected from the lands in question inasmuch as the notice served by the plaintiff was not sufficient in law The lower Appellate Court held in its judgment, dated the 27th August 1917, before the case was remanded for further finding, that the notice was served upon the appellants on the 4th August 1913, and the present suit was brought on the 2nd March 1914, after the expiry of six months, the term of the notice, and hence the notice was sufficient and valid in law. The contention of the learned Vakil is that the appellants were entitled to have six months' notice before the plaintiff could terminate the lease in question. This contention is based upon section 106 of the Transfer of Property Act. In the first place, it is doubtful if section 106 applies to the land which was used by the plaintiff for agricultural purposes, for section 117 of the Transfer of Property Act exempts leases for agricultural purposes from the operation of Chapter V of the Transfer of Property Act in which section 106 happens to be, except in so far as the Local Government with the previous

sanction of the Governor General in Council may by notification published in the Local Official Gazette declare all or any of such provisions to be applicable in the case of all or any of agricultural leases. We have not been shown any notification issued by the Government under the latter part of section 117 and hence section 106 does not apply to agricultural leases. Assuming for the sake of argument that the section does apply to agricultural leases, the lease terminated in 1314 F. S. The defendants held over the lands with the consent of the landlord in the succeeding year during the pendency of negotiations for a lease of the share of the plaintiff in the village. The negotiations having fallen through, the plaintiff regarded the continuance of the possession of the defendants as that of a trespasser upon the lands and consequently brought the Suit No. 730 of 1911 referred to above. In that case, as has already been observed, the defendants were held as having been allowed to continue to hold over the lands after the expiry of the lease as mere licensees. The plaintiff did not at all treat the defendants as tenants of the lands. The suit of 1911 is a clear notice of the intention of the plaintiff to evict the defendants from the lands in suit. No fresh tenancy having been created as held by the Court below, it would appear that no notice under section 106 was at all necessary. This view has been taken in two cases, *Nandikolla Gopalan* v. *Manyam Mahalakshmi Amma Zemindarini Garu* (1) and *Gokul Chand* v. *Shib Charan* (2). The facts of the latter appear to be very similar to those of the present one, where the defendant continued to hold over possession of the house after the expiration of the term of the lease in defiance of the authority of the lessor, and it was held that he was not entitled to a notice to quit under section 106 of the Transfer of Property Act. In the present case the plaintiff gave a notice on the 4th August 1913 (corresponding to 17th Srawan 1320) requiring the defendants to quit the lands by the 1st Asin 1321. The suit was brought on the 2nd March 1914. The defendants were, therefore, given sufficient notice in the present case. If the case is governed by the provisions of the Bengal Tenancy Act applicable to tenure holders, no notice appears to have been prescribed by the said Act; much less a notice of six months, as the learned Vakil on behalf of the appellants contends, his clients were entitled to in this case. The contention is, therefore, overruled.

The result is that this appeal is dismissed with costs.

FOSTER, J.—I concur. In my opinion the defendant has been holding as a tenant of a tenure, as defined in section 5 of the Bengal Tenancy Act. My reasons are that in 1315 F. S. the two parties agreed to the defendant remaining on the land, he having hitherto held it as tenure-holder, and that they were contemplating a renewal of the tenure in respect of that very land. It is quite obvious that neither party contemplated a *raiyati* settlement. It also seems to me that the settlement was for that year only. There is nothing to show to the contrary, and the parties were expecting a renewal of the tenure. So even if it be considered a new settlement, as the appellant would have held it to be in 1315, it was only a new settlement for one year and it was a settlement of a tenure. That apparently was renewed with the tacit assent of the landlord year by year up to the year 1320. I gather this from the decision of Suit No. 730 of 1911. But what has been the position since 1320? The defendant cannot say for a moment that he held over the land as a *raiyat* with the assent of the landlord in the years 1321, 1322 and the other succeeding years, year by year; for that is necessary to justify his remaining on the land. If there is no landlord's assent, then the defendant has lost his status. Giving the very best position possible to the defendant, it could only be that of a tenant by sufferance, and that tenancy is terminable at the will of the landlord. I think that the notice issued in August 1913 was sufficient expression of the landlord's will to determine that tenancy. It is quite clear, however, from the record that the defendant has been holding the land against the wishes of the landlord, and his allegations both that he has been given a *raiyati* settlement and that the landlord had assented to his possession of the land, are untrue and disingenuous.

Appeal dismissed.

(1) 7 Ind. Cas. 8; 8 M. L. T. 230; (1910) M W. N. 622.

(2) 18 Ind. Cas. 59; 9 A. L. J. 574.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 132 OF 1917.

May 8, 1919.

Present:—Mr. Justice Newbould.

JNANADA SUNDARI CHOWDHURANI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JILAPI BEWA AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Adverse possession by tenant—Acquisition of limited interest.

A tenant who occupies land other than that comprised in his tenancy for more than twelve years acquires the limited interest of a tenant in the land by adverse possession.

Appeal against the decree of the Second Additional District Judge, Mymensingh, dated the 15th of September 1916, affirming that of the Munsif, Iswargunj, dated the 24th of July 1915.

FACTS appear from the judgment.

Babu *Sasanka Jibon Roy* for Babu *Chandra Kanth Ghose* (with him Babu *Nilkanta Ghose*), for the Plaintiffs-Appellants.—This was a suit brought by the plaintiffs for recovery of possession of the disputed lands. The lower Court has not given my clients *khas* possession on the ground that the tenant defendants have been occupying the lands for more than 12 years and that they have acquired a limited interest in the lands by adverse possession. The defendants took advantage of their position as tenants and possessed themselves of lands which belonged to the plaintiffs. If Article 142 of the Limitation Act applies my clients are clearly barred, but I submit that Article 144 applies in a case like this. Here the tenants have committed a tort by trespass and they cannot take advantage of tort and ask the landlord to receive rent from them. The tenants are trespassers; *Nuddyarchand Shaha* v. *Mexjan* (1). The tenants cannot without their landlord's consent have occupancy rights and insist that they must possess to the end of their tenures. The tenants cannot take advantage of their own wrong, *Krishna Govinda Jawadar* v. *Banka Behari Shaha* (2). The tenants must prove adverse possession. The plaintiffs' rights as landlords are denied here. The landlords had no notice

(1) 10 C. 820; 5 Ind Dec. (N. S.) 549.
(2) 4 Ind. Cas. 526; 13 C. W. N. 699.

of the adverse possession of the defendants. The plaintiffs came to know of the trespass within 12 years of the suit.

Babu *Biraj Mohan Mojumdar*, for the Deputy Registrar, who represented the Respondents, was not called upon.

JUDGMENT.—The plaintiff-appellant brought this suit for recovery of possession of certain land on establishing her title thereto. Both the Courts below have granted the plaintiff a decree declaring her title but held that she was not entitled to *khas* possession. The finding is that the defendants, who are tenants of the plaintiff in respect of other lands, have been occupying the land in suit for more than 12 years claiming the right of tenancy thereto. The rulings cited in the judgment of the lower Appellate Court, *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (3), *Raktoo Singh* v. *Sudhram Ahir* (4) and *Protap Narain Mukerjee* v. *Biraj Dasi* (5), fully support the decisions of the Courts below that on the facts found by them the defendants must be held to have acquired a limited interest in the land by adverse possession.

The appeal fails and must be dismissed with costs.

Appeal dismissed.

(3) 2 C. L. J. 125.
(4) 8 C. L. J. 557.
(5) 20 Ind. Cas. 823; 19 C. L. J. 77.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 102 OF 1918.

April 2, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

EDA PUNNAYYA AND ANOTHER—PETITIONERS Nos. 3 AND 5—APPELLANTS

versus

JANGALA KAMA KOTAYYA AND ANOTHER—COUNTER PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XXXII, rr. 3, 4—Minor—Guardian ad litem, *whether can be appointed without consent—Guardian not properly appointed—Minor, whether bound by decree—Ex parte decree against minor not properly represented—Application to set aside decree, whether maintainable.*

EDA PUNNAYYA v. JANGALA KAMA KOTAYYA.

The appointment of a person as the guardian *ad litem* of a minor without that person's consent is not a valid appointment. [p. 185; col. 2, p. 186; col. 1]

Where a minor is not properly represented on the record, he cannot be regarded as a party to the proceedings, and the result of such proceedings, therefore, cannot bind him; consequently there can be no question of his having been prevented by sufficient cause from conducting them. If in such a case an *ex parte* decree is passed against a minor, he cannot apply to set it aside under Order IX, rule 13, of the Civil Procedure Code. [p. 185, col. 2; p. 186, cols 1 & 2.]

In order to attract the provisions of Order IX rule 13 of the Civil Procedure Code, relating to the setting aside of *ex parte* decrees, the person seeking the aid of the Court must be a party to the suit. It is of the essence of the rule that the complaint must come from one whose rights could validly be dealt with by the trial Court. [p. 186, col. 2.]

If in consequence of the failure to have a guardian appointed a minor defendant is not properly before the Court, any decree passed against him and any proceedings intended to affect him would be nullities. The minor has in such a case, his remedy against the invalid act of the Court in quite a different proceeding, and not in a proceeding instituted to set aside the decree treating him as if he were properly before the Court. [p. 186, col. 2.]

Appeal against the order of the Court of the Subordinate Judge, Bezwada, in Civil Miscellaneous Petition No. 376 of 1917, in Original Suit No. 36 of 1916.

FACTS appear from the judgment.

Mr. *N. Rama Rao*, for the Appellants.—Order IX, rule 13, Civil Procedure Code, applies to this case. The minor was represented by a guardian and the case was decreed *ex parte* owing to his absence. The provisions of the rule are attracted.

See *Bhagwan Dayal* v. *Param Sukh Dass* (1). See also *Shroof Sahib* v. *Raghunatha Sivaji* (2) and *Adayapadi Ramanna Udpa* v. *Krishna Udpa* (3).

Mr. *P. Narayanamurti*, for the Respondents.—There has been no valid appointment of a guardian *ad litem*, because his consent was not taken and he never expressed his willingness to act. The proceedings in the suit do not bind the minors and they are entitled to treat the decree as non existent. The minors cannot be regarded as parties to the suit. It is only a party that can apply to set aside the *ex parte* decree under Order IX, rule 13, Civil Procedure Code. See Privy Council decision in *Rashid-un-nisa* v. *Muhammad Ismail Khan* (4). In *Vulia Konikkal Edathil Cheria Pajni Achan* v. *Maruthu Veera Kaundan* (5) the applicability of Order IX, rule 13, was not considered. In *Adayapadi Ramanna Udpa* v. *Krishna Udpa* (3) the decision turned on the negligence of the guardian. The proper course for the minors is to apply to have the decree vacated in appropriate proceedings.

(1) 36 Ind Cas. 366; 39 A 8; 14 A. L. J. 818.
(2) 29 Ind. Cas. 579; 18 M. L. T. 401.
(3) 25 Ind. Cas. 450. 27 M. L. J. 167.

(4) 3 Ind. Cas. 864; 31 A. 572 (P. C.); 13 C. W. N. 1182; 10 C. L J. 318; 6 A. L J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 35 I. A. 168.
(5) 18 M. L. J. 543; 4 M. L. T. 230.

JUDGMENT.

OLDFIELD, J.—We take the facts in this case to be that the father of the present appellants was appointed their guardian *ad litem*, although he had never appeared and consented to his appointment, and that the suit was afterwards decreed against them *ex parte*. The lower Court has refused to set aside that decree, on the ground that the procedure provided by Order IX, rule 13, Civil Procedure Code, cannot be applied to it.

The appointment of the guardian was certainly bad in the circumstances, and the minors must, therefore, be taken to have been unrepresented. The question is then whether Order IX, rule 13, is applicable. We have been referred to two decisions of this Court and certain decisions of the Allahabad High Court to show that it is. The Allahabad decisions, however, of which the latest is *Bhagwan Dayal* v. *Param Sukh Dass* (1), were given without reference to the principle which in my opinion governs the case and the judgment of the Judicial Committee to which I shall refer. My learned brother's decision in *Shroof Sahib* v. *Raghunatha Sivaji* (2) appears to have turned on the invalidity of the guardian's appointment, the application of Order IX, rule 13, not having been disputed and my own decision in *Adayapadi Ramanna Udpa* v. *Krishna Udpa* (3) dealt with the negligence of a regularly appointed guardian and the question whether it could be regarded as "sufficient cause" within the meaning of the rule.

The proper principle to apply, however, is that the minor, if he is not properly represented, cannot be regarded as a party to the proceedings at all, they, therefore, cannot

bind him and there can be no question of his having been prevented by any sufficient cause from conducting them. This follows from *Rashid-un-nisa* v. *Muhammad Ismail Khan* (4), in which it was held that the appointment of a guardian not having been valid, the litigation she had conducted on behalf of the minor was a nullity and the minor was not a party to it for the purpose of section 244 of the former Code. This ground of decision is implied in the lower Court's reference to the possibility that the minors may be entitled to treat the decree passed as not binding on them. Adopting it, I would dismiss the appeal with costs.

SESHAGIRI AIYAR, J.—I agree.

I shall, however, add a few words having regard to the citation of a decision to which I was a party, namely, *Shroof Sahib* v. *Raghunatha Sivaji* (2). In that case, there was no argument that the procedure prescribed by Order IX, rule 13, was not applicable where the minor was not properly represented; therefore, that decision is not an authority for the proposition contended for on behalf of the appellant.

We must take it that the minor was not properly represented in the suit. The consent of the proposed guardian was not obtained for his appointment and according to principle and the recognised practice of this Court, no guardian can be appointed unless he has expressed his willingness to act. It follows, therefore, that the minor, though co nominee in the array of parties, was not represented and was not consequently a party to the suit. The decision of the Judicial Committee in *Rashid un nisa* v. *Muhammad Ismail Khan* (4) lays this down distinctly. The learned Chief Justice and Sadasiva Ayyar, J., have taken the same view in this Court, *Vasumarti Payidanna* v. *Ganti Lakshminarasamma* (6). My learned brother's decision in *Adayapadi Ramanna Udpa* v. *Krishna Udpa* (3) related not to the question of the want of representation of the minor, but to gross negligence in the conduct of the guardian properly appointed. I do not think that decision is relevant to the present case

Two decisions of the Allahabad High Court have been quoted which *prima facie* are in favour of appellants' contention. As regards *Bhagwan Dayal* v. *Param Sukh Dass* (7) I do not find much difficulty. In that case a Court Amin was appointed, without notice to the mother, the natural guardian. The learned Judges held that it was an improper appointment. I do not understand them to have decided that the appointment was invalid In this view, the decision is not inconsistent with the Privy Council decision. But in a later case, *Bhagwan Dayal* v. *Param Sukh Dass* (1), the learned Judges understood the earlier case to have decided that there was no valid appointment of a guardian and on this construction of their Court's judgment, they held that Order IX, rule 13, was applicable to the case. It may be remarked that the learned Judges relied on the inherent power of the Court to vacate the judgment: when this provision is appealed to, I fail to see why the order should have been set aside under Order IX, rule 13. As in my opinion the view taken in the last mentioned case is not reconcilable with *Rashid-un-nisa* v. *Muhammad Ismail Khan* (4), I am unable to accept it as good law. There can be no question that to attract the provisions of the order relating to the setting aside of *ex parte* decrees, the person seeking the aid of the Court must be a party to the suit. It is of the essence of Order IX, rule 13, that the complaint must come from one whose rights could validly be dealt with by the trial Court. If in consequence of the failure to have a guardian appointed the minor was not properly before the Court, any decree passed against him and any proceedings intended to affect him would be nullities. He has his remedy against the invalid act of the Court in quite a different proceeding, and not in a proceeding instituted to set aside the decree treating him as if he were properly before the Court. This conclusion follows from the Privy Council decision and from the decision of this Court already quoted by me.

In my opinion the Subordinate Judge was right in holding that in the view of the facts he had expressed, the present application was incompetent. I agree in the order proposed by my learned brother as to costs.

M. C. P.

Appeal dismissed.

(6) 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J. 525.

(7) 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No 1014 of 1916.

June 16, 1919.

Present:—Mr. Justice Shah and
Mr. Justice Hayward

CHOLAPPA GATTINNA SANNA AND ANOTHER—APPELLANTS

versus

RAMCHANDRA ANNA PAI—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 145—Limitation Act (IX of 1908), Sch I, Art. 182 (2)—Surety - Execution of decree against surety—Appeal by defendant—Limitation, commencement of.

A decree-holder has, under section 145, Civil Procedure Code, a right to execute his decree against a surety to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees. The fact that the defendant appealed, and that the sureties were not parties to the appeal, would make no difference. [p. 187, col. 2; p. 188, cols. 1 & 2.]

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 122 of 1915, reversing the order passed by the Subordinate Judge, Sirsi, in Miscellaneous Application No. 537 of 1913.

Messrs. *Coyajee* and *A. G. Desai*, for the Appellants.

Mr. *Nilkanth Atmaram*, for the Respondent.

JUDGMENT.

SHAH, J.—In this case an *ex parte* decree was originally passed against defendant No. 1 in Suit No. 342 of 1901; but that *ex parte* decree was set aside and the suit was ordered to be retried on the defendant No. 1 furnishing security. Two persons, who are now represented by the present appellants, stood sureties for the amount that the Court, in which the suit was filed, *i.e.*, the Sirsi Court, might find the defendant liable for. Ultimately a decree was passed by the Sirsi Court against the defendant No. 1 on the 22nd March 1907 for a certain amount. The defendant appealed to the District Court, which, subject to some variation, with which we are not now concerned, confirmed the decree of the trial Court on the 15th April 1908. In second appeal this Court confirmed the decree of the District Court on the 13th February 1911. The decree-holder applied for a transfer of the decree for execution against the sureties on the 20th December 1913. The sureties contended that the execution as against them was time-barred, as no application for execution was made within three years from the date of the trial Court's decree which alone they had undertaken to satisfy. The first Court allowed this contention: but in appeal the District Court has disallowed it and has ordered the Court of first instance to proceed with the application against the sureties according to law.

In the appeal before us the same contention has been raised on behalf of the sureties: I am of opinion that the view taken by the District Court is right. It is clear from section 145 of the Code of Civil Procedure that the decree-holder has a right to execute the decree against a surety to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees. The article which governs the applications for execution is Article 182 of the First Schedule of the Indian Limitation Act. The article prescribes three years' limitation from the date of the decree or where there has been an appeal, from the date of the final decree of the Appellate Court. The execution of the decree is clearly not time-barred, if the period of limitation begins to run from the final decree of the High Court in second appeal. Under this article the decree-holder has clearly a right to proceed against the sureties within the time allowed under clause 2 in the third column.

It is contended, however, that the sureties undertook to satisfy the decree of the Sirsi Court, that they have nothing to do with the appeal preferred by the defendant, to which they were not parties, and that the application is governed by clause 1 and not clause 2. I do not think that this contention is sound. For instance, if the defendant's appeal had succeeded, the sureties would have taken the benefit of the Appellate Court's decree in favour of the defendant It cannot be said that when they stood sureties for the defendant in the trial Court, they could not have contemplated the possibility of an appeal, which would be an ordinary incident of the litigation which was re opened with their assistance at the instance of defendant No. 1, and which would have the effect of extending the time from which the limita-

tion would begin to run according to the Indian Limitation Act. The fact that the sureties would not be parties to the appeal could not make any difference.

Mr. Coyaji has relied upon the decision in *Narayan* v. *Timmaya* (1); but that decision is based upon the consideration of the explanation applicable to clause 5 in the third column. It has nothing to do with the point arising in this case. I do not think that that case lends any support to the contention that in determining the date from which the prescribed period of limitation under Article 182 should run in the present case, clause 1 only should be considered and that clause 2 can have no application, as the sureties were not parties to the Appellate Court's decree. I would dismiss the appeal and confirm the decree of the lower Appellate Court with costs.

HAYWARD, J.—I concur. The applicants became sureties for the execution against defendants of the decree of the original Court. Their liability would be enforceable to the extent to which they have rendered themselves personally liable in the manner provided for the execution of decrees under section 145 of the Civil Procedure Code. They were, therefore, liable to be proceeded against within the ordinary period prescribed by limitation for the execution of such decrees. That period has been prescribed by Article 182 of the First Schedule to the Limitation Act. They have claimed to be governed by the first clause of that Article, and they have contended that execution has become time-barred against them as more than three years have elapsed since the date of the decree of the original Court. They have contended that the second clause applies only to parties who have appealed, and that it is only in the case of parties who have appealed that execution can be brought within three years of the date of the final decree of the Appellate Court. It seems to me that their contention is unsound and contrary to the plain and wide words of the clause, and that view was held in the similar case of defendants who had not appealed in *Shivram* v. *Sakharam* (2). It seems to me, therefore, that the execution was not time-barred and that the appellants were liable to be proceeded against in execution under clause 2 of Article 182 of the First Schedule of the Indian Limitation Act. I am of opinion, therefore, that the appeal must be dismissed with costs.

Appeal dismissed.

(1) 31 B. 50; 8 Bom. L. R. 507.
(2) 33 B. 39 at p. 43; 10 Bom. L. R. 939.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 916 OF 1918.

May 2, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Cuming.

ABHOYA CHARN LATABAIDYA—DEFENDANT No. 1—APPELLANT

versus

Srimati KAMINI PROBHA NAG, WIFE OF NILMANI NAG—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B C of 1885), ss. 159, 160 (c)—Landlord and tenant—Lease for term of years—Betel plantation, whether protected interest—Sale in execution of rent decree—Purchaser, whether takes land subject to protected interest.

The interest of a tenant in land on which a *boraj* or betel plantation has been made is a protected interest within the meaning of section 160 of the Bengal Tenancy Act, although the tenant does not hold the land under a permanent lease [p. 189, col. 2.]

Banko Behary Das v. *Krishna Chandra Bhowmick*, 21 Ind. Cas. 419; 18 C. W. N. 349; 18 C. L. J. 170, relied on.

Jogendra Narain Roy v. *Kiran Chandra Ray*, 50 Ind. Cas. 406; 23 C. W. N. 315; 46 C. 720, distinguished.

A purchaser of a tenure at a sale in execution of a decree for rent due in respect of land on which there is a *boraj* or betel plantation, made by a tenant who originally held under a lease for a term of years but afterwards held over on payment of rent, takes subject to the protected interest of the tenant and the rights of such a purchaser are controlled by the provisions of section 159 of the Bengal Tenancy Act. [p. 189, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Tipperah, dated the 6th February 1918, reversing that of the Munsif, 2nd Court at Brahmanbaria, dated the 10th March 1917.

FACTS appear from the judgment.

Babu *Sasadhar Roy* (Senior), for Defendant No. 1 Appellant.—There can be no denying the fact that the plaintiff-respondent is the lawful purchaser of the

tenure in question. But the point in issue is—does he take it subject to 'protected interests'? Section 160, clause (*c*), of the Bengal Tenancy Act mentions that any lease of land on which plantations have been made is a protected interest. The disputed land contains a betel leaf plantation which has been there for nearly 30 years. It was quite in good faith that defendant No. 1 took settlement of this plantation from the original owner Ram Kumar. So the plaintiff's purchase must have been subject to the interest of defendant No. 1. Refers to *Banko Behary Das* v. *Krishna Chandra Bhowmick* (1).

Babu *Upendra Kumar Roy*, for the Respondent.—The Khatiar, Exhibit 5, shows that the plaint lands were *raiyati* lands under the Maharaja, defendant No. 3. The correctness of the Khatian has neither been strongly impugned nor rebutted. Moreover under clause (*c*) of section 160 of the Bengal Tenancy Act the plantation, in order to become a protected interest, must be a permanent plantation, about which there has been neither any investigation nor any finding. The lease of the land referred to in the said clause must be a permanent lease. Then refers to *Jogendra Narain Roy* v. *Kiran Chandra Ray* (2).

Babu *Sasadhar Roy* replied.

JUDGMENT.—The plaintiff is the purchaser in execution of a decree for arrears due in respect of the land in suit. Section 159 of the Bengal Tenancy Act controls his rights. He as purchaser takes the tenure subject to the interests defined in Chapter XIV as "protected interests." Section 160 deals with protected interests, and clause (*c*) mentions any lease of land whereon plantations have been made amongst others. The land in suit contains a *boraj* or betel leaf plantation. It has been in existence for about 30 years. The land originally belonged to one Ram Kumar who claimed Lakheraj title to it. He made a settlement for a term of three years to the contending defendant for making betel groves. That lease undoubtedly provided that he was to give up the land after the expiry of the lease. He held over and continued to pay rent to Ram Kumar. It has been found by the learned Subordinate Judge that Ram Kumar's claim that it was Lakheraj land, is not justified. He has found, however, that Ram Kumar was not a trespasser, but he was the original owner either as Lakherajdar or as *raiyat* and was in actual possession of the land. There was no want of good faith on his part in settling the land with defendant No. 1 for a term of three years and no want of good faith on the part of the defendant No. 1 for taking settlement for the said term.

Reliance, however, is placed by the learned Subordinate Judge upon a Khatian, Exhibit 5, which says that the plaint lands were *raiyati* lands under the Maharaja, defendant No. 3. He finds that except the Potta Exhibit A, by which the land was granted as the Lakheraj of Ram Kumar, there is no other document in favour of that contention. He has overlooked Exhibit C which is a mortgage and he has not attached any importance to the oral evidence which is quoted in his judgment, namely, that of witness No. 4. He thinks that the correctness of the Khatian has not been rebutted, whereas the learned Munsif having regard to all this evidence held that it was rebutted.

But the contention pressed before us is that the plaintiff's purchase is subject to the interest of defendant No. 1, who made a plantation and had a lease of the land whereon his plantation stood. There is no doubt that section 160 (*c*) covers such interest. This has been held in *Banko Behary Das* v. *Krishna Chandra Bhowmick* (1). There Mr. Justice Chatterjee held that the land in which a *boraj* is made is a protected interest within the meaning of section 160 of the Bengal Tenancy Act. That judgment was affirmed by Sir Lawrence Jenkins, Chief Justice, and Mr. Justice Mookerjee. It has, however, been strenuously urged before us that the plantation referred to in clause (*c*) must be a permanent plantation and that also the lease of the land referred to therein must be a permanent lease. But the clause itself mentions "any lease of land", and so far as the betel plantation is concerned, we think it is covered by the decision we have referred to and it is a protected interest. The

(1) 21 Ind. Cas. 419; 18 C. W. N. 349; 18 C. L. J. 170.

(2) 50 Ind. Cas. 406; 23 C. W. N. 315; 46 C. 730.

whole of the land in Exhibit A was leased out as a *boraj vita* and there is a small orchard on it. *Kiran Chandra Roy* v *Niamuddi* (3) may in this connection be referred to. *Jogendra Narain Roy* v. *Kiran Chandra Ray* (2) does not affect this case, as the whole of the land mentioned in the lease is *boraj vita*. There is no case made here for an enquiry if any portion of the land can be excepted.

We, therefore, set aside the decree of the Subordinate Judge and affirm that made by the Munsif. The appellant is entitled to the costs of all Courts.

Decree set aside.

(3) 30 C. 498.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES

SECOND APPEAL PETITION No. 15 OF 19 8-19.

February 7, 1919.

Present:—Mr. Ferard, S. M., and Mr. Hopkins, J. M.

LACHMI NARAIN—APPELLANT

versus

Musammat SARDAR KUAR—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 34, 156, 177 (e) —Suit under s. 156—Proprietary title, plea of—Revenue Court, whether can take cognisance of plea—Jurisdiction of Civil and Revenue Courts.

Where in a suit under section 156 of the Agra Tenancy Act, read with section 34 thereof, the defendant pleads a proprietary title, the Revenue Courts have no jurisdiction to entertain and examine the plea under section 177 (*e*) of the Act; this function rests with the Civil Court [p. 191, cols. 1 & 2.]

Second appeal from the order of the Commissioner, Allahabad Division, dated 13th September 1918, in the case of determination of rent.

JUDGMENT.

FERARD, S. M.—The defendant-appellant Lachmi Narayan is tenant. The plaintiff-respondant, *Musammat* Sardar Kuar, sued him under section 156, Tenancy Act, read with section 34 for assessment of rent on 7 unrented plots about 2 acres in area. The suit was a sequel of the Board's appellate order of 10th—15th February 1915 in Petition No. 7 of 1913-14, which indicated proceedings under the Resumption Chapter as a possible course for the present plaintiff-respondent to take.

The tenant on 13th September 1917 pleaded in the first Court, *inter alia*, that he had acquired proprietary title by adverse possession or by operation of section 157. The Assistant Commissioner accepted the latter plea, found that the plaintiff's suit under section 156 was barred by section 158 and dismissed it. The Assistant Collector's issue and decision were not so concise as they might have been, but there is no doubt that the defendant raised the plea, which was practically covered by the first issue framed, "Is the suit maintainable under section 156, Tenancy Act?" and it was decided. The plaintiff appealed to the Commissioner and in reply the defendant again pressed in writing on 13th September 1918 that he was a proprietor. Thus, *prima facie*, the conditions of section 177 (*e*), Tenancy Act, were present and made it incumbent on the Commissioner to return the appeal for presentation in the Court of the District Judge.

The Commissioner in appeal refused to take the latter course, because the defendant's plea of proprietary right went further than his plea of 13th September 1917 and an admission of tenancy on 20th November 1913 in the previous case. He held that this made defendant's present extended plea of proprietary right negligible and that he could hear the appeal, which he proceeded to do.

In the first ground of his second appeal the tenant urges that the Commissioner acted *ultra vires* in hearing the appeal.

Rulings on the point are conflicting. In 1917 a Bench of two Judges in a case, *Damodar Das* v. *Jhaoo Singh* (1), held that the language of section 177 must be followed as it is. That case had for its subject a question of jurisdiction under section 177 (*f*). The learned Judges held that the bare fact of a question of jurisdiction having been decided, whether properly or not, necessarily barred the Commissioner from hearing the appeal. It would follow by analogy that whatever pleas or admissions in previous proceedings a party may have made, a Commissioner

(1) 39 Ind. Cas. 87; 15 A. L. J. 319.

must consider only the case before him and if in it the conditions of section 177(*e*) are present, he must refer the appellant to the Civil Court.

Against this, the appellant quotes a decision of the Hon'ble High Court (Richards, C. J.) in *Deo Narain Singh* v. *Sitla Baksh Singh* (2), in which the learned Chief Justice remarked that "It would be reducing matters to an absolute absurdity to hold that the defendants in a revenue suit could by formally raising an absolutely untenable plea of jurisdiction take every case from the Revenue Court to the Civil Court." Though the learned Chief Justice did not quote section 151, Civil Procedure Code, it is evident that his finding merely followed the principle of that section, in holding that an "absurd" plea of jurisdiction is outside the scope of section 177 (*f*), Tenancy Act, but I cannot apply this ruling to the case before me. There was nothing absurd in the plea of proprietorship under section 158 taken by the defendant-appellant in the present case and, however, convinced the Commissioner may have felt that the District Judge would hold that the tenant could have no case superior to his pleas and admissions in a previous case, he was not in my opinion justified in assuming the function which under section 177 (*e*) rested with the Civil Judge. He interpreted the section as he would like to see it and not as it is. I would, therefore, accept ground 1 of this appeal and, setting aside the Commissioner's appellate order, direct him to return the appeal to the respondent, the plaintiff appellant in the Commissioner's Court, for presentation to the proper Court, *viz.*, the District Judge, under section 177 (*e*), Tenancy Act.

In holding that the above is the proper order to pass in this case, I have not omitted to consider a point which the respondent has raised, to the effect that the appeal is premature and that appellant should have waited till the assessment of rent which the Commissioner has ordered has been made. He has quoted *Zohra* v. *Mangu Lal* (3) and *Anandgir* v. *Sri Niwas* (4), and the appellant has referred to decisions of the Board. The hitherto practice of the Board has been to admit appeals on the main subject matter of a case without waiting for the final settlement of subsidiary details, such as determination of amount of rent or revenue which the Commissioner's appellate order directs. There is a good deal to be said on both sides, but the present is not a suitable case for a new departure in the Board's practice. To throw out this appeal as premature would merely delay letting the parties know that the proceedings in the Commissioner's Court were invalid.

I would give appellant his costs in this and the lower Appellate Court.

HOPKINS, J. M.—I agree in the order proposed. The Commissioner has found that the plea of proprietary title raised by the appellant is not substantiated, but in order to arrive at that finding he had to entertain and examine the plea, which he had not jurisdiction to do. This is not a case of an absurd or absolutely untenable plea raised by a party to enable him to select his own forum of appeal.

Appeal accepted.

(2) 47 Ind. Cas. 891; 16 A. L. J. 590; 40 A. 177.
(3) 28 A. 753; 3 A. L. J. 563; A. W. N. (1906) 223.
(4) 47 Ind. Cas. 1008; 16 A. L. J. 711; 40 A. 652.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1810 OF 1917.

July 31, 1919.

Present:—Mr. Justice Sesbagiri Aiyar and Mr. Justice Burn.

AMANCHI VENKATARAMA SASTRULU —DEFENDANT—APPELLANT

versus

NAMA VENKANNA AND ANOTHER—PLAINTIFF AND THE LEGAL REPRESENTATIVE OF THE PLAINTIFF—RESPONDENTS.

Contract Act (IX of 1872), s. 73—Damages, measure of—Lease—Failure of lessor to give possession to lessee—Assessment of damages, mode of.

Section 73 of the Contract Act lays down the principles to be employed in assessing damages

and embodies the principles of English Law on the subject. The loss or damage must arise naturally in the usual course of things from the breach or it must be such as the parties knew to be likely to result from the breach. In estimating the loss, the means which existed of remedying the inconvenience must be taken into account [p 194, col 1.]

In an action for damages for the lessor's failure to give possession of the lands leased to the lessee, the plaintiff is entitled to the primary profits he would have derived had he cultivated the lands in a husband like manner, *i.e*, the net and not the gross produce, making deductions for the expenses of cultivation and the failure of season, if any. The amount fixed in the contract cannot form the criterion for assessing damages, and the opportunities which the plaintiff had of renting other lands should be taken into account. [p 193, col. 2]

Mahomed Esa Khan v. *Baboo Keshub Lall*, 14 W. R. 382, not followed.

Zamindar of Vizianagram v *Behara Suryanarayana Patrulu*, 25 M. 587 at p. 598; 12 M. L. J. 249, relied on.

Per *Phillips, J.*—In considering what should be set off against the gross profits it must be assumed that the cultivation was carried on entirely by hired labour. [p. 194, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Cocanada, in Appeal Suit No. 17 of 1916, preferred against the decree of the Court of the Additional District Munsif, Cocanada, in Original Suit No 238 of 1915.

FACTS appear from the judgment.

Mr. *Narasimha Row*, for the Appellant.—Plaintiff was entitled, in any event, only to nominal damages. See *Mahomed Esa Khan* v. *Baboo Keshub Lall* (1). The District Munsif has, in fact, awarded him the gross produce of the lands. He has not taken into account the want of rains and the cost of cultivation. Besides, there has been no enquiry as to the opportunities plaintiff had of getting a lease of other lands.

Messrs. *P. Somasundram* and *C. Rama Row*, for the Respondents—The principles regulating assessment of damages are laid down in section 73 of the Contract Act. The proper test is to see what profits plaintiff would have derived had he cultivated the lands. The lower Courts have applied the right test. See *Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (2). The test is the profit which the plaintiff would have derived if he had been put into possession and interest at 6 per cent. per annum.

JUDGMENT.

SESHAGIRI AIYAR, J.—The defendant gave a lease of about 11 acres of *inam* lands for 5 years to the plaintiff beginning with 1911. Before the *cowle* to the plaintiff the lands had been leased to another person. The plaintiff attempted to take possession of the lands but was unable to get them in the first year. In the second year he was able to get possession of a few acres and in the third year a few more. The suit was instituted for damages for failure to give possession. The defence was that there was no undertaking to give possession, that the defendant did give possession of the lands, that the damages were excessive and that the plaintiff was not entitled to maintain the suit. The District Munsif held that the suit was maintainable and following the *Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (2) gave the plaintiff a decree for his share of the crops as estimated in the *cowle*, Exhibit A. This decree was confirmed on appeal.

In the second appeal it was not disputed that the suit was properly instituted. The only point seriously argued related to the measure of damages. Mr. Narasimha Rao, relying upon *Mahamed Esa Khan* v. *Baboo Keshub Lal* (1), contended that the plaintiff is only entitled to nominal damages. The general rule as to damages, whether they relate to moveable or immoveable property, is contained in section 73 of the Indian Contract Act Two considerations arise in assessing damages: (1) whether the damage naturally arose in the usual course of things from the breach; and (2) whether the plaintiff had means of remedying the inconvenience and has neglected to avail himself of them. In *Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (2) the learned Judges without discussing the question, under very similar circumstances like the present, say: "The measure of damages is the amount of profits with interest thereon at 6 per cent. per annum which would have accrued to the plaintiff if he had been put in possession of the villages and was in enjoyment of the same during the term of the lease." In my opinion the observations are fully supported by the English authorities. In *Fletcher* v. *Taylour* (3) the defendant had contracted to build a ship which was to be delivered to the plaint-

(1) 14 W. R. 382.
(2) 25 M. 587 at p. 598; 12 M. L. J. 249.

(3) (1855) 17 C. B. 21; 25 L. J. C. P. 65; 139 E. R. 973; 104 R. R. 557.

iff in August 1854. It was not delivered till March 1855. It was held that as the primary object of the ship was to earn freight by carrying passengers, the measure of damages was the value of the profits which could have been obtained between the date fixed for the delivery and the date on which the ship was actually delivered. Wills, J., stated the law to be "that the measure of damages for the breach of a contract for delivery of a chattel should be governed by a similar rule to that which prevails in the case of a breach of contract for the payment of money," and concluded by saying "the measure of damages in such a case as this was held by analogy to be the average profit made by the use of such a chattel." In *Trent and Humber Co., In re, Cambrian Steam Packet Co., Ex parte* (4) the Lord Chancellor said: "The measure of damages is *prima facie* the sum which would have been earned in the ordinary course of employment of the chattel in the time." This principle was accepted as good law in *Owners of the Steamship 'Gracie' v. Owners of the Steamship 'Argentino'* (5). In *Jaques v. Millar* (6), which was a case of an agreement to grant a lease, Mr. Justice Fry after examining the case law on the point said: "The question of damages is a more difficult one. Damages are claimed, in addition to the specific performance of an agreement, in respect of the delay which was caused by the defendant's wilful refusal to perform his contract and the consequent loss of profit to the plaintiff. I think I am at liberty to consider what would have been the value of the possession of the premises to the plaintiff for the period between the 5th of September 1876 and the time when he actually obtained possession of other premises." Although this case was overruled by *Marshall v. Berridge* (7) on another question, the principle as to damages enunciated by the learned Judge was accepted in *Royal Bristol Permanent Building Society v. Bomash* (8). There are cases which draw a distinction between what are primary and secondary profits. Under the first heading profits or advantages which are the direct and immediate fruits of the contract are included. Under the latter class profits expected from dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract are brought in. The decision in *Madras Railway Company v. Govinda Rau* (9), to which our attention was drawn, belongs to the latter category. In the present case the parties must have contemplated that the plaintiff would have cultivated the lands in a husbandlike manner and that he would have derived profit therefrom. That undoubtedly is what is known as the primary profits, and there is no reason why the plaintiff should not be entitled to it. The principle is neatly stated in Sedgwick on Damages, Volume III, section 984: "The general principle in this case is the same as in cases of refusal to convey, although the Courts are more nearly agreed in adopting the principle of complete compensation for the loss of the bargain. The ordinary rule is to allow the difference between the rental value of the premises for the term and the rent reserved." In another place (section 187) it is stated: "The rental value of a building will be the measure of damages in an action for delay in delivering possession." Applying this test to the present case, it is the net profit which the plaintiff would have derived, that should be awarded to him. The District Munsif was wrong in holding that the decree which he gave represented the net profit of the lands. From the evidence of the plaintiff it is clear that it was the gross produce. From this, deduction will have to be made for the expenses of the cultivation and for the failure of season, if any, during the period for which damages are claimed. The amount which has been fixed in the contract should not be the criterion for assessing damages. Further, as was pointed out in one of the cases already quoted, the opportunities which the plaintiff had of renting other lands should be taken into account. Therefore, before finally disposing of this case we must ask for a finding on this question, namely:—

(1) "What was the net profit which the

(4) (1868) 4 Ch. App. 112 at p. 117; 38 L. J. Ch. 38; 19 L. T. 465; 17 W. R. 181.

(5) (1889) 14 App. Cas. 519; 59 L. J. P. 17; 61 L. T. 706; 6 Asp. M. C. 433.

(6) (1877) 6 Ch. D. 153; 47 L. J. Ch. 544; 37 L. T. 151; 25 W. R. 846.

(7) (1881) 19 Ch. D. 233; 51 L. J. Ch. 329; 45 L. T. 599; 30 W. R. 93; 46 J. P. 279.

(8) (1887) 35 Ch. D. 390; 56 L. J. Ch. 840; 57 L. T. 179

(9) 21 M. 172; 8 M. L. J. 85; 7 Ind. Dec. (N. S.) 478.

plaintiff could have derived during the period he was out of possession?"

The finding should be given on the evidence on record within 6 weeks: and 7 days will be allowed for objections.

PHILLIPS, J.—The question of quantum of damages is somewhat difficult. In *Mahomed Esa Khan* v. *Baboo Keshub Lall* (1) it was held in a similar case that plaintiff was only entitled to nominal damages, but in this Court in the *Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (2) it was held that the measure of damages is the amount of profit with interest at 6 per cent. per annum which would have accrued to the plaintiff if he had been put in possession, and the issue sent down for trial was: "What is the amount of net profits.....which the plaintiff would have derived from the villages leased to him, if he had been in possession of the villages during the term of the lease?"

Section 73 of the Contract Act lays down the principles to be employed in assessing damages and embodies the principles of English Law on the subject, *vide Jaques* v. *Millar* (6) and Mayne on Damages, pages 64—66. The loss or damage must arise naturally in the usual course of things from the breach or it must be such as the parties knew to be likely to result from the breach. In the present case it may be assumed that the plaintiff would have cultivated the lands if he had been put into possession. He would, therefore, be entitled to the net profits that he would have made by such cultivation. In considering what should be set off against the gross profits, I think it must be assumed that the cultivation was carried on entirely by hired labour, for if the profit is calculated on the assumption that plaintiff himself worked, he would in the shape of compensation not only receive the value of that labour, but would be able to utilize the same labour for obtaining profit in some other direction.

The explanation to section 73 further lays down that in estimating the loss, the means which existed of remedying the inconvenience must be taken into account. In the present case, therefore, while it may probably be said that plaintiff could not conveniently have obtained other land for the first year of his lease, the same assumption could not be made for succeeding years and evidence would be necessary to show that he could have mitigated the loss by taking a lease of other land. With these remarks, therefore, I agree in the order proposed.

In compliance with the order contained in the above judgment the Subordinate Judge of Cocanada submitted the following

FINDING.—The issue sent to me for finding is, what is the net profit which the plaintiff could have derived during the period he was out of possession? I am directed to give the finding on the evidence on record.

2. The facts as found are that the defendant leased to the plaintiff A. 10—93 cents (roughly 11 acres) of land for a period of 5 years, but the latter was not put in possession and enjoyed no portion in the first year and only 6 acres in each of the subsequent 2 years. The lease is on sharing system, the tenant (plaintiff) having to meet the cultivation expenses and take half of the gross yield and deliver the other half to the landlord (defendant). The suit is for damages and the amount is estimated in the plaint on the footing that 1 *putti* per acre was the outturn *after deducting the cultivation expenses* (*vide* paragraph 7 of the plaint). In the defendant's written statement, paragraph 4, he claimed rent at 6 *putties* a year and this would be so if the gross yield is 12 *putties* for the whole of 11 acres. The difference between the plaintiff's figure and the defendant's, so far as the pleadings go, is 1 *putti* for the whole, and this more than covers the cultivation expenses which according to the evidence of plaintiff's 7th witness would be Rs. 6 an acre. Thus both the parties are agreed that 1 *putti* per acre is the net yield after deducting the cultivation expenses. It is why the defendant did not let in any evidence to contradict the plaintiff's estimate of the produce made in his plaint. On the contrary the defendant in his own deposition (defendant's 1st witness) admitted the yield to be 4 *garces* (equivalent to 12 *putties*), and this is in conformity to his written statement. No doubt in the plaintiff's deposition he is mentioned as having stated that the yield was 1 *putti* per acre *gross*. This should be a mistake, for it is the case of neither party and I cannot press it against the plaintiff. As to the price of paddy both the parties admitted it in the pleadings to be Rs. 150 a *putti* and I should adopt this

figure ignoring what the plaintiff has stated in his deposition. The result is that the amount claimed in the plaint both as regards the quantity and value is correct and should be accepted. The sum of Rs. 520 claimed represented the plaintiff's half share out of the yield of land not put in his possession during the period of 3 years under consideration—deducting what he would have had to bear for the cultivation expenses.

3. The observations in the judgment of the High Court are to the effect that the damages should be assessed making deductions from the gross produce of the land in respect of 3 heads, (1) the cultivation expenses, (2) the failure of season, if any, and (3) the opportunity the plaintiff might have had to take other lands on lease. The first point has been considered above in arriving at the figures Rs. 520. As to the 2nd and 3rd points, there is no evidence on record and as there can be no presumption that either of them existed during any of the 3 years in question, I should hold that no deduction can be made in respect thereof. Leases of lands are not always procurable and the existence of opportunity, therefore, should be proved.

4. The appellant's Pleader argues that deduction should also be made for the rent due to the defendant on the entire 11 acres. This contention was overruled by my predecessor when dealing with it in paragraph 7 of his judgment, and in the judgment of the High Court no reference is made to it. I do not know if it is permissible for the appellant to raise this point here when the judgment of the High Court states definitely the principle on which the damages should be assessed and the heads of items in respect of which deductions should be made, of which this is not one. I may, however, state that the contention is quite untenable. The observations in *Zamindar of Vizianagram* v. *Behara Suryanarayana Patrulu* (2), followed in the present remand order, clearly lay down the measure of damages to be the amount of profits which would have accrued to the plaintiff if he was put in possession and was in enjoyment during the term of the lease. Applying this test the plaintiff's profit would have been half the net produce of the whole 11 acres during the first year and of 5 acres in each of the two subsequent years. The defendant could get nothing for rent for the first year and is, of course, entitled to rent in respect of the 6 acres enjoyed by the plaintiff in the subsequent two years. There is a dispute between the parties as to whether this rent has been paid or not, and it needs no consideration here as it is admitted that a suit is pending between them about it. The observations in *Meenakshi Sundara Nachiar* v. *Chidambaram Chetty* (10) do not support the defendant's contention about his claim for rent for the *whole* land where no part of it or only a portion of it was delivered as here.

5. I, therefore, find on the issue remitted that the net profit the plaintiff could have derived is as claimed in the plaint, which amounts to Rs. 520 for all the 3 years together.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court on the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and dismiss the second appeal with costs.

M.C.P.

Appeal dismissed.

(10) 15 Ind. Cas. 711; 12 M. L. T. 124; 23 M. L. J. 119; (1912) M. W. N. 813.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 257-B OF 1918.

March 25, 1919.

Present :—Mr. Mittra, A. J. C.

DEORAO, MINOR, GUARDIAN GAMBHIRJI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BAPUJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of, rule of—Notions of Hindus, whether can be taken into consideration.

In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially ancestral, shall be retained in his family and that a Hindu knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are unable to alienate. [p. 196, cols. 1 & 2.]

All the expressions of a Will must be taken together, without any one being insisted upon to the exclusion of others. [p. 196, col. 2.]

DEORAO v. BAPUJI.

Appeal against the decree of the District Judge, Amraoti, in Civil Appeal No. 6 of 1918, decided on the 2nd July 1918, arising out of Civil Suit No. 103 of 1917, decided by the Munsif, Amraoti, on the 30th November 1917.

Dr. *H. S. Gour* and Mr. *G. V. Deshmukh*, for the Appellants.

Mr. *M. B. W. Joshi*, for Respondents Nos. 1 and 2.

Mr. *M. V. Abhyankar*, for Respondents Nos. 3 and 4.

JUDGMENT.—We are concerned in this appeal with the interpretation of a Will executed by one Vithoba a few days before his death, whereby he gave the whole of his moveable and immoveable property to his wife Bakai. He had two other wives, one of whom predeceased him leaving a daughter, plaintiff No. 1, the other, Rajai, was not on good terms with her husband as stated in the Will. She had, however, an unmarried daughter plaintiff No. 2, the only one of Vithoba's four daughters who was unmarried at the date of the Will. She has been since married and the expenses were defrayed out of the estate of Vithoba. Bakai died in 1916, and the two plaintiffs seek to recover possession of immoveable property alienated by their step-mother Bakai, but her own daughters support the alienation as they claim the unalienated property exclusively for themselves. Both the Courts below have held that an absolute estate was created in favour of Bakai and that she had power to validly transfer the fields in suit without legal necessity.

The test to be applied in such a case was laid down by the Judicial Committee of the Privy Council in *Mohamed Shumsool Hooda* v. *Shewukram* (1). At page 231 their Lordships say: "In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are unable to alienate." Further, all the expressions of the Will must be taken together without any one being insisted upon to the exclusion of others.

The main argument on behalf of the plaintiffs-appellants is that the object of the Will was to disinherit Rajai and to prevent mismanagement after Vithoba's death, and not to give an alienable estate to Bakai. Although there are no words expressly authorising Bakai to transfer the immoveable property, she is described as full owner (*pura malik*). The same clause disposes of the moveable and immoveable property. The Will says: "You should enjoy from generation to generation in the same way as I have been enjoying as owner." The legatee is made a new stock of descent. The testator knew that two of his daughters would not be her heirs. The only provision for the daughters is that they are to be entertained on the "homecoming" in the ordinary way and the marriage expenses of the unmarried girl are declared a charge on the estate. It seems to me that even if there had been an express prohibition to transfer immoveable property the two plaintiffs would be out of Court, not being Bakai's heirs when her own daughters are living. Again, the Will gives maintenance to Rajai but contemplates the possibility of her re-marriage and in such event, her ornaments are given to Bakai and not to Rajai's daughter. As regards Bakai, she appears to have been over thirty at least at the date of the Will and had two married daughters and the testator does not contemplate the possibility of her re-marriage, I am, therefore, not called upon to answer the somewhat difficult question raised by Counsel as to what would happen on such re-marriage. I should note that there is nothing in the Will which qualifies the expressions and clauses cited above. I think the view taken by the Courts below is correct and the appeal is dismissed with costs.

Appeal dismissed.

(1) 14 B. L. R. 226 (P. C.); 22 W. R. 409; 2 I. A. 7 3 Sar. P. C. J. 405; 3 Suth. P. C. J. 43.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 917 OF 1916.

March 18, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

ALIMAHMAD ABDUL HUSSEIN AND OTHERS—APPELLANTS

versus

VADILAL DEVCHAND PAREKH—RESPONDENT.

Insolvency proceedings—Property acquired by insolvent after order of adjudication—Transfer, validity of.

Transactions in respect of all property, moveable and immoveable, acquired by an insolvent after the order of adjudication, with any person dealing with him *bona fide* and for value and completed before the intervention of the Official Assignee, are valid. [p. 20⁻, cols. 1 & 2.]

Appeal from the decision of the Assistant Judge at Ahmedadad, in Appeal No. 110 of 1915, confirming the decree passed by the Second Class Subordinate Judge at Kapadwanj, in Suit No. 130 of 1913.

Messrs. *Strangman*, *Munshi*, *G. S. Rao* and *T. T. Parekh*, for the Appellants.

Mr. *Mehta* (with him Mr. *M. H. Vakil*), for the Respondent.

JUDGMENT.

SHAH, J.—The facts material to the point arising in this second appeal after the remand are briefly these. One Tyabaji Farzullabhai applied to the Court for the Relief of Insolvent Debtors, Bombay, and the usual vesting order was made on the 10th January 1887. Subsequently on the debtor's application a personal discharge subject to any further orders was allowed and in accordance with the practice that obtained then, a judgment for all the debts was entered against the insolvent in favour of the Official Assignee under section 86 of the Indian Insolvency Act (11 & 12 Vic, c. 21) on the 17th August 1887. The insolvent did not obtain any final discharge under the Act, and in fact nothing was done in the matter of the insolvency up to his death in 1904 or up to November 1917 after his death. Owing to the non-production of the necessary papers the lower Appellate Court had some doubt as to the existence of the vesting order and as to whether there was a final discharge of the insolvent. In the argument before us the facts as stated above have not been disputed, and the papers relating to this insolvency, which we have seen with the consent of the parties in order to avoid delay and further remand on points capable of being easily ascertained, support the statement. Tyabaji was, therefore, an undischarged insolvent from 1887 to the time of his death in 1904.

In 1898 Tyabaji purchased a house at Kapadvanj and mortgaged it with possession on the same day (9th July 1898) to one Vajiraboo for Rs. 700 Babashahi and executed a second mortgage in favour of one Jamnadas on the same day. It is found by the lower Appellate Court and not contested before us that the house was purchased by Tyabaji with the money borrowed from the two mortgagees.

Jamnadas filed Suit No. 93 of 1910 on his mortgage against the heirs of Tyabaji and obtained a decree, in execution whereof the house was sold through the Court subject to the first mortgage and purchased by the present plaintiff, Vadilal, on the 12th September 1912. The plaintiff as auction-purchaser then filed the present suit against the defendants, the heirs of Vajiraboo, for redemption of the first mortgage. The trial Court allowed the plaintiff's claim. The lower Appellate Court confirmed the decree. On appeal to this Court certain issues were sent down for findings in connection with the insolvency of Tyabaji. Before the remand the defendants purchased the right, title and interest of the Official Assignee in November 1917.

On these facts it is urged on behalf of the defendants that the plaintiff did not purchase Tyabaji's interest at the Court sale as it was vested in the Official Assignee, and that they having purchased that interest from the Official Assignee, they are entitled and willing to redeem the mortgage in favour of Jamnadas which is vested in the plaintiff. It is conceded on behalf of the defendants that this mortgage now vested in the plaintiff is binding upon the Official Assignee and that the plaintiff is entitled to be redeemed. The plaintiff contends that the after-acquired property of the insolvent cannot vest in the Official Assignee until he intervenes, and that the Court-sale which took place long before his intervention is binding upon him, and conveys to the plaintiff the whole interest of Tyabaji and the

second mortgagee subject, of course, to the first mortgage.

It may be mentioned that the point now made on behalf of the defendants was not urged in the trial Court, and that what is described as the intervention of the Official Assignee really came into existence long after the decision of the lower Appellate Court. It involves practically a reconsideration of the rights of the parties on a new basis. This Court has, however, allowed the point to be raised at the time of the remand, and it is clear that the appellants are entitled to have their rights determined on the facts now ascertained.

It must be taken for the purpose of this appeal that the transactions of the insolvent with Jamnadas and Vajiraboo were *bona fide* and for value, that Jamnadas sued the heirs of Tyabaji in complete ignorance of the insolvency proceedings, and that the subsequent proceedings on the suit resulting in the Court sale were *bona fide* throughout.

It is urged, however, that under section 7 of the Indian Insolvency Act, the interest of Tyabaji was vested in the Official Assignee. No doubt that section applies to after-acquired property of the insolvent. But as pointed out in *Kerakoose* v. *Brooks* (1), the right of the Official Assignee is subject to the qualification that "if the insolvent has acquired property subject to liens and obligations, then any property taken by the assignee under that state of things is taken subject to those charges and equities which affect the property in the hands of the insolvent." It is not necessary to refer to the other qualification mentioned by their Lordships of the Privy Council. It is conceded in the present case that the Official Assignee would take the property subject to the two mortgages effected by Tyabaji in 1898; and in view of the fact that Tyabaji purchased the property with the moneys received from the two mortgagees, it is indisputable that the insolvent acquired the property subject to those charges.

It is argued, however, that the equity of redemption was vested in the Official Assignee, and that the suit by Jamnadas was not properly constituted as the Official Assignee was not a party to it. It is urged by way of reply that the suit was properly constituted, that the sale in execution of the decree is binding upon the Official Assignee as a *bona fide* transaction for value, and the equity of redemption would not vest in the Assignee before his intervention according to the rule in *Cohen* v. *Mitchell* (2).

If the mortgage in favour of Jamnadas is good as against the Official Assignee, I do not see how the suit of 1910 can be said to be defective in any way. If Tyabaji or his heirs could have sued Jamnadas to redeem the mortgage in his favour as the Official Assignee had not intervened, Jamnadas could sue the heirs of Tyabaji to enforce his mortgage. It is difficult to see what else Jamnadas could have done to enforce his mortgage, as he was ignorant of Tyabaji's insolvency and as the Official Assignee had not intervened. The suit and all the subsequent proceedings appear to me to be quite proper on the assumption that at the time it was open to Tyabaji or his heirs to deal with the equity of redemption. The Court purchaser could not be in any worse position than a *bona fide* purchaser for value under similar circumstances from the insolvent or his heirs before the intervention of the Official Assignee, and the learned Counsel for the appellants has not suggested that he should be in any worse position.

It is urged, however, that a *bona fide* purchaser for value of the after-acquired immoveable property cannot get a good title against the Official Assignee even though the latter has not intervened, as the equity of redemption is vested in the Official Assignee. The plaintiff seeks to meet this contention by relying upon the rule in *Cohen* v *Mitchell* (2), which is stated by the Court of Appeal in these terms: "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." This rule is stated in perfectly general terms and there is no suggestion in the rule itself that it applies only to personal and not to real property. If this rule applies to after-acquired immoveable property in India, the appellants' contention must fail. The question, therefore, is whether it applies to such immoveable property.

(1) 8 M. I. A. 339 at p. 356; 4 W. R. 61; 1 Suth. P. C. J. 426; 3 L. T. 712; 14 Moo. P. C. 452; 1 Sar. P. C. J. 778; 184 R. R. 73; 19 E. R. 559; 15 E. R. 376.

(2) (1890) 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 7 Morrell 207.

It will be convenient to state briefly how the rule has been applied in England. It has been held that the rule does not apply to real estate: see *New Land Development Association and Gray, In re* (3). In this case the decision of Chitty, J., was upheld by the Court of Appeal on a different ground, but in the course of argument the Lords Justices expressed a strong opinion in favour of limiting the application of the rule to personal estate. In *Clarke, In re, Beardmore, Ex parte* (4). Davey, L. J., referred to the same rule with approval without any reference to the limitation as to the nature of the after acquired property. In 1895 Chitty, J., refused to attempt to introduce any limitation in the rule beyond that stated by him in the case of *New Lond Development Association and Gray, In re* (3) and applied the rule to leasehold property: see *Clayton & Barclay's Contract, In re* (5). In *Official Receiver* v. *Cooke* (6) Neville, J., felt himself bound to treat the rule as applicable only to personal estate including leaseholds. The same learned Judge applied it to the after acquired real estate, which undischarged bankrupts purchased as partners for partnership purposes and sold and conveyed to *bona fide* purchasers for value before the trustee intervened in the case of *Kent County Gas Light and Coke Company Limited, In re* (7). The rule in *Cohen* v. *Mitchell* (2) received a statutory recognition in section 11 of the Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. V, c. 34) and later in section 47, sub section (1) of the Bankruptcy Act of 1914 (4 & 5 Geo. V, c. 59). In the recent case of *Hill* v. *Settle* (8) Lord Cozens Hardy, M. R., after referring to *Cohen* v. *Mitchell* (2) and the Bankruptcy Act of 1914, has observed that "the Legislature has plainly recognised the validity and effect of that which is to be found in what is, no doubt, judge-made law as expressed in a series of decisions extending over some 200 years." I have not thought it necessary to refer to the decisions prior to *Cohen* v. *Mitchell* (2).

Thus it is clear that the rule has always been recognised as a beneficent rule, that though for some years the view that it did not apply to real property prevailed, the tendency was in favour of extending its application and that finally the Legislature has fully recognised the rule both as to the real and personal property, and has applied it retrospectively to all transactions completed before April 1914, subject to the condition that the trustee has intervened before that date.

In India long before the decision in *Cohen* v. *Mitchell* (2) it was held in *Kristocomul Mitter* v. *Puresh Chunder Deb* (9) that so long as the Official Assignee had not interfered, an insolvent who had not obtained his final discharge had power with respect to after-acquired property to buy and sell and give discharge and do all other acts which he could have done before his insolvency. The property in that suit was immoveable property. In *Fatimabibi* v. *Fatimabibi* (10) it was held by Parsons, J., that the Official Assignee was not a necessary party to a suit by the heirs of the deceased undischarged insolvent for a share in the after-acquired property, and that such property vested in the insolvent subject to the right of the Official Assignee to intervene and to claim the property. There is no reference to the rule in *Cohen* v. *Mitchell* (2) in the judgment. The Madras High Court declined to apply the rule to dealings by the insolvent with immoveable property: see *Rowlandson* v. *Champion* (11). It may be noted that Collins, C. J., had in the first instance applied the rule to immoveable property. In appeal, however, the learned Judges reversed the order of the Chief Justice and their judgments show that their decision was influenced by the case of *New Land Development Association and Gray, In re* (3) already referred to. Later on in *Sriramulu Naidu* v *Anjalammal* (12) the decision in *Fatimabibi* v.

(3) (1892) 2 Ch. D. 138; 66 L. T. 404; 61 L. J. Ch. 323; 40 W. R. 295.

(4) (1894) 2 Q. B. 393; 9 R. 498; 70 L. T. 751; 63 L. J. Q. B. 806; 1 Manson 237.

(5) (1895) 2 Ch. D. 212; 64 L. J. Ch. 615; 13 R. 556; 72 L. T. 764; 43 W. R. 549; 2 Manson 345; 59 J. P. 489.

(6) (1906) 2 Ch. D. 661; 75 L. J. Ch. 757; 13 Manson 337.

(7) (1909) 2 Ch. D. 195; 78 L. J. Ch. 625; 100 L. T. 983; 16 Manson 85.

(8) (1917) 1 Ch. 319 at p. 325; 86 L. J. Ch. 243; 116 L. T. 263; (1917) H. B. R. 23; 61 S. J. 217; 33 T. L. R. 168.

(9) 8 C. 553; 12 C. L. R. 253; 4 Ind Dec. (N. S.) 359.

(10) 16 B. 452; 8 Ind. Dec. (N. S.) 780.

(11) 17 M. 21; 6 Ind. Dec. (N. S.) 14.

(12) 30 M. 145; 17 M. L. J. 14.

Fatimabibi (10) was approved, and the learned Judges were content to distinguish *Rowlandson's case* (11) on the ground that there was no question of *contract* or *transfer* by the insolvent relating to his after-acquired immoveable property. The rule in *Cohen* v. *Mitchell* (2) has been referred to in two decisions of this Court. In *Naoroji Nusserwanji Thoonthi* v. *Kazi Sidick Mirza* (13) it was considered in relation to a special set of facts, and there was no occasion to consider it with reference to the point arising in this case. At page 634 of the report it is pointed out that the rule in *Cohen* v. *Mitchell* (2) could not apply to the agreement with which the Court had to deal in that case. In *Macleod* v. *B. B. & C. I. Ry. Co*, (14) it was urged that the doctrine of *Cohen* v. *Mitchell* (2) was limited to those cases where the insolvent's after acquired property had been the outcome of subsequent trade. The appeal was ultimately decided on a different ground, and the question of law was left undecided. But after referring to certain cases Jenkins, C. J., observed as follows:—"In the face of this I hesitate to say that the doctrine on which *Cohen* v. *Mitchell* (2) rests is limited to subsequent acquisitions in trade, though I do not say it may not be the correct view. In this connection I have not overlooked the decision in *Kerakoose* v. *Brooks* (1), but I am not clear that their Lordships intended there to lay down an exhaustive statement of the law as to after-acquired property except so far as was necessary for the purposes of the case then before them." I do not think that there can be any doubt as to the trend of the learned Chief Justice's opinion with reference to the scope of the doctrine on which *Cohen* v. *Mitchell* (2) is based. At any rate there is nothing in the judgment which is opposed to the view that the rule applies to all the after-acquired property, moveable and immoveable, of the insolvent.

On a careful consideration of all the decisions above referred to, it seems to me that the rule in *Cohen* v. *Mitchell* (2) can be, and ought to be, applied to all the property, moveable and immoveable, acquired by the bankrupt after the adjudication order, provided that the transaction by the bankrupt is *bona fide* and for value and is completed before the intervention of the Official Assignee. In other words, I do not think that the nature of the after-acquired property forms any essential part of the rule: what is essential is that the transactions with reference to the property with third parties must be *bona fide* and for value and that they must be entered into before the Official Assignee intervenes. The reason of the rule does not compel the recognition of any restriction as to the nature of the property in its application: and I do not think that the distinction between real and personal property made in England in applying the rule can be properly applied to immoveable and moveable property in India. The statement of the law as to after acquired property in *Kerakoose* v. *Brooks* (1) has been held not to be exhaustive in Indian decisions; and the weight of judicial opinion in India seems to favour the view that the rule in *Cohen* v. *Mitchell* (2) applies to the after acquired property, moveable as well as immoveable. With due respect for the opinion of the Madras High Court to the contrary in *Rowlandson's case* (11), I think that the rule can be properly applied to all after-acquired property, whether moveable or immoveable.

Thus in the present case the property was effectively disposed of before the Official Assignee can be said to have intervened. The conveyance in favour of the appellants by the Official Assignee cannot help them, as the Official Assignee had nothing to convey at the date.

For the purpose of this case, I have assumed that the Official Assignee intervened when he sold his right, title and interest to the appellants in November 1917. I am not sure that that amounts to an intervention on the part of the Official Assignee as is required to vest the property in him. It is not necessary for the purpose of this case to examine the point further, as the transaction was completed long before the alleged intervention; and I express no opinion on the question whether the intervention such as we have here is effective.

I also refrain from expressing any opinion

(13) 20 B. 636; Chitty's S. C. C. R. 486; 10 Ind. Dec. (N. S.) 992

(14) 7 Bom. L. R. 618 at p. 621.

as to whether under the circumstances the Official Assignee should have attempted to enforce the judgment under section 83 of the Indian Insolvency Act or should have himself intervened in these proceedings, if he thought that he had any right to the property in suit, instead of allowing his intervention to be pleaded through the appellants.

The result is that the appeal is dismissed and the decree of the lower Appellate Court confirmed with costs.

HEATON, J.—My learned brother's judgment shows that the only point of interest in the case is whether section 7 of the Indian Insolvency Act, 11 & 12 Vic., c. 21, is to be literally construed or not. If it is, the words "do vest in the Official Assignee" must be given their full ordinary meaning. If that be done, then the entire interest in property apparently acquired by an undischarged insolvent belongs to the Official Assignee. Many years' experience both in India and England has demonstrated that this would be a most undesirable position. The words have not been literally construed either in India or in England. It is, therefore, established that there is a measure of freedom allowed to us in construing this section. That being so, I agree with the method of applying the section to the facts of this case adopted by my learned brother. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1091 OF 1918.

April 24, 1919.

Present:—Mr Justice Seshagiri Aiyar and Mr. Justice Phillips.

MUKKU VENKATARAMIAH—PLAINTIFF—APPELLANT

versus

MUKKU CHINNAIAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33, scope of—Appellate Court, power of, in respect of non-appealing parties—Procedure, proper—Joinder of parties.

The object of Order XLI, rule 33, Civil Procedure Code, is to enable an Appellate Court to pass judgments or orders which would give consistency to its decisions and although the power to interfere with an order against a person who is not before it should be exercised with great care and caution, the discretion of the Court to grant relief which benefits a party who has not appealed is not hampered. [p. 202, col. 1.]

Venkatachela Pillai v. *Ranga Pillai*, 28 Ind. Cas. 634; 28 M. L. J. 334; 17 M. L. T. 220 and *Peria Krishnasami Naik* v. *Aiyappa Naik*, 24 Ind. Cas. 924; 1 L. W. 376, followed.

Ramachandra Mallya v. *Narayana Heyade*, 42 Ind. Cas. 972; 22 M. L. T. 480; 7 L. W. 10; (1917) M. W. N. 803, explained.

The principle that no decree or order should be passed against a person without hearing him does not apply where the non-appealing party is benefited by the order. [p. 202, col. 1.]

The illustration to Order XLI, rule 33, Civil Procedure Code, is not exhaustive of the scope of the rule. [p. 202, col 1.]

Where interference with a decree in favour of a party not before the Court is deemed necessary, the Court should implead him in the exercise of its plenary powers so that he may avail himself of the benefit of the decree in execution. [p. 202, col. 1.]

Second appeal against the decree of the District Court, Nellore, in Appeal Suit No. 278 of 1917, preferred against the decree of the Court of the Temporary Sub-Judge, Nellore, in Original Suit No. 31 of 1917.

FACTS appear from the judgment.

Mr. *Y. Adiga*, for the Appellant.—The lower Appellate Court erred in allowing the parties who did not appeal the benefit of his decree. No decree or order should be passed affecting a party who was not before the Court and was not heard. *Ramachandra Mallya* v. *Narayana Hegade* (1). See also the illustration to the rule.

Mr. *T. V. Vencatramier*, for the Respondents.—The language of the rule is wide enough to give the Appellate Court power to pass decrees in favour of non-appealing parties. Where the order is to prejudicially affect a party, he should be heard. Where the order is to benefit a person, the rule gives ample discretion to the Appellate Court.

JUDGMENT.—The first question argued by Mr. Adiga is that as Rs. 10,000 was paid in furtherance of an agreement which fell through, that sum should not be regarded as having been paid in satisfaction of the common decree. The answer to this is that in the application

(1) 42 Ind. Cas. 972; (1917) M. W. N. 803; 22 M. L. T. 480; 7 L. W. 10.

for execution as regards the balance of Rs. 5,000 the Rs. 10,000 was referred to as having been paid in part satisfaction, and the present plaintiff did not object to this statement. It is not open to him now to contend that the Rs. 10,000 was not paid towards the decree. We must, therefore, uphold the order of the District Judge.

It was next objected that as the District Munsif passed several decrees against each of the defendants and as only some of them appealed against the decrees so passed, it was not competent to the District Judge to act under Order XLI, rule 33, Code of Civil Procedure, in favour of the defendants who did not appeal. The language of the rule is wide enough to cover the case. The use of the two words *respondents* and *parties* shows that the Legislature contemplated interference by the Appellate Court even though some of the parties to the suit were not before it. This was the view taken in *Venkatachela Pillai* v. *Ranga Pillai* (2) and in *Peria Krishnasami Naik* v. *Aiyappa Naik* (3). As against these cases, the learned Vakil relied on the judgment of Kumaraswami Satri, J., in *Ramachandra Mallya* v. *Narayana Hegade* (1). The learned Judge rightly enough points out that no decree should be passed against a person without hearing him: but we do not think that this principle is applicable where the party who is not heard is not prejudiced by the order but is benefited by it. The learned Judge relies upon the illustration to rule 33; but that illustration is not exhaustive of the scope of the rule. The very object of the rule is to enable a Court to pass judgments or orders which would give consistency to its decisions and although the power to interfere with the order against a person who is not before it should be exercised with great care and caution, there is no ground for introducing into the language of the rule words which would unnecessarily hamper the Court's discretion. We may also say that in the majority of cases where interference with a decree in favour of a person not before the Court is deemed necessary, the Court should implead him in the exercise of the plenary powers possessed by it, so that the benefit of the decree may be availed of in execution.

(2) 28 Ind. Cas. 694; 28 M. L. J. 334; 17 M. L. T. 220.

(3) 24 Ind. Cas. 924; 1 L. W. 376.

We think the order of the District Judge is right and dismiss the second appeal with costs.

M. C. P.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1375 OF 1918.

June 20, 1919.

Present :—Mr. Justice Newbould.

PRASANNO KUMAR BHATTACHARJEE AND ANOTHER—DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

SIB KRISHNA SINGHA SARMA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Cess Act (IX B. C. of 1880), s. 20—Road cess return, statement in, value of—Rent, rate of, determination of.

A statement made by a landlord in a road cess return is not merely an admission, it is a statutory bar under section 20 of the Bengal Cess Act to recovering rent at a rate higher than that shown in the cess return. [p. 203, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Mymensingh, dated the 18th March 1918, reversing that of the Munsif, 2nd Court at Mymensingh, dated the 20th August 1917.

FACTS appear from the judgment.

Babu *Romesh Chandra Sen* (with him Babu *Kali Kinker Chakraberty*), for the Appellants, submitted that the lower Appellate Court erred in giving a decree to the plaintiffs at the rate of Rs. 28 6 13 per annum, when the entry in the Record of Rights showed that the annual rent was Rs. 20 and 5 pies only. The presumption arising from entries in the Record of Rights had not been sufficiently rebutted by the rent decrees relied on by the landlords in support of their case. The entries in the Record of Rights should be presumed to have been prepared with great care and should not, therefore, be lightly discarded. Further, the road cess return supported the case for the defence. The learned Subordinate Judge considered that that did not stand in the way of plaintiffs getting a decree to the full extent of their claim. The plaintiffs

were not entitled to get a decree at a rate higher than what was stated in the return. Section 20 of the Act IX of 1880 was referred to.

No one appeared for the Respondents.

JUDGMENT.—This appeal arises out of a suit for arrears of rent, the only point in dispute between the parties being the rate of rent payable. The plaintiffs alleged that the rental was Rs. 28 6-13. The contesting defendants alleged that it was Rs. 27-0-5 pies. The Munsif decided in the defendants' favour. The learned Subordinate Judge on appeal reversed that decision and decided in favour of the plaintiffs. The defendants' case is supported by the Record of Rights and also by a cess return. As regards the Record of Rights the learned Subordinate Judge has held that the presumption arising therefrom has been rebutted by the evidence of certain rent decrees. These rent decrees are evidence as to the rate of rent payable but do not operate as *res judicata* as held by the lower Appellate Court. As regards the road cess return the learned Subordinate Judge remarks: "The admission in the road cess return may well be explained away." But how it can be explained away, he does not state. The way he committed a serious error is that he treated the statement in the road cess return as an admission only. It is more than an admission under section 20 of the Cess Act, IX of 1880. There is a statutory bar to the plaintiffs recovering rent at a higher rate than that shown in the cess return. I, therefore, hold that the lower Appellate Court has given no satisfactory reasons for reversing the decision of the Court of first instance.

I accordingly decree this appeal, set aside the judgment and decree of the lower Appellate Court and restore those of the Munsif.

The appellants will get their costs in this and the lower Appellate Court.

Appeal decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1499 AND 1544 OF 1917.

April 23, 1919.

Present :—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

IN S. A. No. 1499 OF 1917

P. SHANMUGA DEVAR—DEFENDANT No. 1—APPELLANT

versus

T. SHANMUGA DEVAR AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

IN S. A. No. 1544 OF 1917

P. SUBBAROYA CHETTI—PLAINTIFF—APPELLANT

versus

P. SHANMUGA DEVAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession Act (X of 1865), ss. 101, 102—Hindu Wills Act (XXI of 1870), s. 3—Disposition creating life-estate and bequeathing ulterior estate to person on attaining age, validity of—Madras Hindu Transfers and Bequests Act (I of 1914), s. 2 (2)—"Time which is subsequent to such date," meaning of—Vesting after passing of Act, effect of.

When by a disposition a previous life-estate is created, and the ulterior estate is bequeathed to a person on his attaining age, such disposition is valid. [p. 204, col. 1.]

Having regard to the terms of section 3 of the Hindu Wills Act, sections 101 and 102 of the Succession Act, which are applicable to Hindus, must be read as if they contained a proviso that the disposition must be of such a character as could have been made before the passing of the Hindu Wills Act, but this provision can be availed of only if the person who invokes its aid is not precluded by any law to which he is subject from availing himself of it. [p. 204, col. 1.]

The expression "at a time which is subsequent to such date" in sub-section 2 of section 2 of the Madras Hindu Transfers and Bequests Act, 1914, does not refer to any fixed period, and if the final vesting is to take place after the passing of the Act, the Act would validate such disposition. [p. 204, col. 1]

Second appeals against the decree of the Court of the Temporary Subordinate Judge, Chingleput, in Appeal Suit No. 136 of 1916, preferred against the decree of the Court of the District Munsif, Trivellore, in Original Suit No. 328 of 1914.

Messrs. *T. V. Muthukrishna Aiyar* and *O. Viraraqavulu Chetty*, for the Appellants.

Mr. *M. S. Vencatrama Aiyar*, for the Respondents.

These second appeals coming on for hearing on the 8th of November 1918, the Court delivered the following

JUDGMENT.—We feel no doubt that if sections 101 and 102 of the Succession Act applied to the case, the provision in favour of the grandson would be valid. Illustration (*c*) to section 101 would cover the case. As regards *Sivasankara Pillai* v. *Soobramania Pillai* (1) relied by the Subordinate Judge, it is enough to say that all the ulterior dispositions in that case were not in favour of minors who would be of age when the property was to vest in them. Therefore, that decision would not preclude us from holding that when a previous life-estate is created and the ulterior estate is to a person on his attaining age, such a disposition is valid.

But it was contended before us by the learned Vakil for the 2nd respondent in Second Appeal No. 1499 of 1917 that as the testator intended to create an interest in favour of unborn persons, the *Will is invalid*. We think that having regard to section 3 of Hindu Wills Act, sections 101 and 102 of the Succession Act, which were made applicable to Hindus, must be read as if they contained a proviso that the disposition must be of such a character as could have been made before the passing of the Hindu Wills Act. Moreover, the frame of the two sections suggests that the provision can be availed of only if the person who invokes its aid is not precluded by any law to which he is subject from availing himself of it. In answer to this contention, it was suggested by the learned Vakil for the appellant in Second Appeal No. 1499 of 1917 that the Hindu Bequests Act, Act I of 1914, would render the disposition valid. We are disposed to agree with this contention. The expression "at a time which is subsequent to such date" does not refer to any fixed period as was contended for by the respondent. In our opinion if the final vesting takes place after the passing of the Act as it must necessarily be in this case, the Act would validate such a disposition. The decision in *Kudapa Venkayamma* v. *Kakarla Narasamma* (2) supports this proposition.

Even in this view, the question arises whether the plaintiff is not protected by the proviso. That would depend upon facts which have not been ascertained. No issue was raised on the question. Still we think that the plaintiff should have an opportunity of showing that he comes under the proviso. We shall, therefore, remit the issue to the Subordinate Judge whether the plaintiff was a *bona fide* transferee for valuable consideration in whom the right to property vested prior to the date of Act I of 1914.

Fresh evidence may be taken.

Finding should be submitted within two months from the date of receipt of records and seven days will be allowed for filing objections. The costs of this enquiry must in any event be paid by the plaintiff.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Chingleput submitted the following

FINDING.—I have been directed by the High Court to submit finding on the issue framed, *viz.*:—Whether the plaintiff was a *bona fide* transferee for valuable consideration in whom the right of property vested prior to the date of Act I of 1914.

2. The plaintiff examined himself and two more witnesses since the case was remitted. He also produced a receipt Exhibit M and an account book Exhibit N on the date of hearing. The defendants examined no witnesses and filed no documents.

3. The evidence of the plaintiff shows that Sadasiva executed the sale deed Exhibit B for Rs. 190 and that the consideration therefor was a prior mortgage evidenced by Exhibit D and Rs. 30 cash taken. He also proves that the mortgage money was taken for the purchase of plough cattle for the family and that Rs. 30 was taken for the *nisheka muhurtham* of the mortgagor Sadasiva's daughter. Plaintiff's 4th witness Raju Chetty, who has attested the mortgage-bond Exhibit D, corroborates plaintiff as regards the nature of the consideration for the mortgage; and as regards the Rs. 30 he says that the amount was reserved with the mortgagee for payment after the registration of the document. This witness has also attested Exhibit B. The writer of Exhibit B Ponna Pillai, examined as plaintiff's 3rd witness, proves the sale-deed and the purpose for which the same was executed.

4. There was nothing elicited in the course of the cross-examination so much as to discredit the evidence of plaintiff and his witnesses. The plaintiff does not appear

(1) 31 M. 517; 4 M. L. T. 306.

(2) 35 Ind. Cas. 150; 40 M. 510; 31 M. L. J. 33; 20 M. L. T. 221; 4 L. W. 189.

to be in any way closely connected with Sadasiva and there is no reason to think that the document Exhibit B is other than a *bona fide* one. The sale is a transaction binding on the mortgagor's sons as well.

5. As regards the other sale by Sachidananda, the deed is marked Exhibit A which purports to be for Rs. 250. Rupees 200 of this amount is said to be due under a prior mortgage bond Exhibit C and Rs. 50 is said to have been under dealings. The consideration is proved in this case also by the writer plaintiff's 3rd witness, the attestor plaintiff's 4th witness, Raju Chetty and by plaintiff. As regards the 50 rupees the document of the sale Exhibit A recites that it was received that day. But it, however, appears in the evidence that it was due under money dealings. It appears from the evidence of plaintiff's 4th witness that Sachidananda owed a cloth merchant Rs. 15 and the plaintiff undertook to pay that Rs. 15 also, which together with the amount due under prior dealings came up to Rs. 50. In respect of this transaction also there is nothing to suspect in the evidence of plaintiff and his witnesses. The sale is one binding on the sons.

6. I have not referred to the accounts Exhibits N and N 1 and the receipt Exhibit M, as they do not appear to be above suspicion. But that does not in my opinion detract from the value to be given to the evidence of plaintiff and his witnesses. It appears in the evidence of witnesses aforesaid that plaintiff obtained possession soon after the sale and that there was obstruction for his enjoyment only about a year later. I am prepared to believe the evidence of the plaintiff's witnesses in so far as it goes to show that plaintiff obtained possession and leased the same, though I have reason to think that plaintiff was not able to realise the rents due from his lessees owing to the obstruction of the executors.

7. Believing the evidence of plaintiff and his witnesses which is not shaken by the cross-examination and in view also of the fact that no evidence was adduced on the other side in rebuttal, I find this issue in the affirmative.

These second appeals coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding, reverse the decrees of both the Courts below and give a decree to plaintiff as sued for with costs throughout: only one set of costs in this Court excepting the costs of the enquiry.

M. C. P.

Appeals allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 34-B OF 1919.

August 21, 1919.

Present:—Sir Henry Drake-Brockman, KT., J. C.

AWADHUT—APPELLANT

versus

PUNJAJI AND OTHERS—RESPONDENTS.

Execution of decree—Objections to attachment, dismissal of—Declaration of title, suit for—Burden of proof—Transfer of Property Act (IV of 1882), s. 53—Auction-purchaser, whether subsequent transferee.

Where a person objects to the attachment and sale of property in execution of a decree on the ground that the property is his under a sale-deed and his objection is disposed of otherwise than on the merits, whereupon he sues to obtain a declaration that the property is his and is not liable to attachment, the onus of proving *mala fides* and want of consideration on the plaintiff's part is on those who seek to resist the claim. [p. 207, col. 1.]

An auction-purchaser at a sale in execution of a decree is not a "subsequent transferee" entitled to impeach a previous transfer under section 53 of the Transfer of Property Act. [p. 207, col. 2.]

Second appeal against the appellate decree of the 2nd Additional District Judge, Akola, decided on the 26th October 1918, arising out of the decree of the Munsif, Akola, decided on the 4th March 1918.

Mr. *Y. B. Niyogi*, for the Appellant.

Mr. *K. K. Gandhe*, for the Respondents.

JUDGMENT.—In this case the first four respondents purchased from the sixth respondent Nagoji on the 8th September 1914 four fields in Mauza Nakshi, a field in Mauza Bharatpur and some house property for Rs. 4,000. The sale deed Exhibit P 3 recites that the consideration had already been received in advance. The

document was written by a petition-writer at Balapur and registered the same day. On the 31st August preceding the fifth respondent Motilal had obtained a decree for payment of Rs. 1,315 against Nagoji. On the 21st December following Motilal applied for execution and caused two of the fields sold, namely, No. 62-1 of Nakshi and No. 156-2 of Bharatpur, to be attached. Form C was sent to the Collector on the 14th August 1915 and eventually No. 62-1 in Nakshi alone was sold, the price fetched being Rs. 550 and the sale being confirmed on the 2nd October 1916. The auction-purchaser was the present appellant Awadhut.

The suit out of which this second appeal arises was filed on the 21st September 1916 by the vendees under Exhibit P-3. They claimed a declaration that No. 62-1 in Nakshi and No. 156 2 in Bharatpur belong to the plaintiffs and are in their possession by virtue of the sale-deed and that they are not liable to attachment and sale in execution of the decree obtained by the defendant Motilal against Nagoji.

The defence set up by the auction-purchaser, the present appellant, was as follows:—

"Defendant No. 4 denies the sale-deed and its consideration. If there be any, it was simply to defraud his creditors because Suit *sic* No. 72 of 1914, Court of the Senior Subordinate Judge, Akola, was passed on the 31st August 1914 and the alleged sale-deed was executed on the 8th September 1914. All the other allegations are admitted."

The following issues were framed:—

1. Whether the defendant No. 2 executed the sale-deed for Rs. 4,000 in the plaintiff's favour as alleged;

2. Was the sale-deed executed with intent to defraud creditors as alleged.

The trial Judge found as follows on issue No. 1:—

P. W. No. 3 is the attesting witness on the sale-deed (Exhibit P-3). He duly proves it. P. W. No. 4 deposes that Rs. 4,000 were paid to defendant No. 2 as consideration. I, therefore, hold that defendant No. 2 executed the sale-deed for Rs. 4,000 in plaintiffs' favour.

On issue No. 2, however, he decided that the actual payment of consideration was not satisfactorily made out and that by reason also of certain other circumstances, which he mentioned, the sale was a bogus one, being simply intended to shield Nagoji against his creditors. The plaintiffs appealed to the District Court and the Additional District Judge gave them the declaration sought for, holding that the evidence established the passing of the consideration and that in accordance with the view taken in *Subramania Ayyar* v. *Muthia Chettiar* (1) a defence based on section 53, Transfer of Property Act, is not available to an attaching creditor.

The second appeal is preferred by the auction purchaser alone and it is urged that the lower Appellate Court has altogether failed to notice certain circumstances which are relevant to the question whether the sale to the plaintiffs was a mere cloak to shield the property from creditors. As to the passing of the consideration it is urged that the evidence of Sambhu (P. W. No. 4) and the defendant Nagoji (P. W. No. 6), on which the lower Appellate Court has relied, is inconsistent with the recital in the deed, but on reading their depositions I am unable to find any such discrepancy. The deed does not give the date on which the consideration was paid and all that the two witnesses say on the subject is as follows:—

Sambhu:—

The consideration was paid to Nagoji on the date of the execution of the sale-deed. In my presence the sale-deed was not executed.

Nagoji:—

"The sale-deed was executed about 9 A. M. I received the consideration on the day the deed was registered.

Sambhu lives at Nakshi 12 miles from Balapur, and it is quite possible that the money was paid at Nakshi where the plaintiffs live before the party left for Balapur.

Much stress is laid on the point that Nagoji is a brother of the plaintiff Jairam. The significance of this is, however, very small, for Jairam is a Mali while his three co-plaintiffs are Kunbis. Nor can I attach any importance to the fact. Bapu (P. W. No. 3) denied that Nagoji admitted receipt of the consideration in his presence. This point has been considered by the lower Appellate Court and I think this witness, who attested Exhibit P-3, can only have

(1) 43 Ind. Cas. 651; 41 M. 612; 6 L. W. 750; 33 M. L. J. 705.

meant that Nagoji made no separate admission beyond what the deed itself contains. As to possession the trial Judge relied much on the fact that some of the property remained in Nagoji's possession for sometime after the sale. This fact too has been considered by the lower Appellate Court. The trial Judge also considered the price (Rs. 4,000) to be inadequate, but his view on this point is certainly not supported by the result of the sale of No. 621 which fetched only Rs. 550.

There is evidence to support the finding that the full price passed and that the vendees obtained possession of part of the property, and this Court is precluded from interfering with the findings based upon it. The lower Appellate Court has laid the burden upon the plaintiffs to prove the passing of the consideration and the existence of good faith as if the principle laid down in *Narayan Ganesh* v. *Bhiooray* (2) applied to the cases. The position, however, is similar to that of a plaintiff whose objection to an attachment has been disposed of otherwise than on the merits, and in such a case the burden of proving *mala fides* and want of consideration is on those persons who seek to resist the vendees' claim: see *Nandlal* v. *Krishnaji* (3). This mistake, however, is no ground for setting aside the lower Appellate Court's decision, inasmuch as it is found positively in favour of the vendees that there was a real transfer for a price. Of bad faith on the part of the vendees there is really no evidence calling for serious consideration.

It is unnecessary to consider whether the view taken by a Full Bench of the Madras High Court in *Subramania Ayyar* v. *Muthia Chettiar* (1) (above cited) should be followed or not. In *Abdul Kader* v. *Ali Meah* (4) the decision in which was not approved of by the Madras High Court, the auction-purchaser, who was the defendant in the vendee's suit for a declaration, was not only the decree-holder who had attached the property but also the sole creditor. In the present case there are other creditors besides the respondent Motilal, and in this respect the position is similar to that in the Madras case. I agree with the view expressed in *Vasudev Raghunath* v. *Janardan Sadashiv* (5) by Shah and Heaton, JJ., that an auction-purchaser is not a 'subsequent transferee' entitled to impeach a previous transfer under section 53, Transfer of Property Act. That section relates only to transfers of property by the act of parties, as appears from the preamble to the Act and also from section 5 which defines a transfer of property as an act by which a person conveys property: an execution sale does not satisfy either the preamble or the definition. It is of course clear that the appellant cannot rank for the purposes of section 53 as a person 'having an interest' in the property. I may add that the appellant's pleading did not properly raise the question whether the sale to the plaintiffs was voidable under section 53, for it alleges merely a circumstance which is entirely inconclusive on the point: see *Mardan Singh* v. *Karanju* (6).

The appellant could only succeed if he made out the sale of the 8th September 1914 to be a merely colourable transaction not intended to pass the property but only to be used as a shield against the creditors. This he cannot possibly be regarded as having done in face of the facts that the consideration passed and possession of part of the property sold was transferred to the vendees. The appeal accordingly fails and is dismissed with costs. In the Courts below costs will be paid as already ordered.

Appeal dismissed.

(2) 2 N. L. R. 87.
(3) 13 C. P. L. R. 69.
(4) 14 Ind. Cas. 715; 16 C. W. N. 717; 15 C. L. J. 649.
(5) 29 Ind. Cas. 497; 39 B. 507; 17 Bom. L. R. 522.
(6) 13 C. P. L. R. 180 at p. 186.

MADRAS HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 1098 OF 1918.

August 26, 1919.

Present :—Sir Abdur Rahim, KT., Offg. Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

SINNAPPAN *alias* METHARMAMANA ROWTHER—PLAINTIFF—APPELLANT

versus

ARUNACHALAM PILLAI AND OTHERS—DEFENDANT'S LEGAL REPRESENTATIVE—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64, O. XXI, r. 54—Attachment, order for, when takes effect.

SINNAPPAN *v.* ARUNACHALAM PILLAI.

An attachment operates as a valid prohibition against alienation of the attached property, only from the date on which the necessary proclamation is made, *i. e*, a copy of the order is affixed as required by Order XXI, rule 54, Civil Procedure Code. [p. 211, col. 2]

Venkatachelapatirao v. *Kameswaramma*, 43 Ind. Cas. 214; 22 M. L. T. 330; 33 M. L. J. 515; 6 L. W. 617; (1917) M. W. N. 785; 41 M. 151 (F. B.), applied.

Yuna Ramanayakudu v. *Boya Pedda Basappa*, 50 Ind. Cas. 261; 36 M. L. J. 284; 42 M. 565; 26 M. L. T. 45, followed.

Venkatasubbiah v. *Vankata Seshaiyar*, 48 Ind. Cas. 232; 42 M. 1; 24 M. L. T. 346; (1918) M. W. N. 606; 35 M. L. J. 387; 8 L. W. 369, explained and distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Madura, in Appeal Suit No. 34 of 1917, preferred against the decree of the Court of the Additional District Munsif, Dindigal, in Original Suit No. 67 of 1915.

This second appeal coming on for hearing on the 29th and 30th of April 1919, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit, and upon hearing the arguments of Mr. *K. S. Jayarama Aiyar*, for the Appellant, and of Mr. *T. R. Venkatarama Sastri* and Mr. *K. S. Ganapathi Aiyar*, for the Respondents, the Court (Oldfield and Sadasiva Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—The question raised is in general terms, whether an attachment operates as a valid prohibition against alienation of the attached property from the date, on which it is ordered or from that on which the necessary proclamation is made and copy of the order affixed.

I should be content to treat the matter as concluded by the decision of Phillips and Krishnan, JJ., in *Yuna Ramanayakudu* v. *Boya Pedda Basappa* (1). There is, however, it seems to me, great difficulty in reconciling that decision with some expressions in the judgments of the former learned Judge and of Kumaraswami Sastri, J., in an earlier case which is included in the authorised reports, *Venkatasubbiah* v. *Venkata Seshaiyar* (2) In that case Phillips, J., said: "The attachment, when effected, is an attachment made in pursuance of an order to attach before judgment and must be treated as an attachment before judgment and not as a nullity merely because as a matter of fact the attachment is not completed until after judgment. To adopt the opposite view would be to allow a formal judicial order to be upset by the negligence or default of a subordinate ministerial officer," and Kumaraswami Sastri, J., "Attachment of the property in the manner prescribed by Order XXI, rule 54, is a purely ministerial act. Any delay of the officers of Court in effecting the attachment should not prejudice the decree-holder and the validity of the order of attachment under rule 5, Order XXXVIII, should not depend on the date when it is actually effected." These observations were not, so far as appears, brought to the notice of the learned Judges in *Yuna Ramanayakudu* v. *Boya Pedda Basappa* (1). There may, it must be respectfully suggested, be some difficulty in following their connection with the context in which they occur, and in particular with the reference in it to completion of an attachment by the proclamation, &c. But in view of Order XXXVIII, rule 7, I do not think that their application can be restricted to cases, such as that actually then before the Court of attachment before judgment. In these circumstances there is a conflict which, in my opinion, must be resolved by a Full Bench and I, therefore, refer to one the question stated at the beginning of this order.

SADASIVA AIYAR, J.—It must be admitted that there are observations in the judgments of both the learned Judges who took part in the decision in *Venkatasubbiah* v. *Venkata Seshaiyar* (2) which lend support to the contention of the appellant's learned Vakil, Mr. Jayarama Aiyar, that an attachment, which prevents a valid alienation after it is made, is effected or made as soon as the order directing the attachment is passed by the Court and even before the order is proclaimed in the manner directed by clause (2) of Order XXI, rule 54. But the real basis of that decision seems to me to have been (as stated in the judgment of Phillips, J.) that it is not necessary at all that there should be an attachment fully effected before judg-

(1) 50 Ind. Cas. 261; 36 M. L. J. 234; 42 M. 565; 26 M. L. T. 45.

(2) 48 Ind. Cas. 232; 42 M. 1; 24 M. L. T. 346; (1918) M. W. N. 606; 35 M. L. J. 387; 8 L. W. 369.

ment to attract the provisions of Order XXXVIII, rule 11 (which dispenses with re-attachment after decree), and as a consequence the provisions of section 64, but it is only necessary that the property should have become attached and "under attachment" (whether before or after judgment) "by virtue of the provisions of this order" (that is, of Order XXXVIII).

There is also the observation of Kumaraswami Sastri, J., in the course of his judgment that "under section 64, the attachment invalidates an alienation only when the alienation is after the actual compliance with the provision of rule 54," that is, I take it after proclamation is also made under clause 2 of rule 54. This opinion of Kumaraswami Sastri, J., is supported by the decision in *Yuna Ramanayakudu* v. *Boya Pedda Basappa* (1) to which Phillips, J. was a party, though *Venkatasubbiah* v. *Venkata Seshaiyar* (2) is not referred to in *Yuna Ramanayakadu* v. *Boya Pudda Basappa* (1). This latter case is directly against the contention of the appellant.

As regards the omission from section 64 of the words "by actual seizure or by written order duly intimated and made known in manner *aforesaid*" (that is, in the manner mentioned in old section 274) found in the old section 276 (which corresponded to the present section 64), it might first be remarked that old section 276 followed in order the old section 274, but section 64 in the body of the new Code precedes all orders including Order XXI, rule 54. The Legislature could not, therefore, reproduce the words "in manner *aforesaid*" but should have substituted the words "in manner provided by the Order XXI, rule 54 *infra*," if it wanted to reproduce as many of the words as is possible to be found in the language of the old Act But the Legislature knew (what Mr. Jayarama Aiyar conceded) that all the decisions under the old Code, section 276, had held that an alienation is not invalidated merely by an order for attachment having been passed before its date, but such order should have been also proclaimed in the manner provided by Order XXI, rule 54, clause (2). (I might add that the language of Order XXI, rule 54, can be modified by the High Court so that even further conditions might be imposed to completely "make" an attachment.) It seems, therefore, to have been thought by the Legislature unnecessary to retain the omitted words, though it might be considered (if I may say so with respect) injudicious on the part of the Legislature to have so omitted them. As stated in Maxwell, "Language is rarely so free from ambiguity as to be incapable of being used in more than one sense." "There is enough in the vagueness and elasticity inherent in language to account for the difficulty so frequently found in ascertaining the meaning of an enactment." But I think that the intention of the Legislature not to interfere with the settled law which made an alienation invalid only if notice of attachment had been given to the judgment-debtor and the public by a proclamation as provided for in Order XXI, rule 54, clause (2), seems to me to be reasonably clear notwithstanding the omission of certain words in old section 276 when re-enacting it as section 64.

I am prepared, therefore, to follow *Yuna Ramanayakudu* v. *Boya Pedda Basappa* (1), but as my learned brother considers that it is advisable to have the question referred to a Full Bench, I agree.

This second appeal came on for hearing in pursuance of the Order of Reference to Full Bench.

Mr. *K. S. Jayarama Aiyar*, for the Appellants.—The material date is the date on which the order was passed. The words of the rule (Order XXI, rule 54) are "the attachment shall be made by an order prohibiting, etc." So the order is that which creates the attachment. The same law prevailed under the old Code. See also section 235 of Act XIV of 1859. The attachment by itself creates no charge or lien. It simply restrains the judgment-debtor from dealing with it. See *Venkatasubbiah* v. *Venkata Seshaiyar* (2). See also *Yuna Ramanayakudu* v. *Boya Pedda Basappa* (1). It has been held that when proceedings are stayed by an Appellate Court, the time when the order is communicated is the material date. *Venkatachelapatirao* v. *Kameswaramma* (3). But in

(3) 43 Ind. Cas. 214; 41 M. 151; 22 M. L. T. 330; 33 M. L. J. 515; 6 L. W. 617; (1917) M. W. N. 785 (F. B.).

that case, the lower Court has a jurisdiction to execute in spite of the presentation of an appeal against its decree. A judgment-debtor who wants to alienate property will be affected by *lis pendens* if he alienates during the suit. He can defraud the decree-holders by the time that an order for attachment is carried out under Order XXI, rule 54 (2).

Reference was also made to *Rutnessur Singh* v. *Ram Tanoo Ghose* (4), *Richards, In re, Deeping, Ex parte* (5).

Mr. *K. S. Ganapathi Aiyar*, for the Respondents.—Attachment by itself creates no charge or lien and it has, therefore, been held that until the attachment is carried out according to the provisions of Order XXI, rule 54, there is nothing to prevent the judgment-debtors' dealing with the property. See *Kanai Lal* v. *Ahed Bux* (6), *Simrik Lal Bhakat* v. *Radharaman Kalidaha* (7).

OPINION.

ABDUR RAHIM, OFFG. C. J.—The question referred to the Full Bench is "whether an attachment operates as a valid prohibition against alienation of the attached property from the date on which it is ordered or from that on which the necessary proclamation is made and copy of the order affixed." This depends upon the proper construction of section 64 and Order XXI, rule 54, of the Code of Civil Procedure. Section 64 lays down that "where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment." Rule 54 lays down how an attachment is made: It is in these words:

"(1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

"(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the Office of the Collector of the District in which the land is situate." It is contended before us by Mr. Jayarama Aiyar that the attachment is made when the order prohibiting the judgment-debtor from transferring the property is passed and that from that date the alienation of the property is prohibited. His argument is that although the order has to be proclaimed as required by the 2nd paragraph of the rule, the attachment must be taken to have been made when the Court passed the order of prohibition. He is unable to cite any authority in support of his contention, but he says that the language of section 64 and rule 54 supports it. Section 64 does not say "where an order for attachment has been made" but "where an attachment has been made." No doubt rule 54 says that an attachment shall be made by an order, but that does not necessarily mean that the order completes the attachment. In fact Mr. Jayarama Aiyar seemed in one part of his argument to concede that the attachment is not completed until the order is proclaimed and a copy of the order affixed in the way described in paragraph 2 of rule 54. That seems to be obvious. The object of section 64 is to prohibit alienation after attachment, and, if the mere passing of an order in Court would have that effect, one can easily imagine that the judgment-debtor would be in a position to make alienations to innocent purchasers to their prejudice. The essence of an order for attachment is to prohibit the judgment-debtor from transferring the property and until such a prohibition is proclaimed and made known in the way provided by the rule, it cannot be said to have come into operation.

Our attention has been drawn to a somewhat different wording of rule 43 and rule 46 of Order XXI. The first rule provides

(4) 12 W. R. 491; 4 B. L. R. A. C. 24.
(5) (1907) 2 K. B. 33; 76 L. J. K. B. 643; 96 L. T. 712; 14 Manson 88; 23 T. L. R. 388.
(6) 39 Ind. Cas. 562.
(7) 39 Ind. Cas. 857.

that in case of moveable property the attachment shall be made by actual seizure, and it does not contain reference to any order. Rule 46 provides that the attachment shall be made by a written order prohibiting the debtor from paying the debt to his creditor. But so far as rule 43 is concerned, there can be no doubt that there must be an order preceding the actual seizure; and when the debtor receives notice under rule 46, that is when the order is served on the debtor, there can be no question of his paying the debt to his creditor without notice of any prohibitory order. In a recent Full Bench ruling of this Court, *Venkatachelapatirao* v. *Kameswaramma* (3), it was laid down that where subsequent to an interim order for stay of execution made by an Appellate Court without notice to the decree holder but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid. The reason given is that the order staying execution is in the nature of a prohibitory order to the lower Court and until it is communicated, the steps taken by the lower Court must be treated as legally valid. It cannot be denied that so far as prohibitory orders, properly so-called, are concerned, they do not come into operation until notice of the order is given to the prohibited person. Applying the same principle to the case now under consideration, it would not be right to hold that the mere passing of the order by a Court without anything being done to effectuate the attachment would operate as an attachment of the property.

The main argument of Mr. Jayarama Aiyar is based on the omission from section 64, Civil Procedure Code, of the words "by actual seizure" or "by written order duly intimated and made known in the manner aforesaid" after the words "where an attachment has been made." The reason for the omission seems to be obvious. The mode of attachment is laid down in the Code, that it is to be effected by actual seizure or by written order duly intimated and made known in the manner referred to, and the Legislature apparently thought that it was superfluous to repeat those words. This is what was pointed out by Woodroffe and Mookerjee, JJ., in *Simrik Lal Bhakat* v. *Radharaman Kalidaha* (7).

It is also argued by Mr. Jayarama Aiyar that although an attachment is not completed until the proclamation is made, still once the proclamation is made, the attachment takes effect from the date of the order of the Court. It is difficult to appreciate the force of this argument. The attachment can be said to be made only on the date on which it is completed and becomes operative.

There is only one ruling of this Court in point and that is the ruling in *Yuna Ramanayadu* v. *Boya Pedda Basappa* (1) to which Phillips and Krishnan, JJ., were parties. That is directly in support of the view just indicated. There is another decision by Phillips and Kumaraswami Sastri, JJ., in *Venkatasubbiah* v. *Venkata Seshaiyar* (2). That was a case of attachment before judgment and the question for consideration was whether, where an order for attachment was made before judgment and the attachment was not actually made until after the decree, that was a valid attachment. They hold that it was a valid attachment, and in so holding certain general expressions were used in the course of the judgment which have been seized upon by Mr. Jayarama Aiyar in support of his argument. The general observations ought to be read in connection with the point which the learned Judges had before them and if so read, they cannot be said in any way to countenance the construction contended for on behalf of the appellant.

There is only one other case that has been brought to our notice and that is a Calcutta decision in *Kanai Lal* v. *Ahed Bux* (6). That also is in support of the view which has been indicated. The answer will, therefore, be that an attachment operates as a valid prohibition against alienation of the attached property only from the date on which the necessary proclamation is made—copy of the order affixed as contemplated in Order XXI, rule 54.

OLDFIELD, J.—I agree.

SESHAGIRI AIYAR, J.—I entirely agree. I think the principle enunciated in *Venkatachelapatirao* v. *Kameswaramma* (3) is applicable to this case.

NATHU v. GANGADHAR.

As regards the contention that the omission of the words commented upon by the learned Chief Justice makes for the position that the order was intended to be efficacious from the moment of its promulgation and not from its publication, I agree with the view taken by the Calcutta High Court that the Legislature must have thought that these words were mere surplusage. If the Legislature had intended to introduce such a fundamental change as is suggested by Mr. Jayarama Aiyar, it could have very easily stated in section 64, "where an order for an attachment has been made, any private transfer," etc. That is not what the Legislature has said and it would not be in consonance with any canon of construction to impute to the Legislature such a violent change in the law because of the omission of certain unnecessary words. In my view the decision in *Yuna Ramanayakudu* v. *Boya Pedda Basappa* (1) is correct. As regards *Venkatasubbiah* v. *Venkata Seshaiyar* (2), as I understand the learned Judges, the question before them was whether an order for attachment which was made before the decree was passed had spent itself out because it had not been effectuated by doing the acts enjoined before the passing of the decree. The learned Judges in construing Order XXXVIII, rule 11, were of opinion that although nothing might have been done between the passing of the order and the passing of the decree, the order still remained in force and could be effectuated by publication and proclamation after the date of the decree. That is not the point we are concerned with. Apart from that point, the learned Judges have expressed themselves in no uncertain terms on the question we have to decide: they say that until the order has been proclaimed there can be no attachment, and are, therefore, in agreement with the view taken in *Yuna Ramanayakudu* v. *Boya Pedda Basappa* (1).

The second argument which Mr. Jayarama Aiyar advanced before us is, that although the order might have been proclaimed only at a later date, it dates back to the date of its being made. The answer to that is this: section 64 attempts at preventing a party from exercising his undoubted right of alienation. Therefore, unless we find in section 64 any provision which says that the order of publication was to date back to the date of its promulgation, the Courts are not justified in saying that this should be read into the language of the section. The right was intended to be affected only from the date which is actually mentioned in the section and not from an anterior date as suggested by Mr. Jayarama Aiyar. This is the view taken by the Calcutta High Court in *Kanai Lal* v. *Ahed Bux* (6) and in my opinion that view is right.

For both these reasons the answer must be the one suggested by the learned Chief Justice.

M. C. P.

Reference answered.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 558 OF 1917.

July 24, 1919.

Present:—Mr. Mittra, A. J. C.

NATHU, MINOR, GUARDIAN MAROTI, AND OTHERS—DEFENDANTS—APPELLANTS

versus

GANGADHAR—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 60—Limitation Act (IX of 1908), Sch. I, Art. 139—Transfer of Property Act (IV of 1882), s. 116—Occupancy tenant—Sub-lease, perpetual, grant of—Sub-lessee, position of—Prescription, acquisition of title through—Ejectment, suit for—Renewal of lease—Limitation.

Plaintiff, an occupancy and ordinary tenant of certain fields, sued to eject the defendants, who pleaded a perpetual lease in their favour by the plaintiff, but it was found that as that lease had been granted after the Central Provinces Tenancy Act was passed, it was valid only for one year and the plaintiff's suit was decreed. The defendants appealed and contended that their possession having become wrongful after the expiry of one year when the tenancy was determined, the suit was barred by limitation under Article 139 of Schedule I to the Limitation Act and that they had acquired by prescription the status of perpetual sub-lessees:

Held, applying the principle of section 116 of the Transfer of Property Act, that the payment of rent by the defendants and the acceptance of the same by the plaintiff resulted in the renewal of the lease every year until disputes arose and as the suit was instituted within two years of such disputes, it was not barred under Article 139 of Schedule I to the Limitation Act. [p. 213, cols. 1 & 2.]

SEENI NADAN v. MUTHUSWAMY PILLAI.

As section 60 of the Central Provinces Tenancy Act, 1898, precludes an occupancy and ordinary tenant from granting a perpetual lease, a sub-tenant of such a tenant cannot acquire title by prescription, as no such title is recognized by law.

Appeal against the decree of the District Judge, Nagpur, in Civil Appeal No. 53 of 1915/1917, dated the 7th August 1917, arising out of Civil Suit No. 104 of 1913, decided by the Junior Subordinate Judge, Nagpur, on the 26th March 1915.

Dr. *H. S. Gour* and Mr. *G. L. Subhedar*, for the Appellants.

Messrs. *M. K. Padhya* and *M. B. Kinkhede*, for the Respondents.

JUDGMENT.—The case was once remanded by my judgment in Second Appeal No. 637 of 1915 delivered on the 23th February 1917. At the request of the defendant-appellants I indicated the possibility of further pleadings being taken, though I did not express any opinion on such pleas.

The plaintiff is an occupancy and ordinary tenant of the fields in dispute. He alleged that he used to give every year a fresh lease to the defendants' father and that disputes arose in the Fasli year 1321. The defendants pleaded that about thirteen years ago a perpetual lease was granted to them. The lower Appellate Court had accepted the defendants' story about the perpetual lease and dismissed the suit. I held that if the perpetual lease was given after the coming into force of the Tenancy Act of 1898, it was only valid for one year. The lower Appellate Court has now decreed the plaintiff's suit and this second appeal has been filed by the defendants.

It is contended that after the expiration of one year of the lease defendants' possession became wrongful as the tenancy was determined then. It is, therefore, urged that the suit is barred by limitation under Article 139. In the alternative it is urged that the defendants have acquired by prescription the status of a perpetual sub-lessee.

The position taken up by the defendants is somewhat inconsistent. So far as the question of limitation is concerned, the principle underlying section 116, Transfer of Property Act, governs the case. The defendants paid rent to the Malguzar and it was accepted as rent on behalf of the plaintiff. The plaintiff assented to the defendants continuing in possession, as found by the lower Appellate Court, under the belief that the perpetual lease was binding. Therefore, the lease was renewed every year till disputes commenced, and this was within two years of the suit. The suit is, therefore, not barred under Article 139.

Whether the sub-tenant of an occupancy or ordinary tenant could acquire the status of a permanent sub-tenant by prescription under the Tenancy Act of 1883 need not be considered. As such a tenant cannot now grant a perpetual lease, having regard to the provisions of section 60 of the Tenancy Act of 1898, no such title can be acquired by prescription, as such a title is not recognised by law.

The result is that the appeal fails and it is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 44 OF 1918.

April 24, 1919.

Present:—Sir John Wallis, KT., Chief Justice, Justice Sir William Ayling, KT., and Mr. Justice Sadasiva Aiyar.

SEENI NADAN *alias* VIRAKUMARU NADAN—RESPONDENT NO. 1—COUNTER-PETITIONER NO. 2—APPELLANT

versus

MUTHUSWAMY PILLAI AND OTHERS—APPELLANT AND RESPONDENTS NOS. 3 TO 11—PETITIONER AND COUNTER PETITIONERS NOS. 5 TO 9 AND LEGAL-REPRESENTATIVES OF COUNTER-PETITIONER NO. 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 37, 38, 39, 150—Limitation Act (IX of 1908), Sch. I, Art. 182—Jurisdiction, territorial, change in—Mortgage decree—Assignment, after decree, of jurisdiction over mortgaged property to another Court—Execution, application for, to Court which passed decree, maintainability of, 'include' in s. 37, Civil Procedure Code, meaning of—Interpretation of Statutes—American decisions, citation of.

Held, by the Full Bench (Sadasiva Aiyar, J., dubitante.)—A Court which passes a mortgage decree is the proper Court for execution within the meaning of clause (4) of Article 182 of Schedule I of the Limitation Act even though the property over which it had jurisdiction at the time of the decree is taken away from its jurisdiction and assigned to another Court at the time of the presentation of the application for execution. [p. 222, col. 2.]

(Authorities reviewed).

Per *Wallis, C. J.*—The re-drafting and re-arrangements of the sections of a Statute leave the

substance of the law unaltered, and such a serious change as the abolition of the decree-holder's right to apply in all cases to the Court which passed the decree in the first instance cannot be raised by implication, but should plainly and clearly appear on the language of the sections. The words "shall be deemed to include" is a phrase of extensive and not of restrictive jurisdiction, and it does not take away the right of Courts to execute decrees passed by them. The case of direct application to the Court to which the area has been transferred is met by the enactment of the new section 150 in the Civil Procedure Code, which is in terms wide enough to authorise that Court to entertain in the first instance any application which might have been made to the Court which passed the decree. [p. 220, col. 2; p. 221, col. 1.]

The tendency of Indian Courts to resort unnecessarily to American decisions deprecated. [p. 221, col. 2.]

Imambandi v. *Mutsaddi*, 47 Ind. Cas. 513; 45 I. A. 73; 25 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; 45 C. 878; (1919) M. W. N. 91; 9 L. W. 518 (P. C.), explained.

Per *Ayling, J.*—Section 150, Civil Procedure Code, covers the case of the transfer of all the litigations arising out of a tract of country from one Court to another, and section 37 of the Code whatever it means by ceasing to have jurisdiction to execute, does not operate to exclude the Court which actually passed the decree and to substitute for it another Court and it is still open to the decree-holder to apply to the former for execution by way of transmission of the decree to the Court which has territorial jurisdiction. [p. 222, col. 2; p. 223, col. 1.]

Per *Sadasiva Aiyar, J.*—There seems to be no distinction in principle between jurisdiction to entertain an application for sale of property outside the jurisdiction and jurisdiction to execute the decree by sale of such property. Section 150 of the Civil Procedure Code would appear to have been enacted so as to take away both rights from the Court which ceased to have territorial jurisdiction. [p. 225, cols. 1 & 2.]

Where questions of International Law or Commercial Law or Constitutional Law are involved, it is indispensable (owing to paucity of Indian decisions) to refer to foreign decisions where the Statute Law of India is silent and rules of justice, equity and good conscience have to be applied by Indian Courts and such rules have been clearly set out in famous decisions of foreign Courts, references to such authorities cannot conveniently be avoided. [p. 226, col. 1.]

Appeal against the order of the Court of the Subordinate Judge, Tinnevelly, in Appeal Suit No. 30 of 1917 (Appeal Suit No. 442 of 1917 on the file of the District Court, Tinnevelly), preferred against the order of the Court of the Additional District Munsif, Tinnevelly, in Execution Petition No. 312 of 1916, in Original Suit No. 104 of 1901.

FACTS appear from the Order of Reference by Seshagiri Aiyar, J.

This appeal against order came on for hearing before Oldfield and Seshagiri Aiyar, JJ.

Mr. *T. M. Ramaswami Aiyar* (with him Mr. *A. Krishnaswami Aiyar*), for the Appellant.—The Court had no jurisdiction to entertain the application. It was not "the Court which passed the decree" under section 37, Civil Procedure Code, nor had it jurisdiction over the properties, sought to be attached, at the time of the application. The right to execute decrees cannot survive a transfer of territorial jurisdiction. *Ipso facto* the jurisdiction is transferred, the right to order execution also ceases. See *Mahammad Husain* v. *Abdul Kareem* (1), *Ashfaq Husain* v. *Gauri Sahai* (2), *Nimmala Mahankali* v. *Kallakuri Subba Rao* (3), *Ramasami Reddi* v. *Sokkappa Reddi* (4), *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (5) and *Vadivelu Pillai* v. *Maruda Pillai* (6).

For the same reason, the applications prior to 1910 are also not to a proper Court, even though at the time the Principal Munsif had jurisdiction over the suit properties.

This contention was disallowed.]

(At this stage Mr. *A. Krishnaswami Aiyar* was permitted to continue).

Mr. *Krishnaswami Aiyar*, for the Appellant.—If while an execution application is pending, transfer of jurisdiction is made by operation of law, no fresh application to the new Court will be necessary. But here it is, for there was no pending application at the time of the transfer. The Court which has acquired jurisdiction is the only Court to entertain such applications. That is what *Subbiah Naicker* v. *Ramanathan Chettiar* (7) lays down.

SESHAGIRI AIYAR, J.—I am not satisfied that the law as laid down in that case is correct.]

[The opposite side cited *Panduranga*

(1) 29 Ind. Cas. 237; 39 M. 544; 17 M. L. T. 424.
(2) 9 Ind. Cas. 975; 33 A. 264 at p. 270; 15 C. W. N. 370; 8 A. L. J. 332; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140; 13 C. L. J. 351; 9 M. L. T. 380; (1911) 2 M. W. N. 177; 38 I. A. 37 (P. C.).
(3) 41 Ind. Cas. 268; 32 M. L. J. 455.
(4) 48 Ind. Cas. 732; 35 M. L. J. 194.
(5) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 910 (P. C.).
(6) 26 Ind. Cas. 413.
(7) 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251.

Madaliar v. *Vythilinga Reddi* (8) as laying down the correct rule.]

Panduranga Mudaliar v. *Vythilinga Reddi* (8) is wrong in principle and has not been followed in a series of cases commencing with *Subbiah Naicker* v. *Ramanathan Chettiar* (7). See *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (9), *Parthasaradhi Appa Rao* v. *Naka Venkatadri Appa Rao* (10), *Penugonda Rattan* v. *Korasika Thatha* (11), *Doorvas Seshadri Iyer* v. *Ananthayee* (12) and *Vadivelu Pillai* v. *Marudu Pillai* (6), all of which quote *Subbiah Naicker* v. *Ramanathan Chettiar* (7) with approval and the last says that *Panduranga Mudaliar* v. *Vythilinga Reddi* (8) is inconsistent with *Subbiah Naicker* v. *Ramanathan Chettiar* (7).

The adjustment not having been certified, the Court is precluded from recognising it and so the petition is time-barred. Even otherwise it is barred; deducting the time occupied by the petition of 1913, there is an interval of more than three years before the present application in 1914. The alleged adjustment has not been proved.

Mr. *K. R. Rangaswami Aiyangar*, for the Respondents.—The word "include" in section 37 of the Code shows that the Court which passed the decree does not lose its right to execute it even though, as in clause (*b*), it "has ceased to have jurisdiction to execute it." That is the law also as laid down in *Panduranga Mudaliar* v. *Vythilinga Reddi* (8).

[OLDFIELD, J.—'Include' does not mean simultaneous jurisdiction.]

There may be two Courts or even three at the same time to any of which the applicant can resort at his option.

[SESHAGIRI AIYAR, J.—The section does not imply it.]

The section does not exclude it but "includes." See *Lalchman Pundeh* v. *Maddan Mohun Shye* (13) followed in *Panduranga Mudaliar* v. *Vythilinga Reddi* (8). The Privy Council has held that there may be three Courts at the same time. See *Maharajah of Bobbili* v. *Narasaraju Peda Boliar* (14).

In *Subbiah Naicker* v. *Ramanathan Chettiar* (7) the only question was whether a transfer for execution was necessary or not to give the new Court jurisdiction to execute. The question of competency of the first Court was not before the Court.

The adjustment is valid to save limitation. For Order XXI, rule 2, is intended for the protection of the judgment-debtor. See *Masilamani Mudaliar* v. *Sethuswami Aiyar* (15), where an entry in an execution petition of the partial adjustment of the decree was held to be a sufficient basis to enable the Court to recognise and certify the adjustment. There is no time limit imposed on the decree-holder.

Whether there was an adjustment is a question of fact and cannot be heard in second appeal.

ORDER OF REFERENCE TO A FULL BENCH.

OLDFIELD, J.—I have had the advantage of reading the judgment, which my learned brother is about to deliver, and agree with him as to the effect of the judgment of the Judicial Committee in *Ashfaq Husain* v. *Gauri Sahai* (2). On the first point argued we must hold that time began to run on the date on which the decree was made absolute.

I do not think it necessary to add to my learned brother's discussion of the decision in *Subbiah Naicker* v. *Ramanathan Chettiar* (7), because I should be content to follow it, and should prefer to apply the principle *stare decisis* in dealing with a question, such as this, of procedure. In deference, however, to his opinion I agree to a Reference to a Full Bench in the terms he proposes.

SESHAGIRI AIYAR, J.—A mortgage decree was obtained on the 28th of August 1901 in the Additional District Munsif's Court, Tinnevelly. The suit was originally instituted in the Principal District Munsif's Court which had jurisdiction over the property mortgaged. It was conceded in the lower Court and it seems fairly clear

(8) 20 M. 537; 2 M. L. T. 466; 17 M. L. J. 417.
(9) 36 Ind. Cas. 682; 39 M. 640; 31 M. L. J. 300; 18 Bom. L. R. 903; 14 A. L. J. 1129; 20 M. L. T. 472; 24 C. L. J. 478; 4 L. W. 658; (1916) 2 M. W. N. 541; 21 C. W. N. 162; 1 P. L. W. 26; 43 I. A. 238 (P. C.).
(10) 27 Ind. Cas. 83; (1914) M. W. N. 898.
(11) 35 Ind. Cas. 237; 31 M. L. J. 90 at p. 92; 20 M. L. T. 327.
(12) 42 Ind. Cas. 671; (1917) M. W. N. 783; 6 L. W. 775.
(13) 6 C. 513; 7 C. L. R. 521; 5 Ind. Jur. 414; 3 Ind. Dec. (N. S.) 833.
(14) 15 Ind. Cas. 738; 37 M. 231 at p. 235; 12 M. L. T. 119; (1912) M. W. N. 721; 23 M. L. J. 236.
(15) 41 Ind. Cas. 701; 41 M. 251; (1917) M. W. N. 502; 33 M. L. J. 219; 22 M. L. T. 115.

that at the time of the decree the Additional District Munsif's Court was not assigned any local jurisdiction. Therefore, the Additional District Munsif's Court was an auxiliary to the Principal District Munsif's Court and as such the decree may be taken to have been passed by the Principal District Munsif himself. Under the decree money was made payable in six months. By an application to the Principal District Munsif the decree was made absolute on the 16th of September 1914. The present application for execution was made on the 6th of July 1916. It was first contended that as more than 12 years had elapsed since the passing of the decree and since the time fixed for payment, the present application is barred by limitation by virtue of section 48 of the Code of Civil Procedure. But the decree was passed when Act XIV of 1882 was in force, and as was held by the Judicial Committee in *Ashfaq Husain* v. *Gauri Sahai* (2) the decree-holder had 12 years from the date on which the decree was made absolute.

The more serious contention was this. In June 1910 by a notification in the Fort St. George Gazette the respective jurisdictions of the Principal District Munsif and the Additional District Munsif were fixed, and the property mortgaged fell within the jurisdiction of the Additional District Munsif. Notwithstanding this fact, prior to and after the notification and until February 1914, all applications for execution in the present suit were made to the Principal District Munsif. It was contended on behalf of the judgment-debtor that these applications were not made to the proper Court and that consequently the present application is barred by limitation. We need only consider the propriety of the application of 12th of July 1913, for, if that was not properly made, the present application was undoubtedly out of time. The Subordinate Judge has held that the application to the District Munsif was a step-in-aid of execution. He was greatly influenced by the fact that the records of the case were in the custody of the Principal District Munsif, and that the decree holder had vainly tried to induce that officer to transfer these records to the Additional District Munsif. In this Court reliance was mainly placed on *Subbiah Naicker* v. *Ramanathan Chettiar* (7). That was also a case from Tinnevelly. After the attachment of the property by the Court which passed the decree, the Taluk in which the property was situated was assigned to the jurisdiction of another Court. The learned Judges held that the proper Court for entertaining applications for sale was the new Court and not the Court which passed the decree. The decision very elaborately discusses the whole question of executory process where there is a change in venue after the passing of the decree. There are strong observations suggesting that on the assignment of jurisdiction the original Court ceases to have any right to execute the decree. In page 473* the learned Judges say:—"the business of a Court which loses jurisdiction over a certain area, so far as it relates to cases affecting the lands in the transferred area, will be *ipso facto* transferred to the new Court," and they point out that suits and execution proceedings stand upon the same footing. They conclude by saying:—"Even if we are wrong in the above view, we are prepared to get over the difficulty sought to be raised on the question of jurisdiction by transferring Execution Petition No. 389 of 1909 from the Srivilliputhur Munsif's Court for disposal to the file of the Additional District Munsif of Tinnevelly." In another place also they expressed their opinion with some reserve. In the course of the judgment they refer to the decision in *Pandurangа Mudaliar* v. *Vythilinga Reddi* (8), in which it was held that the original Court did not cease to have jurisdiction to execute the decree on the transfer of property from its jurisdiction, as such transfer did not take away the jurisdiction which it had to execute its own decree under the Civil Procedure Code. Although the learned Judges who decided *Subbiah Naicker* v. *Ramanathan Chettiar* (7) do not say so expressly, it is clear from the trend of their judgment that they dissented from the view taken in *Pandurangа Mudaliar* v. *Vythilinga Reddi* (8).

Now the question for consideration apart from authority is whether in this state of conflict of decisions I should not, on the principle of *stare decisis*, accept the view taken in the later decision or

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whether the more proper course is to refer the matter to a Full Bench. I am aware that in matters relating to procedure there should be some endeavour to maintain uniformity. But it may not unreasonably be argued that the observations in *Subbiah Naicker* v. *Ramanathan Chettiar* (7) are *obiter*, whereas *Panduranga Mudaliar* v. *Vythilinga Reddi* (8) actually decides the case which is on all fours with the present one. If such an argument was addressed to the lower Court, it cannot be blamed for falling back upon the express decision in *Panduranga Mudaliar* v. *Vythilinga Reddi* (8) and for refusing to act on the observations in the later case. It is true that *Subbiah Naicker* v. *Ramanathan Chettiar* (7) has since been followed without further discussion in *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (9), *Kasi Viswanatham Chetty* v. *Murugappa Chetty* (16) and *Parthasaradhi Appa Rao* v. *Maka Venkatadri Appa Rao* (10) and in *Doorvas Seshadri Iyer* v. *Ananthayee* (12). In those cases curiously enough the conflict between *Panduranga Mudaliar* v. *Vythilinga Reddi* (8) and *Subbiah Naicker* v. *Ramanathan Chettiar* (7) was not emphasised. Nor was there any discussion as to the principles to be applied to such cases. Therefore, we have this state of facts; a reported decision directly in point which has not been expressly overruled and a later decision which has been followed and which may be said to contain observations by way of *obiter dicta*. I think in the interests of litigants and in order that proper guidance may be given to the Courts below, it is desirable that there should be a Reference to a Full Bench on the question.

Now I shall give my reasons very shortly for doubting the correctness of *Subbiah Naicker* v. *Ramanathan Chettiar* (7). Mr. A. Krishnaswami Aiyar frankly confessed that the reason of the rule for the pronouncement in *Subbiah Naicker* v. *Ramanathan Chettiar* (7) is that only one Court can at the same time execute a decree. I think that this proposition is not unexceptionable. For a long time it has been the practice in this Presidency to order concurrent executions of the same decree. Rule 221 of the Original Side Rules of the High Court impliedly sanctions this course. In *Saroda Prosaud Mullick* v. *Luchmeeput Sing Doogur* (17) the Judicial Committee stated that there can be concurrent execution of the same decree. *Krishtokishore Dutt* v. *Rooplall Dass* (18) follows this ruling as also *Baij Nath Goenka* v. *F. H. Holloway* (19). All these decisions were under the old Code of Civil Procedure. It is not easy to trace in the sections and the orders of Civil Procedure Code the provisions of law on which this theory is founded. Mr. Ameer Ali in his edition of the Civil Procedure Code seems to incline to the view that the practice is not justifiable on principle. However, there can be no doubt that it has always been regarded as undisputed law in this Presidency that there can be concurrent execution. As against these decisions it was said that the view taken by the Judicial Committee in *Maharajah of Bobbili* v. *Narasaraju Pedu Baliara* (9) is inconsistent with the theory. I do not think so. In this latter case what the Privy Council said was that after the transfer of the records at the instance of a party from one Court to another it was not open to that party to apply to the original Court for execution. In the second place, I am not satisfied that the Court which passes a decree *ipso facto* ceases to have jurisdiction by the deprivation of territorial jurisdiction. If a decree was passed by a Court and if proceedings in execution had been started in that Court, until the records are transferred to another Court, that Court, in my opinion, will have jurisdiction to entertain applications. It is undoubtedly the Court which passed the decree, and under section 38 of the Civil Procedure Code a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. The fact that under Clause (*b*) of section 37 the Court to which jurisdiction has been assigned is within the definition of the expression "Court which passed a decree," does not make it clear that the original Court becomes

(16) 43 Ind. Cas. 79; 33 M. L. J. 750; 23 M. L. T. 24; (1918) M. W. N. 132.

(17) 14 M. I. A. 529; 17 W. R. 289; 10 B. L. R. 214; 2 Suth. P. C. J. 560; 3 Sar. P. C. J. 77; 20 E. R. 893.

(18) 8 C. 687; 10 C. L. R. 603; 4 Ind. Dec. (N. S.) 442.

(19) 1 C. L. J. 315.

functus officio by the bare fact of ceasing to have territorial jurisdiction. It was held with reference to section 234 of the Civil Procedure Code of 1882 in *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (20) that notwithstanding the transfer to another Court for execution, the first Court is the only Court which can entertain applications for bringing in the legal representatives of the parties. That provision has been re-enacted in section 50, clause 1. The expansion of the definition of the term "Court which passed the decree" may enable the party to apply to the transferred Court for bringing in the legal representatives. Supposing after a partial execution by the first Court it is found that there is no property within the jurisdiction of that Court sufficient to satisfy the balance of the decree, then the records would be sent to the Court where either the judgment-debtor resides or where he has got other property. If in these circumstances the records are transferred, cannot the decree-holder regard the application which was made to the original Court as still pending and ask the transferred Court either to arrest or attach and sell the other properties of the judgment-debtor? If I am right in this, it would show that an application made to a Court which cannot give the particular relief prayed for would be effectual in another Court where that relief can be obtained. I am inclined to agree with the view taken in Calcutta that the Court which passed the decree does not cease to have jurisdiction to entertain applications until the records are sent away to the Court to which jurisdiction has been assigned. Even if I am not right in this conclusion, I think it is desirable, as I stated already, that the matter should be set at rest by a pronouncement from a Full Bench having regard to the difference of view between *Panduranga Mudaliar* v. *Vythilinga Reddi* (8) and *Subbiah Naicker* v. *Ramanathan Chettiar* (7). I would, therefore, refer for the opinion of the Full Bench the following question:—

"Whether the Court which passed the decree is not the proper Court for execution within the meaning of clause 4 of Article 182 of the Limitation Act by virtue of the fact that the property over which it had jurisdiction at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution."

(20) 28 M. 466; 15 M. L. J. 116 (F. B.).

This appeal against appellate order came on for hearing before the Full Bench on the 8th and 9th April 1919 in pursuance of the above Order of Reference to a Full Bench.

Mr. *A. Krishnaswami Aiyar* (with him Mr. *T. M. Ramaswami Aiyar*), for the Appellants.

[WALLIS, C. J.—How do you shew that by the transfer the jurisdiction of the original Court is taken away?]

The test is whether the suit could have been instituted in that Court when execution was applied for. The Code is clear on the point, sections 36, 37 and 38.

[WALLIS, C. J.—A decree may be executed by the Court which passed it or by the Court to which it is sent for execution.]

Section 150 deals with transfer of business.

[AYLING, J., referred to *Venkatasawmi Naik* v. *Sivanu Mudali* (21).]

[WALLIS, C. J.—What is the provision as to jurisdiction under the Civil Courts Act?]

See section 11 of Act III of 1873. It contemplates that local jurisdiction is assigned but in practice no such thing is conferred. *Venkatachallam* v. *Sithayamma* (22).

[AYLING, J.—In *Kadir Mohideen Sahib* v. *Abubakkar Sahib* (23) we held that the Additional District Munsif of Tinnevelly who passed the decree could execute the decree so far as he could, *e.g.*, by sending it for execution, even though he had no local jurisdiction in respect of the subject-matter of the suit.]

The Principal District Munsif cannot entertain the application as he could not grant all the reliefs claimable in execution, as the territorial jurisdiction has been made over to the Additional Court. I assume that the Principal Court passed the decree.

Under Order XXI, rule 8, the Court executing a decree also should be of competent jurisdiction.

(21) 51 Ind. Cas. 102; 36 M. L. J. 199; 42 M. 431; 10 L. W. 370.

(22) 35 Ind. Cas. 296; 31 M. L. J. 22.

(23) 50 Ind. Cas. 518; 36 M. L. J. 122; (1918) M. W. N. 886; 9 L. W. 8; 25 M. L. T. 245.

[The other side pointed out Order XXI, rule 10.]

[WALLIS, C. J.—Do you say that under the Code execution applications can be made only to one Court at any one time?]

Yes. That is the logical result of the Privy Council decision in *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (9). The presentation of an application predicates the competency of the Court to grant the relief claimed. I submit that section 150, Civil Procedure Code governs the question. Reference was made to *Prem Chand Dey* v. *Mokhoda Debi* (24), *Subbiah Naicker* v. *Ramanathan Chettiar* (7), *Subbayya* v. *Rachayya* (25), *Latchman Pundeh* v. *Maddan Mohun Shye* (13), *Jahar* v. *Kamini Debi* (26), *Parthasaradhi Appa Rao* v. *Maka Venkatadri Appa Rao* (10), *Venkatachallam* v. *Sithayamma* (22), *Penugonda Rattan* v. *Korasika Thatha* (11), *Kasi Viswanatham Chetty* v. *Murugappa Chetty* (16) and *Doorvas Seshadri Iyer* v. *Ananthayee* (12). Clause (b) of section 37 contemplates the class of cases where the Court which passed the decree has no jurisdiction to execute the decree. This is the view in *Subbiah Naicker* v. *Ramanathan Chettiar* (7) and *Penugonda Rattan* v. *Korasika Thatha* (11).

Mr. *K. R. Rangaswami Aiyangar* (with him Mr. *C. R. Subramania Aiyar*), for the Respondents.—The jurisdiction of the Court which passed the decree to execute it continues in spite of the transfer of jurisdiction.

[AYLING, J.—When does it cease to have such jurisdiction?

That is not provided for in the Code.

[WALLIS, C. J.—What do you say is the scope of section 150, Civil Procedure Code?]

It refers to the transfer of business and not of territorial jurisdiction. Suppose a mortgage decree is passed after which part of the property is transferred to another jurisdiction. The original Court can sell the whole property.

[SADASIVA AIYAR, J.—The suit could have been instituted in it. So the test is satisfied.]

But there is no automatic transfer of power to execute.

Section 37 is not confined to immoveable property.

[SADASIVA AIYAR, J.—Where the decree in question is against the person as well as the property, we have taken it as comprising two decrees for purposes of execution.]

In cases where a decree has been transferred for execution to another Court, an application to bring a legal representative on record will be only to the original Courts.

See also sections 45, 46 (precepts); Order XXI, rules 3, 6, 8, 10, 16, 26, 28.

Territorial jurisdiction is not the sole criterion for determining the power of the Court to execute the decree. See section 46 *Kali Pado Mukerjee* v. *Dino Nath Mukerjee* (27), *Kartick Nath Pandey* v. *Tilukdhari Lall* (28).

[WALLIS, C. J.—Whether the transferee Court acquires jurisdiction is not in question here.]

Quite so. Territorial jurisdiction is not necessary for purposes of execution. In *Udit Narain* v. *Mathura Prasad* (29) the view was expressed that both the Courts have jurisdiction. *Latchman Pundeh* v. *Maddan Mohun Shye* (13) is the case which clearly explains the words "Court which passed the decree" (See at page 517). *Jahar* v. *Kamini Debi* (26). *Prem Chand Dey* v. *Mokhoda Debi* (24) simply said that a Court should not sell properties outside its jurisdiction. But the power to entertain application is not denied.

[SADASIVA AIYAR, J., referred to *Girindro Chunder Roy* v. *Jarawa Kumari* (30).]

Bandoo Krishna v. *Narsingrao* (31).

[SADASIVA AIYAR, J.—Do you mean to say that because there is the word 'include' in section 37, an Appellate Court can order execution?]

[WALLIS, C. J.—Do you mean to say that a Court which is deprived of jurisdiction after decree can execute it?]

It can. See the wording of section 39, clause (c). Territorial jurisdiction is not essential.

[Mr. *Krishnaswami Aiyar*.—*Maharaja of*

(24) 17 C. 693 (F. B.); 8 Ind. Dec. (N. S.) 1008.
(25) 26 Ind. Cas. 519; 37 M. 477.
(26) 28 C. 289; 5 C. W. N. 150.
(27) 25 C. 315; 13 Ind. Dec. (N. S.) 211.
(28) 15 C. 667; 7 Ind. Dec (N. S.) 1028.
(29) 35 C. 974; 12 C. W. N. 859.
(30) 20 C 105; 10 Ind. Dec. (N. S.) 71.
(31) 25 Ind. Cas. 406; 38 B. 662; 16 Bom. L. R. 527.

Bobbili v. *Narasaraju Peda Baliara* (9) says that territorial jurisdiction is essential.

Venkatasawmi Naik v. *Sivanu Mudali* (21). Simultaneous execution is permitted by law. *Sivakolundu Pallai* v. *Ganapathi Iyyar* (32) *Maharaja of Bobbili* v. *Narasaraju Peda Boliar* (14).

[*Begg Dunlop & Co.* v. *Jagannath* (33) was referred to by the other side.]

11 American Cyclopedia, 713.

Mr. *A. Kishnaswamy Aiyar*, in reply.—The word 'include' in section 37 cannot be taken to have its ordinary wide meaning. The object is not that the Appellate Court which passes a decree can execute it. See clause (*c*) "or ceases to have jurisdiction to execute it," which shows that there is a cessation of jurisdiction to execute.

In section 150, Civil Procedure Code, "business" is not something apart from "territorial jurisdiction." The two are interdependent, *Alagappa* v. *Thiyagaraja* (34).

OPINION.

WALLIS, C. J.—The terms of the reference have, if I may say so, been very properly framed with reference to the terms of Article 182, clause 5, of the Limitation Act (4 is a misprint), which makes the date of applying in accordance with law to the proper Court for execution or to take some steps in aid of execution of the decree a fresh starting point for the purposes of the article which deals generally with applications for the execution of decrees. The question really is, whether a litigant who has been authorised to bring his suit in a particular Court and has obtained a decree in such Court in his favour, which he is strictly bound to execute within the time limited in Article 182, is not entitled to apply as of course to that Court as the proper Court for the purpose of saving limitation under the article, or whether, when he decides to apply for execution possibly at the last moment, he is bound to stop and enquire whether the limits of the territorial jurisdiction of the Court which passed the decree have been altered and, if so, whether the immoveable property which is the subject of the suit or the place where the cause of action arose was within the limits of the transferred area, on pain of losing his right to execute under the article if he omits to make these enquiries or comes to a wrong conclusion when he makes them. This last proposition is so unreasonable and involves such hardships to the decree-holder in a country such as India with a stringent law of limitation that we should hesitate to impute such an intention to the Legislature if we can possibly avoid it.

Under the Code of 1859 it was open to the decree-holder to apply to the Court which passed the decree to execute it itself or to transmit it to another Court for execution, and such an application would have been sufficient for the purpose of saving limitation under Article 167 (now 182) of the Limitation Act of 1871. The question is, when and how has the decree-holder been deprived of this right. In 1877 and again in 1882, the Code was repealed, and re enacted with some re-drafting and re-arrangement which included the insertion of the present sections 37 and 38 in the Code of 1877. Now there is a well known presumption that such re-drafting and re-arrangements leave the substance of the law unaltered, and it follows that such a serious change as the abolition of the decree-holder's right to apply in all cases to the Court which passed the decree in the first instance cannot be raised by implication but should plainly and clearly appear on the language of the sections. Now at the time when the Code of 1908 was enacted there was a long and unbroken series of express decisions that this was not the effect of these sections. *Latchman Pundeh* v. *Maddan Mohun Shye* (13), *Kartick Nath Pandey* v. *Tilukdhari Lall* (28), *Kali Pado Mukerjee* v. *Dino Nath Mukerjee* (27), *Jahar* v. *Kamini Debi* (26) and *Panduranga Mudaliar* v. *Vythilinga Reddi* (8). So that the Legislature was well warranted in considering this point as settled. Two questions only had arisen under these sections, one whether the Court which passed the decree had jurisdiction to execute fully a decree for the sale of immoveable property by selling it where the area in which the immoveable property was situated had been removed to another jurisdiction. It was held by the Full Bench in *Prem Chand*

(32) 34 Ind. Cas. 302; 3 L. W. 336.

(33) 11 Ind. Cas. 417; 14 C. L. J. 228; 39 C. 104; 16 C. W. N. 402.

(34) 7 Ind. Cas. 864; (1910) M. W. N. 477; 8 M. L. T. 299.

Dey v. *Mokhoda Debi* (24) that it had not; but it was assumed in that case and expressly decided in *Girindro Chunder Roy* v. *Jarawa Kumari* (30), Pigot, J., being a party to both decisions, that in such a case it was a proper course to apply to the Court which passed the decree to send the decree for execution to the other Court. Then there was a difference of opinion as to whether this was the only proper course, or whether after such a transfer the Court which passed the decree could be treated as "having ceased to have jurisdiction to execute the decree" within the meaning of section 649, now section 37, so as by virtue of that section to cause the Court to which the area had been transferred to be regarded as a Court which passed the decree within the meaning of section 223 (now 38). One view was taken in *Latchman Pundeh* v. *Maddun Mohun Shye* (13) and *Jahar* v. *Kamini Debi* (26) and another in *Kali Pedo Mukerjee* v. *Dino Nath Mukerjee* (27) and *Panduranga Mudaliar* v. *Vythilinga Reddi* (8). This was the state of the authorities when the Code of 1908 was enacted and we are told by Messrs. Woodroffe and Ameer Ali that it was proposed to enact expressly that application might be made to either Court. The draft section to that effect which dealt with other complicated questions was not adopted, but it seems to me that the Legislature brought about the same result in another way. The jurisdiction of the Court which passed the decree was sufficiently recognised by the decisions as I have pointed out, and indeed had never been doubted up to that time, and there was, therefore, no need to to re affirm it. The case of direct application to the Court to which the area had been transferred was met by the enactment of the new section 150 which was in terms wide enough to authorise that Court to entertain in the first instance any application which might have been made to the Court which passed the decree.

This, I think, should have settled the question. Unfortunately in *Alagappa* v. *Thiyagaraja* (34) when I was sitting with Krishnaswamy Aiyar, J., the Advocate-General cited certain American treatises to us, passages from which are cited in the later case of *Subbiah Naicker* v. *Ramanathan Chettiar* (7) and formed the main ground for that decision, and though we came to no decision, we were sufficiently influenced by them to leave the point open and proceed by way of transfer in the particular case. In this I think we were wrong. The Privy Council has since deprecated the tendency of Indian Courts to resort unnecessarily to American instead of the English authorities, that is how I understand their observations in *Imambandi* v. *Mutsaddi* (35) and in this case it would have been better to see how the question had been dealt with in England, especially as the case of the County Courts affords a complete analogy. Those Courts were established some years before the Code of 1859, and have jurisdiction over immoveable property. Power to transfer particular areas from one Court to another was given and has been freely exercised, but it has never been suggested that the fact of such a transfer takes away the power of the Court which passed the decree to entertain application for execution. The power of sending the decree to another Court, if the Court itself was not in a position to execute it, has been found sufficient to meet the case. That, it seems to me was the scheme of the Code, as held in *Panduranga Mudaliar* v. *Vythilinga Reddi* (8), until 1908 when section 150 then conferred upon the Court of the transferred area power to entertain the application in the first instance; but this cannot be read as taking away from the Court which passed the decree the power which it then had according to the unbroken current of authorities for many years, which the Legislature must be taken to have recognised. Again, as the American writers allow, in questions of the kind the particular Statutes must always be looked to, and where, as in the present case, the Code provided two methods of executing decrees both originating in the Court which passed the decree and one of them admittedly applicable to the case of the area having been transferred to the jurisdiction of another Court before the application for execution, this sufficiently

(35) 47 Ind. Cas. 513; 45 I. A. 73; 35 M. L. J. 422; 16 A. L. J. 803; 24 M. L. T. 330; 28 C. L. J. 403; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; 45 C. 878; (1919) M. W. N. 91; 9 L. W. 518 (P. C.).

indicated the procedure which the Legislature desired to be followed, and removed all occasion for raising inferences which might possibly have had to be raised if the Legislature had provided no method at all of executing decrees where the areas had been transferred. It only remains to refer to the arguments which have been addressed to us on the language of sections 37 and 38 (formerly 649 and 223) to show that all decisions on this point down to 1903 were wrong. The words to be interpreted are "a decree may be executed by the Court which passed it" in section 38 (223), a section first inserted in 1877 and merely declaratory of the existing law. These words again have to be interpreted in the light of section 37, an interpretation clause reproduced from section 649 of the Code. Section 37 provides that the words "Court which passed a decree shall be deemed to include (*a*), where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance," and an argument has been based on this clause. Now it may well be that under sections 37 and 38 the Appellate Court has no jurisdiction to execute its own decree, but that is not because such jurisdiction is excluded by the use of the word "include" as has been argued, but because it had no such jurisdiction under section 362 of the Code of 1859, and it may well be questioned, having regard to the presumption already referred to, whether, when that section was eliminated in re-drafting and the matter was dealt with in sections 649 and 223 (now 37 and 38), there was any intention to confer on the Appellate Court jurisdiction which it had not till then possessed. We have, however, to deal with clause (*b*), and where the decree-holder had a valuable right under the Code of 1859 to apply to the Court which passed the decree at least for execution by way of transmission, and where the present Code provides expressly that a decree may be executed by the Court which passed it, the contention that this important right must be held to have been taken away because of the provision in section 37 that these words shall be deemed to "include" another Court appears to me to be altogether untenable. It may be that in some rare and exceptional instances the category of things "included" in a definition may be held to be exhaustive, but ordinarily, as observed in Stroud's Dictionary, it is "a phrase of extensive and not of restrictive jurisdiction," and it cannot in my opinion be used here to deprive the decree-holder of the important right, which he had till then, of applying in all cases in the first instance to the Court which passed the decree, especially having regard to the fact that the section itself was inserted when the Court was in process of re-drafting and re-arrangement, when, as I have already said, there is a presumption against alterations by implication only. In *Subbiah Naicker* v *Ramanathan Chettiar* (7) the question does not seem to have been sufficiently argued from the point of view of the decree holder's rights, and attention was not called to the history of the section. Further the decision is opposed to a long line of authorities which I think the Legislature accepted in 1908, and is also mainly based on citations from American treatises which, I now think, do not afford a satisfactory basis for the decision of a question of this kind, or afford any sufficient reason for answering the question in the negative. Both on principle and on the balance of authority and convenience my answer is that the Court which passed the decree is a proper Court for the purpose mentioned in the question referred to us.

AYLING, J.—I agree. After careful re-consideration in the light of the arguments now adduced before us, I am inclined to think that in our judgment in *Subbiah Naicker* v. *Ramanathan Chettiar* (7) we went too far in saying that the Court which passed the decree for sale of a property could not even entertain an application for sale of such properties, once they had been transferred out of its territorial jurisdiction. This decision was not necessary for the disposal of the case before us, where the question was whether such an application could be properly made to the Court to whose jurisdiction the property had been transferred. I think it could, if only by reason of section 150, Code of Civil Procedure: for this section certainly seems to me to cover the case of the transfer of all the litigations arising out of a tract of country from one Court to another. I would prefer to base this proposition on

section 150, rather than on an interpretation of section 37 regarding which I must confess to considerable difficulty. But I am of opinion that the later section, whatever it means by ceasing to have jurisdiction to execute, does not operate to exclude the Court which actually passed the decree, and to substitute for it another Court: and that it is still open for the decree-holder to apply to the former for execution by way of transmission of the decree to the Court which has territorial jurisdiction.

SADASIVA AIYAR, J.—The question referred to the Full Bench is "whether the Court which passed the decree is not the proper Court for execution within the meaning of the clause 4 of Article 182 of the Limitation Act by virtue of the fact that the property over which it had jurisdiction at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution."

The answer to this question depends upon one's view on the following points:—

(1) Does a Court which passes a decree for sale of land within its jurisdiction at the time of the passing of the decree continue according to general principles of jurisprudence to have jurisdiction to execute (*a*) such a decree by sale, or (*b*) even to entertain an application for execution of such decree by sale, after it ceases to have territorial jurisdiction over that property: (2) even if it has not got the power according to general principles of jurisprudence, has it got such power owing to the provisions of section 37 of the Civil Procedure Code (old section 642, paragraph 2), read with sections 38 and 39 (old section 223)?

On the first point I have very little to add to what has been said in the judgment of Ayling, J., and myself in *Subbiah Naicker* v. *Ramanathan Chettiar* (7). That was a considered judgment of ours in which we attempted to show that the Calcutta High Court from 1890 [see *Prem Chand Dey* v. *Mokhoda Debi* (24), Full Bench of five Judges including Justices Prinsep and O'Kinealy who were Judges learned in procedure law] has uniformly held that a Court, though it passed a decree for sale, ceases to have jurisdiction to execute that decree for sale when the property has passed out of its territorial jurisdiction. The learned Judges refer to section 16 of the Civil Procedure Code, as indicating that the Code intended the Courts in this country to have no power to determine any right or interest in any immoveable property lying wholly outside its jurisdiction. The execution of a decree being only a continuation of the suit, there appears to be no legitimate reason "why a Court in the later stage of a suit should have greater powers than it possessed at its institution." The earlier case in *Latchmun Pundeh* v. *Maddan Mohun Shye* (13), though quoted by Dr. Rash Behari Ghose in his arguments, must be deemed to have been overruled by this Full-Bench decision in *Prem Chund Dey* v. *Mokhoda Debi* (24).

Of course in a matter of procedure when there is a uniform practice of this Court, that must no doubt override even the Full Bench decision of the Calcutta High Court, unless there is a decision of the Privy Council which settles the question for all Courts. I cannot say that there are any such pronouncements of the Privy Council. The case in *Kamini Sundari Chaodhrani* v. *Kali Prossunno Ghose* (36) relied on in *Prem Chand Dey* v. *Mokhoda Debi* (24) merely dealt with the power of the High Court as an Appellate Court making a remand order to give jurisdiction to a Court having no territorial jurisdiction over the suit land to deal with a question relating to that land. In *Maharajah of Bobbili* v. *Narasaraju Peda Baliara* (9) it was held that after the District Court which had passed a decree sent that decree to a District Munsif's Court for execution by the latter Court with a copy of the decree, no execution application could be presented to the District Court for the sale of the property attached by the District Munsif in execution, unless the copy of the decree with a certificate of non-satisfaction was returned back to the District Court. I do not think that any clear guidance can be obtained on the present point from these two Privy Council decisions.

On principles recognised in the Civil Procedure Code, section 16, it seems to me clear that no Court has any jurisdiction either to

(37) 12 C. 225 (P. C.); 12 I. A. 215; 4 Sar. P. C. J. 652; 9 Ind. Jur. 437; 6 Ind. Dec. (N. S.) 153.

entertain an execution application for the attachment of property outside its jurisdiction, or for the sale of immoveable property outside its jurisdiction or to sell it in execution, even though it had jurisdiction at the time of the passing of the decree to pass such a decree. The fact that at a particular time it was competent to pass a decree for sale cannot mean that its jurisdiction to proceed further could be retained for ever. An extreme case might be taken as an illustration. Supposing the District Munsif of Cuddalore passes a mortgage decree in 1918 for sale of a property within his jurisdiction but situated near the French limits and suppose in this year, that property is ceded to the French by treaty with the British, can it be said that in 1920, that decree could be executed by the Cuddalore Munsif or an application for execution of the said property could be entertained by him? On principle, I do not see why the loss of territorial jurisdiction in any other manner not to a foreign power but to a Native State or to some other Court within British India should make any difference.

This question was further considered with reference to the new section 150, Civil Procedure Code, in I. L. R 37 Mad. 462 at page 473 [*Sabbiah Naicker* v. *Ramanathan Chettiar* (7)] and also on general principles (pages 471 and 472 of I. L. R. 37 Mad.) [*Subbiah Naicker* v. *Ramanathan Chettiar*(7)]. It is also clear from Oldfield, J.'s opinion in this Order of Reference to the Full Bench that from 1910 [see *Alagappa* v. *Thiyagaraja* (34)] up to date [see also *Doorvas Seshadri Iyer* v. *Ananthayee* (12) and *Venkatasawmi Naik* v. *Sivanu Mudali* (21)] the course of decisions has been pretty uniform in this Court on this point. In *Begg Dunlop & Co.* v. *Jagannath* (33) Mookerjee, J., with whom Carnduff, J., agreed, held that it was not competent to a Court in execution even of a decree for money to attach a debt payable to the judgment-debtor by a non-resident debtor. The matter is elaborately discussed on principle at pages 233 to 236* citing English and American authorities also; the conclusion being that where the situs of a bond debt is outside the jurisdiction, the Court has no power to deal with it. *A fortiori* it seems to me that where the situs of an immoveable property is outside the jurisdiction, the Court has no power to deal with it unless the Statute Law gives it such power. Because there was some conflict whether the Statute Law enacted in sections 223 and 649 of the old Civil Procedure Code really intended to give such jurisdiction that the Legislature seems to have indicated in the new section 150 that the Calcutta view in *Prem Chand Dey* v. *Mokhoda Debi* (24) should be followed, and not the view enunciated in *Pandurunga Mudaliar* v. *Vythilinga Reddi* (8). As to the argument based on the language of section 37 (old section 649), when an expression is said in a Statute to include something, it no doubt means ordinarily that it should mean that thing *in addition* to the thing which the expression naturally means. But it is clear from the context of section 37, namely, clauses (*a*) and (*b*), that the word "include" in section 37 signifies "mean and include and comprise," and that is a permissible meaning where the context requires it. See Stroud's Judicial Dictionary, pages 945 and 946. If the natural meaning is not to be excluded under any circumstances *and in any case* so as to substitute for it the new meaning *in that case*, section 37 ought to be interpreted as follows. The expression "the Court which passed a decree" shall in relation to the execution of decrees be deemed to mean, (*a*) where the decree to be executed has been passed in the exercise of appellate jurisdiction, (1) the Court of first instance, and (2) *also the Appellate Court which passed or the second Appellate Court which passed the decree*, (*b*) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, (1) the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suits, and (2) *also the Court of first instance which has ceased to exist or to have jurisdiction to execute it.* These natural meanings which I have italicised as (*a*) (2) and (*b*) (2), which would have to be taken in addition to the new meanings if the ordinary meaning of 'include' was to be given to the word, are inadmissible from the context. Therefore, the real

*Pages of 14 C. L. J.—*Ed.*

meaning of the section is that the expression "the Court which passed the decree" shall mean, of course, the Court which passed the decree *ordinarily* but shall exclude that Court and "include and mean", (*a*) where the decree to be executed, (*b*) where the Court of first instance has ceased to exist, &c.

In the result, both on principle and on the interpretation of sections 37, 38, 39 and 150 of the Civil Procedure Code and on the principle of *stare decisis*, I am inclined to answer the question against the jurisdiction of the Court which passed the decree but which has lost jurisdiction over the immoveable property sought to be pursued in execution.

After I had written the above, I had the advantage of perusing the opinions of my Lord and Sir William Ayling, J., in this case. I was at first inclined to think that the hardship pointed out by my Lord, as caused to a litigant who has obtained a decree and who may not know when he applies for execution to the Court which passed the decree in his favour that its territorial limits had been altered, is a matter for the Legislature to consider. I would venture to suggest that Article 182 of the Limitation Act, clause 5, should be amended by adding after the words "to the proper Court" the words "or to a Court which the decree-holder in good faith believed to have jurisdiction to entertain the application." This suggestion I would make to the Legislature, notwithstanding that I have come to the conclusion that I should not differ from my learned colleagues on the narrow question referred to us. I have been much pressed by the fact referred to in the judgment of my Lord that notwithstanding *Prem Chand Dey* v. *Mokhoda Debi* (24), it was held in *Girindro Chunder Roy* v. *Jarawa Kumari* (30) that an application might be made to a Court which passed the decree to send the decree for execution to the Court which had jurisdiction to sell the property in execution. On principle I am unable to see any distinction between jurisdiction to entertain an application for sale of property outside the jurisdiction and jurisdiction to execute the decree by sale of such property. I am still inclined to think that section 150 was enacted so as to take away both rights from the Court which ceased to have territorial jurisdiction.

No doubt, I quoted the American Cyclopedia in support of my view in *Subbiah Naicker* v. *Ramanathan Chettiar* (7). I am myself not very familiar with American or English decisions and I felt glad when their Lordships of the Privy Council made the following pronouncement in *Imambandi* v. *Mutsaddi* (35): "Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, reference to judgments of *foreign Courts* to which Indian practitioner cannot be expected to have access based on considerations and conditions totally differing from those applicable to or prevailing in India is only likely to confuse the administration of justice."

The case in which their Lordships made this pronouncement was an appeal against the decision of the Calcutta High Court decided in 1911 in *Imambandi* v. *Matasuddi* (37) by a Bench and reported in 15 Calcutta Law Journal 621. In that judgment at pages 627 and 630,* several English and American cases have been quoted Not a single foreign decision, however, is referred to in the judgment of their Lordships of the Privy Council on appeal. I take it that, as in the eye of the law, both English and American Courts except, of course, the Privy Council are "Foreign Courts," their Lordships deprecated quotations from decisions of such Courts. That their Lordships of the Privy Council deprecated unnecessary references to English decisions in their strict sense seems to me to be supported by what Lord Macnaghten said in delivering the judgment of their Lordships in *Bhola Nath Nundi* v. *Midnapore Zemindary Co.* (38) as follows: "Unfortunately, however, both in the Munsif's Court, and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious references to English authorities, and by the application of principles or doctrines more or less

(37) 13 Ind. Cas. 678; 15 C. L. J. 621.

(38) 31 C. 50 at p. 509 (P. C.; 31 I. A. 75; 8 C. W. N. 425; 14 M. L. J. 162; 8 Sar. P. C. J. 611.

*Page of 15 C. L. J.—*Ed.*

refined, founded on legal conceptions not altogether in harmony with eastern notions. The result is that, although the decrees appear to be justified by the main facts, which both the lower Courts held to be established, it is impossible to say that the judgments delivered are entirely satisfactory." It may be that where questions of International Law or Commercial Law or Constitutional Law are involved, it becomes indispensable (owing to paucity of Indian decisions) to refer to such cases, and even then it would be no doubt advisable to confine ourselves to English decisions. Also where the Statute Law of India "is silent" and rules of justice, equity and good conscience have to be applied by Indian Courts and such rules have been clearly set out in famous decisions of foreign Courts (such as those collected in Smith's Leading Cases), references to such authorities cannot conveniently be avoided. [See the very recent Privy Council decision in *Maharaja of Jeypore* v. *Eukmini Pattamahadevi* (39) on the question of forfeiture of tenancy by denial of title, a thing which is "not ancient Indian Law" and rules relating to which were adopted by Indian Courts from rules laid down in English cases.]

Why then did I quote the American Cyclopedia in *Subbiah Naicker* v. *Ramanathan Chettiar* (7)? My explanation is that when I was first appointed to the Bench of this Court (about the beginning of 1912), I found that reference to and quotations from American and English treatises and decisions were not only permissible but were generally treated by respectable lawyers of greater learning than I could ever hope to have as indications of a laudable desire to possess an up-to-date knowledge of legal principles and precedents. I, therefore, ventured to do so in that case with great diffidence and I am glad that I am able to give up that practice now. But wholly apart from American treatises and decisions, there seems to be much on principle in favour of the view taken in *Subbiah Naicker* v. *Ramanathan Chettiar* (7).

As my Lord is inclined to the view that notwithstanding the enactment of the new section 150 the probabilities are that the Legislature did not thereby intend to overrule the then prevalent view of the Calcutta High Court, that the Court which passed the decree could entertain as "the proper Court" or as 'a proper Court' within the meaning of Article 182, clause (5), an application for execution, though it might be bound to transfer the decree for execution to the new Court which has obtained territorial jurisdiction over the land to be proceeded against in execution, and as Sir William Ayling, J., who was a party with me to *Subbiah Naicker* v. *Ramanathan Chettiar* (7) is also of that opinion, I do not feel strong enough to differ from them on that point. I would, however, suggest that rules should be made, under the rule-making power of the High Court, clearly indicating (*a*) that though under Order XXI, rule 11, read with sections 37 and 38, an application for execution might be made to the Court which passed the decree, notwithstanding that it had ceased to have jurisdiction to execute it owing to the transfer of territorial jurisdiction, the Court which passed the decree might and should treat it as also an application for transfer of the decree for execution to the new Court and pass orders accordingly, and that it should not order the sale of the property which has passed out of its territorial jurisdiction if it could not then entertain a suit brought for the same reliefs: (*b*) that where applications are made to both Courts, an order analogous to the order passed under section 10 in respect of suits between the same parties in two different Courts having concurrent jurisdiction should be passed: (*c*) that Order XXI, rule 16, which refers to the Court which passed the decree, should be modified by adding an explanation that unless the Court which passed the decree has ceased to exist it is that Court to which an application should be made under Order XXI, rule 16, though it ceased to have jurisdiction to execute it by reason of a suit for the same relief having since passed out of its jurisdiction. The Court which passed the decree should, in such a case, pass orders not for execution in favour of the assignee-decree holder or the heir of the decree-holder, but recognising the assignee-decree-holder's or the heir's rights to execute and it should then transfer the execution to the new Court. If both Courts are given concurrent jurisdiction, the result would be that one

(39) 50 Ind. Cas. 631 (1919) M. W. N. 271; 36 M. L. J. 543; 17 A. L. J. 552; 29 C. L. J. 528; 21 Bom. L. R. 655; 23 C. W. N. 889; 26 M. L. T. 116; 42 M. 589; 10 L. W. 381 (P. C.).

alleged assignee decree holder might make his application to the Court which passed the decree and another alleged assignee decree-holder or the original decree-holder himself might make his application to the new Court (which is included in the definition of the Court which passed the decree), and there might be conflicting decisions as to who is the real assignee decree-holder or who is really entitled to execute the decree. It is because Order XXI, rule 16, raises such difficulties and because very complicated questions might arise under some of the other orders and sections (such as section 47) if concurrent jurisdiction is recognised and if the expression "the Court which passed the decree" may mean two Courts at the same time, that I have felt so much difficulty in agreeing with my learned colleagues in the answer to the question referred to us and it was the consideration that in a matter of procedure, a unanimous decision of a question referred to the Full Bench is desirable that has finally settled the matter in my mind.

M. C P.

Reference answered.

CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 33 OF 1918.
May 19, 1919.
Present:—Mr. Justice N. R Chatterjea and Mr. Justice Duval.

Raja NARENDRA LAL KHAN—DECREE-HOLDER—APPELLANT
versus
BOMKESH MITTER AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Decree awarding compensation, construction of—Decree silent as to interest—Interest, whether can be allowed—Compensation, amount of, when to be ascertained—Execution of decree—Duty of executing Court.

A decree awarding compensation contained the following provisions:—"The defendants are directed to pay compensation at the rate of Rs. 1,265 per annum.....and that the sum of Rs. 1,606 and odd be paid by the defendants to the plaintiff on account of the costs of the suit with interest thereon at the rate of 6 per cent per annum from this date to the date of realization." In execution the decree-holder claimed interest on the amount awarded as compensation:

Held, that upon a proper construction of the decree, interest was awarded upon the amount of the costs only and not on the amount of the compensation. [p. 228, col. 2.]

Where the amount of compensation is fixed by a decree at a certain sum per year, that sum, unlike mesne profits, is not liable to be ascertained thereafter, except in so far as the length of the period in respect of which it is payable is concerned. [p 229, col. 1.]

A Court executing a decree must execute it as it finds it, and cannot allow interest if the decree is silent as to interest. [p. 229, cols 1& 2.]

Appeal against the order of the Subordinate Judge, First Court, Midnapore, dated the 28th of November 1917.

FACTS appear from the judgment.

Babu *Sib Prosonna Bhattacharjee* (with him Babus *Sib Chandra Palit*, *Jyotish Chandra Hazra* and *Khirode Narain Bhuina*, for the Appellant —The decree-holder is entitled to get interest on the amount of compensation awarded by the decree. That would appear to be so upon a proper construction of the decree. The words "with interests thereon" refer not only to the costs of the suit but also to the compensation. If the judgment-debtor does not choose to pay the compensation he must pay interest thereon at the rate of 6 per cent. per annum till realization. Further the compensation awarded in this case is nothing but mesne profits. Though the word compensation has been used in the judgment, it is the mesne profits which the defendants have been made liable to pay to the decree-holder. Section 2, clause (12), of the Civil Procedure Code expressly provides that mesne profits includes interest on such profits. So even if no interest might have been expressly awarded, the decree-holder can claim such interest. See *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1).

Babu *Bepin Behari Ghose* (with him Babus *Manindra Nath Bose* and *Samarendra Kumar Dutt*), for the Respondents.—The decree does not give any interest on the amount of the compensation awarded by the Court. The words "with interest thereon" can have reference to costs only and not to the amount of compensation. Section 2, clause (12), Civil Procedure Code, does not help the appellant because the expression "mesne profits" does not mean the same thing as the word "compensation". The amount of compensation is fixed by the decree, but the amount of mesne profits

(1) 27 I. A. 110; 10 M. L. J. 356; 27 C. 951; 4 C. W. N. 631; 2 Bom. L. R. 709; 7 Sar. P. C. J. 687 (P. C.)

NARENDRA LAL KHAN v. BOMKESH MITTER.

is fixed after the decree. Mesne profits, no doubt, includes interest on such profits, but compensation cannot necessarily imply interest on the amount of compensation. Interest on compensation cannot be claimed unless the Court which passed the decree expressly allows it. The case in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1) does not apply to this case. I rely on the observation of the learned Judges in *Harmanoje Narain Singh* v. *Ramprosad Singh* (2). The amount of compensation is fixed for ever by the decree, and it cannot be varied.

Babu *Sib Prosunna Bhattacharjee* briefly replied.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree, and the question involved in the appeal is whether the decree-holder, who is the appellant before us, is entitled to interest on the amount of compensation for which he obtained a decree against the respondent.

The decree in the original suit was dated the 30th November 1911 and the portion of it which deals with the question of compensation runs as follows: "The defendants are further directed to pay to the plaintiff compensation at the rate of Rs. 1,265 per annum from 17th August 1907 up to the date of institution of the suit and after that till delivery of possession to the plaintiff and that the sum of Rs. 1,606 9-6 be paid by defendants to plaintiff on account of the costs of this suit with interest thereon at the rate of 6 per cent. per annum from this date to date of realisation." When the decree-holder applied for execution of the decree for the amount of compensation and costs, the judgment-debtors objected on the ground that they were entitled to certain deductions on account of Municipal taxes paid by them in respect of the property and that they were not liable to pay any compensation subsequent to the date on which they gave up possession. These objections were upheld by the High Court on appeal.

This had the effect of reducing the amount due to the decree-holder and when the decree-holder again applied for execution, he claimed interest on the amount of compensation. The judgment-debtors objected that under the decree the decree-holder was not entitled to any interest. The Court below allowed the objection, and the decree holder has appealed to this Court.

It is contended before us that upon a proper construction of the decree, the decree-holder is entitled to interest on the amount of compensation. This argument is based upon the ground that the words "with interest thereon" in the portion of the decree which we have set out above, have reference not only to the costs of the suit but also to the compensation at the rate of Rs. 1,265 per annum.

We think, however, that that is not the proper interpretation to be put upon the decree. The first portion of the passage we have quoted above from the decree deals with the amount of compensation which is to be at the rate of Rs. 1,265 per annum, and then the decree provides for the payment by the defendant to the plaintiff of the sum of Rs. 1,606-9-6 on account of the costs of the suit and the words "with interest thereon at the rate of 6 per cent. per annum", which follow, have reference to the costs of the suit which immediately precede the words. We are of opinion that the decree did not award any interest on the amount of compensation.

It has, however, been contended before us that it is unnecessary to make any order awarding interest on mesne profits, as the expression mesne profits under section 2, clause (12), of the Civil Procedure Code includes interest on such profits, and reliance has been placed on the decision of the Judicial Committee in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1).

That case, however, is clearly distinguishable from the facts of the present case. There, the decree directed that the plaintiff would get mesne profits for the period of dispossession and that the mesne profits should be ascertained on inquiry at the time of the execution of the decree. The Commissioner appointed to ascertain the amount of mesne profits disallowed interest. The Subordinate Judge awarded interest on the mesne profits but on appeal the High Court reversed the decision of the Court of first instance so far as the interest on the profits was concerned. The Judicial Committee observed as follows: "The learned Judges say that the Court has still jurisdiction

(2) 6 C. L. J. 462 at pp. 470, 471.

to give or refuse interest as it chooses. Their Lordships agree, because mesne profits are in the nature of damages which the Court may mould according to the justice of the case.....Its obvious effect (of the alteration made in section 211 of Act XIV 1882 corresponding to section 2, clause (12), of the present Code) is to provide that a simple decree for mesne profits shall carry interest on them.....If the Court does not intend to give interest, it should say so." As already stated, in that case mesne profits were left to be ascertained in execution and the decree for "mesne profits" carried interest on such profits having regard to the definition of the expression in the Code.

In the present case the amount of compensation (the Court has not used the expression "mesne profits" either in the original decree or in any subsequent proceedings) which the decree-holder was to get under the decree was fixed by the Court at Rs 1,265 per annum. The amount of compensation, therefore, was not liable to be ascertained thereafter, except in so far as the period was concerned. We think, therefore, that the definition of the expression "mesne profits" in the Code or the decision of the Judicial Committee in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1) does not help the appellant.

In *Harmanoje Narain Singh* v. *Ramprasad Singh* (2), after referring to the decision of the Judicial Committee, the learned Judges (Mookerjee and Holmwood, JJ.) say: "But these cases do not lay down that if the Court which ascertains the mesne profits has omitted to allow interest, it is open to the Court which executes the decree for mesne profits to allow interest in execution proceedings. It is an elementary principle that the Court which executes a decree must execute it as it stands. Besides, there is no rule which makes it obligatory upon the Court to allow interest on mesne profits; it is a matter of judicial discretion, to be exercised according to the circumstances of the case. If, therefore, the Court which assessed mesne profits improperly exercised its discretion and disallowed interest on erroneous grounds, the remedy of the decree-holders was by way of an appeal. They cannot now claim interest when the decree for mesne profits is silent as to interest."

We agree in the above observations.

It is contended that the judgment debtors themselves having appealed in execution proceedings and got the decree of the Court of first instance varied by the High Court, cannot contend that the amount of compensation was definitely fixed by the original decree in the suit. But the decree was varied by the High Court only to this extent, namely, that the period for which the mesne profits were to be allowed, was fixed, and secondly that the judgment-debtors were allowed a deduction on account of certain monthly taxes, in respect of the property, which was payable by the decree-holder. However that may be, we do not think that that in any way affects the question of interest.

It is to be observed that it was not until the High Court's order in the execution proceeding was passed, that the decree-holder claimed any interest on the amount of compensation. Although the mere omission to claim such interest originally does not stand in his way if he is entitled to it under the decree, we think that this indicates that all parties understood that the decree did not allow interest on the amount of compensation.

For all these reasons we are of opinion that the appeal must fail and it is accordingly dismissed with costs, five gold *mohurs*.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1673 OF 1918.

April 11, 1919.

Present :—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

DAMODARAN NAMBOODRI—DEFENDANT No. 1—APPELLANT

versus

GOVINDAN NAIR, PATTUKOTTAI DEVASANOM URALAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (*I of* 1877), *ss.* 52, 54—*Injunction*

DAMODARAN NAMBOODRI v. GOVINDAN NAIR.

—*Suit by* uralans *of* devaswom *to restrain* samudayi *from management—Dismissal before suit, proof of, condition precedent.*

An injunction cannot be asked for against a person whose employment, whatever its exact nature, so long as it continues, entitles him to the exercise of the rights proposed to be restrained. [p. 230, col. 2.]

Where the Uralans of a Malabar Devaswom sued for an injunction to restrain a Samudayi appointed by them from interfering with the management of the Devaswom and its properties without any allegation or proof of his dismissal:

Held, that as the dismissal of the defendant was a condition essential to the grant of relief by way of injunction and as this was not alleged to have been fulfilled, the suit was incompetent. [p. 230, col. 2.]

Kunchunni Nair v. *Subramania Pattar*, 5 Ind. Cas. 758; 33 M. 162; 7 M. L. T. 87, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suit No. 8 of 1918, preferred against the decree of the District Munsif, Walluvanad, in Original Suit No. 244 of 1916.

Messrs. *C. Madhavan Nair* and *K. P. Ramakrishna Aiyar*, for the Appellant.

Mr. *T. Eroman Unni*, for the Respondents.

JUDGMENT.—The plaintiffs, Uralans, sued 1st defendant alleging that they had admitted him to the management of their Devaswom as Samudayi and given him a Samudayam deed. The prayer was for an injunction prohibiting him from interfering with the Devaswom in future, for an account, and for possession of various properties belonging to the Devaswom and for the setting aside, meaning presumably a declaration, in respect of the Samudayam deed.

In the plaint there was no reference to any dismissal of 1st defendant, except a statement that on 1st April 1916 plaintiffs required him to vacate the office of Samudayi. First defendant, therefore, pleaded, *inter alia*, "the statement in the plaint that plaintiffs wanted this defendant to vacate the Samudayiship on 1st April 1916 is false. They have not so requested nor sent any registered letter. Therefore defendant is still Samudayi." Unfortunately the significance of this plea was not appreciated at the trial. It was not noticed that an injunction could not be asked for against a person, whose employment, whatever its exact nature, so long as it continued entitled him to the exercise of the rights proposed to be restrained. *Kunchunni Nair* v. *Subramania Pattar* (1) was no doubt a suit for what was described as the removal of an agent. But the facts, as reference to the printed papers shows, were peculiar, and it would have been useless for the defendant to lay stress on this aspect of them, because the plaintiff had in fact once dismissed him, that dismissal having been the basis of previous proceedings. In the present case there seems to be no reason for departure from the principle recognised in *Srinivasa Swami* v. *Ramanuja Chariar* (2) and *Sundaram Iyer* v. *Venkateswara Iyer* (3) that the plaintiffs cannot throw on the Court the duty which lay upon them and ask it to grant them relief, which can only be granted after that duty has been done, on the assumption that the Court will do it. The present suit, as the cause of action was set out in the plaint, was in the circumstances incompetent, since a condition essential to the grant of relief by way of injunction was not alleged to have been fulfilled. If the proper course had been taken and an issue as to whether 1st defendant had been dismissed had been framed, a finding that he had not been, would have been fatal to plaintiffs and might have resulted in their withdrawing, with or without leave to sue again, after taking action to dismiss 1st defendant. And this point is not merely formal. For if a dismissal had been alleged or proved, 1st defendant might, as he has done here, have gone on to contend that it was of no effect, because the forms of natural justice were not observed in the holding of any enquiry preceding it.

Unfortunately all this was overlooked until the hearing in this Court and even here, although the absence of any enquiry preliminary to the dismissal was alleged in a supplementary ground of appeal, nothing was said as to the absence of any dismissal until the argument. As we have said, however, we think the point fundamental, and we, therefore, do not feel at liberty even at this stage to disregard it. We, therefore, set aside the decisions of the lower Courts and remand the suit to that

(1) 5 Ind. Cas. 758; 33 M. 162; 7 M. L. T. 87.
(2) 23 M. 117; 8 M. L. J. 190; 8 Ind. Dec. (N. S.) 82.
(3) 7 Ind Cas. 391; (1910) M. W. N. 397; 8 M. L. T. 248.

of the District Munsif for restoration to file and re-hearing in the light of the foregoing, after both parties have been given reasonable opportunities to amend their pleading on the points above referred to.

In view of the course of the proceedings, 1st defendant must pay the costs incurred by 1st plaintiff to date, excluding stamp value. Stamp value of appeal to this Court will be refunded on application.

M. C. P.

Appeal allowed ; *Case remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 291 OF 1918.

July 5, 1919.

Present:—Mr. Finlay, A. J. C.

NANHUSAO—PLAINTIFF—APPELLANT

versus

GANPATI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Debts incurred by father—Son, liability of—Pious duty—Co-parcener, transfer by, of share, effect of—Transferee, rights of.

Under the Hindu Law, it is the primary duty of a father to pay debts incurred by him not for any family purpose, but for his own purposes, and the pious duty of a son, if it arises at all, only arises if the father's share or his self-acquisitions are insufficient to meet the debts. [p. 233, col. 2.]

In the Central Provinces the principle is recognised of giving equitable relief in the case of a *bona fide* alienation by a co-parcener of his share in joint family property. [p. 234, col. 1.]

Appeal against the decree of the District and Sessions Judge, Nagpur, dated the 25th April 1918, confirming that of the Senior Subordinate Judge, Nagpur, dated the 20th August 1917.

Sir *B. K. Bose* and Mr. *S. C. Dutta Chowdhry* for the Appellant.

Dr. *H. C. Gour*, for the Respondents.

JUDGMENT.—The plaintiff-appellant, Nanhusao, sued the defendants-respondents, Ganpati and Balwant, for foreclosure in respect of a mortgage deed, dated 13th July 1906, for Rs. 2,500 under which shares in various villages and other property were hypothecated, Ganpati alone had executed the mortgage, but it is plaintiff's case that it was executed for the benefit of the family and that the second defendant, Balwant, was joint and lived with his father, Ganpati. Rupees 1,500 was said to have been paid in cash, while Rs. 1,000 was on account of an old debt said to have been found due by Ganpati on account of an old mortgage executed in 1898 by Ganpati and his brother, Atmaram.

The Subordinate Judge came to the following findings, *viz*:—

(*i*) that although the mortgage dated 1906 was duly executed and attested, the payment of Rs. 1,500 cash thereunder had not been proved and that it was valid to the extent of Rs. 1,000 only.

(*ii*) that the "antecedent debt" of 1898 was not tainted with immorality and that the mortgage in suit was in consequence binding on defendant No. 2, Balwant.

On these and other findings with which I am not now concerned, a decree for foreclosure for a sum of Rs. 315-14-3 was granted to the plaintiff, Nanhusao.

The present plaintiff-appellant appealed to the Court of the District and Sessions Judge on the ground that a decree for the full amount said to have been due in respect of the consideration stated in the deed should have been passed, while the first defendant filed a cross-objection craving that the suit should have been dismissed on the ground that the amount said to be due under the deed in suit had already been satisfied. The District and Sessions Judge, in his order dated 7th February 1918, remanded the case for trial on the question of the legal necessity for the debt of Rs. 2,500 with special reference to the decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1). The Subordinate Judge found that no legal necessity for incurring either the debt of Rs. 1,000 or of Rs. 1,500 had been made out and the learned District and Sessions Judge, accepting these findings, dismissed the plaintiff's suit. In doing so, the lower Appellate Court remarked as follows :—

"In view of the Privy Council judgment mentioned in my order dated 7th February

(1) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

1918, it is clear that a mortgage granted by one co-parcener over the joint family property is invalid, unless the family interests justified the mortgage, or unless the charge was made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the security afforded by the joint estate.

"The debt of 1898 was incurred on the security of the joint estate. Even if a very small fraction of that debt was incurred to pay off a prior debt, it seems impossible to hold that the mortgage of 1906 was incurred to satisfy the obligation resulting from that debt: presumably Ganpati would not have mortgaged the estate to satisfy such a small amount. Even if the 1906 mortgage was valid to the extent of Rs. 77, the re-payments would have satisfied the valid portion of the mortgage debt."

The plaintiff, Nanhusao, has come up to this Court on second appeal on the ground that, in any event, Rs. 1,000 out of the total consideration of Rs. 2,500 was due on the pre existing mortgage of 1898, and that the deed in suit, in the absence of any proof that it was for illegal or immoral purposes, must be considered as binding to this extent on the defendant No. 2, Balwant. It is further urged that a decree in respect of the entire claim should have been passed against the father's interest in the property.

It will be convenient here to examine the finding of the lower Appellate Court to the effect that, in the present instance, the Rs. 1,000 consideration of the deed in suit, which represented the balance due on the mortgage-deed of 1898, was not an antecedent debt within the terms of the definition given by their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1). An antecedent debt must represent "an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate." It has been urged, on behalf of the present plaintiff-appellant, that, in the present case, we have had two transactions, *viz*, the 1898 mortgage and the subsequent one of 1906, and that their Lordships could not have intended that, in such a case, the same set of considerations should be applied to the second transaction as might legitimately be applied to the first. I am unable to regard this contention as sound, for, were it accepted, it would always be possible to defeat the object their Lordships had in view by the obvious expedient of having two such transactions one subsequent to the other. The decision of Drake-Brockman, J. C., in *Hira Ram* v. *Udhe Ram* (2) is not helpful in this connection, for it was only concerned with the first factor in the definition of "antecedent debt" as now laid down by their Lordships of the Privy Council. In any event I can find nothing in the judgment of their Lordships in question to suggest that they were laying down anything other than a general rule, and as the debt of 1898 was incurred on the security of the family estate, it follows, on the finding of fact arrived at by the lower Appellate Court, that the mortgage-deed in suit did not, as regards the Rs. 1,000 consideration included therein, come within the definition of "antecedent debt" as laid down by their Lordships in 1917.

I may point out that, in the same case, their Lordships, after pointing out that the parties' power, in the absence of necessity, to deal with the joint family property is an exception to the general principle of Hindu Law, remarked as follows:—

"The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, and to apply to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him but are joint family property. In their view of the rights of a father and his creditors, if the principle were extended further, then the exception would be made so wide as in effect to extinguish the sound and wholesome principle itself, *viz.*, that no manager, guardian or trustee can be entitled for his own purposes to dispose of the estate which is under his charge. In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position: under his management he can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon

(2) 19 Ind. Cas. 861; 9 N. L. R. 74.

it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain and, it might be, a deliberate breach of trust. The Mitakshara Law does not warrant or legalize any such transaction.

"The limits of the principle of the exception have been thus set forth, because in their Lordships' opinion they form a guide to the settlement of the conflict of authority in India on the subject of antecedent debt."

It seems to me that, in the present case, the position is, therefore, perfectly clear. The previous debt was secured upon the credit of the joint family property, and it follows that it was not such an antecedent debt as to justify the charging of Balwant, the son's interest in the property.

I would further point out that, at page 444* of the same decision, the following passage occurs:—

"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing and the validity of a mortgage over the joint estate is quite another thing. Accordingly the case founded merely upon pious obligation, and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh, who contracted the debt, is still alive and that there is a concurrent finding by both of the Courts below to the effect that the plaintiffs have failed to prove that the debt of Rs. 200 for which the mortgage was granted was incurred for any legal necessity or benefit to the estate."

In these Provinces, the point has also been dealt with by Drake-Brockman, J. C., in *Dilli Singh* v. *Bina* (3). In my opinion, the decision of their Lordships, in the passage quoted above, must clearly be applied in the present case. Assuming that there has been no proof of legal necessity for the debt in suit, it is clearly impossible, at the present juncture, to have appeal to the pious obligation of the son to pay off his father's debts, for we cannot assume that defendant-respondent may not, during his lifetime, satisfy the debt in question either out of his share of profits in the family property or out of his self-acquisitions. The cause of action as alleged to arise out of the son's pious obligation, in my opinion, has not come into being yet and cannot arise until the death of Ganpati. It may be noted here that in *Vinanampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (4) the effect of the decision in the Privy Council case quoted was considered and, although it was held that that decision does not overrule the many earlier decisions as to the right of a creditor of a joint Hindu father to sue father and sons for an antecedent debt untainted with illegality or immorality, it was nevertheless pointed out that their Lordships of the Privy Council had made it clear that it is the primary duty of the father to pay debts incurred by him not for any family, but for his own, purposes and that the pious duty of the son, assuming that it arises at all, arises only if the father's share or his self acquisitions are insufficient to meet the debts. For these reasons, I do not think the mortgage-deed in suit can be enforced against the respondent-defendant No. 2.

The remaining matter for consideration is, whether as alleged on behalf of the appellant the mortgage-deed in suit can be enforced against the father's share of the joint estate, that is, a half interest therein. It is urged in this connection on behalf of the respondent-defendant No. 1 that the position of a manager is that of a trustee and that he cannot validly charge even his own interest in the family property unless not only the first but also

*Page of 39 A.—*Ed.*

(3) 44 Ind Cas 506; 14 N. L. R. 41.

(4) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

the second condition as regards antecedent debt as laid down by their Lordships and referred to above is satisfied. The case of *Sahu Ram Chandra* v. *Bhup Singh* (1) was an Allahabad one and in that Province as in the Province of Bengal alienation by a co parcener of his share has never been recognised. A different view of the law in this connection is, however, prevalent in Bombay, Madras and these Provinces, where the equity to enforce a partition in favour of a *bona fide* transferee for value has always been recognised. This equity is, no doubt, an exception and must be confined within strict limits, but, after careful consideration, I am unable to read the judgment of their Lordships, in the case referred to, as laying down for Bombay, Madras and these Provinces that the view of the law which has been taken therein for many years past is no longer correct. In the judgment referred to their Lordships were purely concerned with the question of Hindu Law, and the case being one from Allahabad there was no necessity or occasion for them to consider the connected question which is now before me for consideration. As at present advised, therefore, I am not prepared to read their Lordships' ruling as laying down the proposition that the Bombay, Madras and Central Provinces principle of giving equitable relief in this connection must no longer hold good. In my opinion, therefore, the plaintiff-appellant is entitled to a decree for the entire debt claimed against the father's interest (half share) in the mortgaged property. The result is, that the judgment and decree appealed against are reversed and there will, instead, be a decree as above stated in favour of the appellant. The appellant must bear the respondent No. 2's costs both in this and in the lower Courts, while the defendant-respondent, Ganpati, must bear the appellant's costs both in this and in the lower Courts. The date of payment of the decretal amount will be 5th January 1920, and interest at the usual Court rate of eight annas per cent. per mensem will be allowed. I allow Rs. 100 as Counsel's fees for respondent No. 2.

Appeal partly allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 813 OF 1918.

March 20, 1919.

Present :—Mr. Justice Bakewell and Mr. Justice Phillips.

PANUGANTI NARASIMHA RAO AND ANOTHER—PLAINTIFFS NOS. 2 AND 3—APPELLANTS

versus

SREE RAJAH VELLANKI SRINIVASA JAGANNATHA RAO BAHADUR, ZAMINDAR GARU OF TIRUVUR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VIII, r. 6, O. XX, r. 19—Set-off, nature of—"Debt" in O. VIII, r. 6, meaning of—Plaintiff, whether can set up limitation as answer to set-off—Principal and agent—Suit on agency transactions—Set-off, whether can be claimed.

The right to claim a set-off is one of attack as well as of defence, and in a suit for the recovery of the balance upon the taking of accounts in which the defendant claims a set-off, he occupies the position of a plaintiff in respect of any balance claimed by him, and the plaintiff is not precluded from setting up the defence of limitation as well as any other defence to the attack of the defendant. [p. 236, col. 2.]

The term "debt" in rule 6 of Order VIII of the Civil Procedure Code means a present obligation to pay a liquidated sum of money, and, in order to constitute a debt, it is not sufficient that a sum of money may be ultimately recoverable. [p. 236, col. 1.]

Where, therefore, in a suit for the balance to be found due on taking an account of an agency transaction, the defendant in his written statement claimed that a balance was due to him on the accounts:

Held, that Order VIII, rule 6, of the Code did not apply, inasmuch as there was no ascertained sum of money claimed, the amount being made to depend upon the examination of the accounts, and the written statement contained no particulars of the debt sought to be set off. [p. 237, col. 2.]

In a suit upon agency transactions where the defendant alleges claims against the plaintiff which he could have sued to enforce independently of the plaintiff's suit, but which claims were, at the date of the plaintiff's suit, barred by limitation, he cannot be permitted to plead these claims as a set-off against the claim of the plaintiff. [p. 237, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam, in Appeal Suit No. 51 of 1917 (Appeal Suit No. 549 of 1915, on the file of the Court of the Subordinate Judge, Ellore), preferred against the decree of the Court of the District Munsif, Tanuku, in Original Suit No. 363 of 1912.

FACTS.—The appellant is the agent of the Zemindar, respondent-defendant. This suit was for recovery of moneys spent on

behalf of the principal to pay *peishcush* to Government and to conduct litigations. The agency terminated on 31st May 1909. Suit was brought within three years. Additional written statement was put in by defendant on February 6th, 1913, claiming a set off of money due on taking accounts. The question was whether this claim was barred, being more than three years after the end of the agency, when claimed.

Mr. *P. Somasundaram*, for the Appellants.—The claim sought to be set off is barred under Article 89, Limitation Act. A suit for money is a suit for recovery of moveable property. See *Asghar Ali Khan* v. *Khurshed Ali Khan* (1). The sum claimed is unascertained and cannot be set off.

Mr. *T. R. Venkatrama Sastri*, for the Respondent.—In *Vyravan Chetty* v. *Srimath Deivasikamani Nataraja Desikar* (2) following *Ramdhari Singh* v. *Parmanund Singh* (3), it was held that where there is liability to account, a set-off can be claimed, provided it is not barred at the date of the plaint. Whether the claim sought to be set off is barred on the date of the written statement is not the test. The date of the plaint is the material date.

In *Vyravan Chetty* v. *Srimath Deivasikamani Nataraja Desikar* (2) it was held that even a claim for unliquidated damages may be set off under Order VIII, rule 6, provided it arises out of the same transaction as the plaint claim and provided it is not barred on the date of the plaint. *Parasurama Pattar* v. *Venkatachalam Pattar* (4), *Chidambara Mudaliar* v. *Krishnaswami Pillai* (5) are strong cases on the point. The principle on which the rule is based is that of the liability of the parties to account to one another. The same principle is recognised also in the Contract Act. The policy is to avoid the necessity for cross suits. In redemption suits also profits are recovered for more than the period allowed by the law of limitation. The principle is recognised also in England. *Walker* v. *Clements* (6). See also *Sheo Saran Singh* v. *Mahabir Pershad Shah* (7), *Edward Dalgleish* v. *Ramdin Singh* (8). Though the sum is unascertained, it can be set off. *Vyravan Chetty* v. *Srimath Deivasikamani Nataraja Desikar* (2). For, as sued for, it is ascertained for purposes of suit valuation, even though ultimately the Court may fix a different sum. If sufficient particulars are not given, particulars can be asked for, but the sum is not in any way to be treated as unascertained. In the present case the amounts are in my account and there are definite entries in it. *Sheo Saran Singh* v. *Mahabir Pershad Shah* (7) cited in *Ramdhari Singh* v. *Parmanund Singh* (3). The plaintiff sues for an account and I am only putting forward claims in accounts which he has ignored.

Mr. *Somasundaram*, in reply.

[BAKEWELL, J.—This is a suit for accounts. Why should not the set-off be allowed?]

This is not a suit for accounts but for an ascertained balance.

[BAKEWELL, J.—It is nonetheless a suit for accounts. The principle of partnership suits can be applied.]

Those suits stand on a different footing. A decree cannot be given in favour of the defendant in a case like the present where there is a fiduciary relationship.

[BAKEWELL, J.—I do not see why that necessitates a difference in procedure.]

Even in the cases of equitable set-off, barred claims are not allowed to be brought in. The Limitation Act does not provide an exception for set-off.

JUDGMENT.

BAKEWELL, J.—The plaint in this case was presented on 17th June 1912 and alleged that the plaintiff was the agent of the defendant and his father for the collection of the *kist* of a certain village and borrowed monies on their authority, and claimed payment of a specific sum, the balance shown by the statement of account therewith filed, interest thereon, and damages for costs incurred by the plaintiff in a suit filed against him in respect of money borrowed on behalf of the defendant. In his defence, dated 26th February 1913, the defendant denied the authority of the plaintiff to borrow monies and defend suits, and otherwise challenged the correctness of plaintiff's

(1) 24 A. 27 (P. C.); 28 I. A. 227; 3 Bom. L. R. 576; 8 Sar. P. C. J. 142.

(2) 32 Ind. Cas. 80; 39 M. 939; 3 L. W. 24; 30 M. L. J. 59.

(3) 21 Ind. Cas. 716; 19 C. W. N. 1183.

(4) 21 Ind. Cas. 701; 25 M. L. J. 561; (1914) M. W. N. 198.

(5) 29 Ind. Cas. 221; 28 M. L. J. 285 at p. 294; 2 L. W. 241; 39 M. 365.

(6) (1850) 15 Q. B. 1046; 117 E. R. 755; 81 R. R. 882.

(7) 32 C. 576; 2 C. L. J. 73.

(8) 5 Ind. Cas. 67; 14 C. W. N. 170 at p. 173.

accounts, and alleged that upon proper accounts being taken a balance would be found due to the defendant in respect of which he was about to take steps against the plaintiff.

On the 24th February 1913 issues were framed as to the correctness of plaintiff's accounts. On the 20th June 1913 the defendant applied for leave to file an additional written statement containing a prayer that a decree might be given in the suit for the amount found due to him on taking the accounts between the parties; and by order dated 24th June 1913 the defendant was allowed to amend his written statement accordingly.

The learned District Munsif found that the defendant's claim was barred, and that his written statement was not within the terms of Order VIII, rule 6, Civil Procedure Code, but the learned Subordinate Judge held that the suit being for an account, a decree could be passed against the plaintiff in favour of the defendant.

It is clear that the defendant's written statement does not fall within the terms of Order VIII, rule 6, Civil Procedure Code, because it does not claim an ascertained sum of money and it does not contain the particulars of the debt. It has been held by this Court that debt means a present obligation to pay a liquidated sum of money [*Sabiu Sahib* v. *Noordin Sahib* (9)]. As is pointed out in that case, it is not sufficient to constitute a debt that a sum of money may ultimately be recoverable. The claim of both the plaintiff and the defendant is for the balance to be found due on taking an account of the agency transactions, and the allegation contained in paragraph 4 of the defendant's original written statement that the plaintiff was compelled to employ persons to perform defendant's duties and the allegation of plaintiff that he incurred costs in proceedings against which defendant was bound to indemnify him, constitute claims for damages for breach of the contract of agency.

It has been argued that under Order XX, rule 19, a set-off is admissible otherwise than under Order VIII, rule 6, and a decree may be given for the defendant. This rule appears to adopt the decisions of this Court that cross demands arising out of the same transaction may be set off though they do not fall within the strict terms of Order VIII, rule 6, and to allow a decree to be passed for the defendant in such cases, but it does not deal with the question of limitation.

A set off was originally merely a defence to an action, and it has been held that the right to plead this defence arises when the action is brought, so that it does not become barred subsequently by the Statute of limitations. [*Walker* v. *Olements* (6).]

The right has now become one of attack as well as of defence, and the defendant occupies the position of a plaintiff in respect of any balance claimed by him. No decision of this Court has been cited before us that in a suit upon a contract the plaintiff is precluded from setting up the defence of the Statute as well as any other defence to the attack of the defendant.

In taking an account of the amount due under a mortgage the mortgagor is entitled to set off any sums due to him under the mortgage contract, whether a suit would lie therefor or not; the mortgagee is a creditor claiming payment of his debt, and the mortgagor's claim is in effect a defence, and his rights under the contract have not been extinguished though he may be precluded by the Statute from bringing a suit [*Parasurama Pattar* v. *Venkatachalam Pattar* (4)]. If the mortgagee, on the other hand, has monies of the mortgagor in his hands, he can, in taking the account in a suit by the mortgagor, appropriate them towards payment of a sum due to him by the mortgagor, notwithstanding that a suit would be barred. *Sheo Saran Singh* v. *Mahabir Pershad Shah* (7). This is also a set-off in defence to the plaintiff's claim. In *Chidambara Mudaliar* v. *Krishnaswami Pillai* (5) a trustee was held to be entitled to set up his right to be indemnified out of the trust estate when called upon for an account; he still held the office of trustee and the Court would not remove him from his office and so deprive him of the right to possession of the trust property and of paying himself thereout without providing for payment of the amount found due to him. In cases where the Court is administering a fund, it will have regard to the subsisting right of the parties, and the fact that any party could not take separate proceedings to enforce

(9) 22 M. 139; 8 Ind. Dec. (N. S.) 99.

this right is immaterial (*Ibid.*, p. 294*).

In the case of a suit upon contract it has been held by this Court that the defendant cannot plead an equitable set-off which is barred at the date of suit, because the amount claimed is not legally recoverable [*Vyravan Chetty* v. *Srimath Deivasikamani Nataraja Desikar* (2)].

I respectfully agree with the observations of my learned brother upon the decisions of the Allahabad High Court which have been cited, and I am of opinion that in pleading an equitable set-off the procedure of Order VIII, rule 6, of the Code should be followed.

In the present case the defendant's right to sue his agent for an account was not barred on the 17th June 1912 when the plaintiff's suit was instituted, but became barred immediately thereafter under Article 89 of the Limitation Act, 1908. I am of opinion that when the defendant filed his written statement, there was no sum due by the plaintiff to the defendant within the meaning of Order XX, rule 19, because there was no amount then legally recoverable by the defendant from the plaintiff. I think that, since the defendant's claim was not barred at the date of the suit, he was entitled to plead that there was a sum in the plaintiff's hands which the latter was bound under his contract to apply in satisfaction of his demand; but that, since a suit could not be brought by the defendant to enforce his claim, he could not plead that there was a further sum payable to him.

I would allow the appeal and restore the District Munsif's decree with costs here and in the lower Appellate Court.

PHILLIPS, J.—In this case, the plaintiff sues as agent of the defendant to recover the balance of money due to him by the latter and states that if accounts of receipts and disbursements are looked into, it will be found that money is owing to him. The defendant put in a written statement stating that as a matter of fact nothing was due by him to the plaintiff and asked that the suit should be dismissed. At a later date he put in an additional written statement which was permitted to be filed under Order VIII, rule 6, in which he claimed that a balance was due to him on the accounts and stated that he was prepared to pay the requisite Court-fee if ordered to do so. The defendant's claim being that of principal against agent, it would be governed by Article 89 of the Limitation Act and his claim would have been barred on the day after the plaint in this suit was filed as the agency terminated on the 31st May 1909.

The question in this appeal is whether a decree can be given to the defendant for the balance found due to him, notwithstanding the fact that when he put in his claim to set-off, that claim would have been barred by limitation. No doubt if the claim could be treated as a set off under Order VIII, rule 6, the provisions of Order XX, rule 19 (1), would justify the decree in defendant's favour. I have, however, no hesitation in stating that this is not a case of set-off under Order VIII, rule 6. In the first place, there is no ascertained sum of money. The amount depends upon the examination of the accounts. Money was not legally recoverable on the date the claim was made, and the written statements do not contain particulars of debts sought to be set off. This being so, I do not think that the provisions of Order VIII, rule 6, can be applied to this case.

The next question is whether it can be treated as an equitable set off. In the first place, I would point out that there is really no set-off pleaded, for all that the defendant says is that if the accounts between himself and the plaintiff are looked into, a balance will be found due to him, that is to say, that on the true view of the facts stated in the plaint the decree should be for defendant and not for the plaintiff. However, treating it as an equitable set-off, we have to see whether it can be allowed although barred by limitation. In mortgage suits, sums are allowed to be set off in taking accounts of the mortgage even though barred by limitation, and this principle is recognised in *Parasurama Pattar* v. *Venkatachalam Pattar* (4), *Sheo Saran Singh* v. *Mahabir Pershad Shah* (7) and *Edward Dalgleish* v. *Ramdin Singh* (8), and it was held in *Chidambara Mudaliar* v. *Krishnaswami Pillai* (5) that a trustee was entitled to have a decree for the amounts due to him from the trust in a suit brought for his removal, although his right to sue for these amounts was barred by limitation. But those cases are cases in which the relationship between the parties still

*Page of 28 M. L. J.—Ed.

subsisted. In the former cases it was that of a mortgagor and mortgagee and in the latter case, the trustee was still in possession of trust property. In *Vyravan Chetty* v. *Srimath Deivasikamani Nataraja Desikar* (2) it was held by the same Bench that decided the case in *Parasurama Pattar* v. *Venkatachalam Pattar* (4) that a lessee could not set up by way of an equitable set off an unliquidated claim for damages which was barred at the date of the suit. The main difference between that case and the present is that the present defendant's claim was not barred at the date of the suit, but became barred on the following day. The question is whether in equity he should be allowed not only to set off an amount equivalent to plaintiff's claim and thus have the suit dismissed, but also to claim a decree for an additional amount. No doubt in *Walker* v. *Olements* (6) it was held that a set-off which was treated as a cause of action must be deemed to date from the cause of action. That case, however, was decided before Courts were empowered to decree claims on set off. Until 1875, a set-off could only be pleaded as a defence and could not be treated as a substantial claim and the English Courts have always recognised that a claim, on a set-off is subject to the law of limitation in the same way as the principal claim, *vide Rawley* v. *Rawley* (10). On principles of equity, therefore, is the defendant entitled to get a decree in this suit? It is not disputed that his claim must be allowed to the extent of the plaintiff's claims and the plaintiff's suit dismissed. But the further question whether he is entitled to a decree for money has arisen. If his claim is allowed, he will be in the exceptionally fortunate position of putting forward a claim in a Court of law which he claims to have tried at no risk to himself. He has not paid Court-fee on his claim and merely undertakes to pay what is necessary in case he gets a decree, whereas if no decree is given he evades all liability. If the plaintiff had not brought this suit, he certainly could not have prosecuted his claim. It would, therefore, not seem right that he should be allowed to evade the Statute of Limitation merely because plaintiff has filed a suit against him. No doubt in *Pragi Lal* v. *Maxwell* (11) it was held by Oldfield, J., that a claim like the present one should be allowed, but the other learned Judge in that case expressly differed on the ground that although a set-off could be admitted as an equitable protection to the defendant against his being cast in the plaintiff's suit, it could not be allowed in order to obtain a decree in his favour. No authority in this Court has been brought to our notice in which a decree has been given for defendant in a suit brought by plaintiff on accounts, but there is a case in *Permanand* v. *Jagat Narain* (12) in which such a decree was given for the defendant. The ground on which this decision was based was that a suit for accounts against an agent necessarily involves an undertaking by the plaintiff to pay to the defendant any sum that may be found due to him. This, I think, is taking a somewhat large view of the intention of a plaintiff in such a suit, for it could rarely be his intention to bring a suit in order that a decree might be given against him. On principles of equity, therefore, I think that the defendant's claim to a decree should be disallowed on the ground that such a decree would have the effect of enabling him to evade the law of limitation. In that view I agree in the order proposed.

M. C. P.

Appeal allowed.

(10) (1876) 1 Q. B. D. 460 at p. 463; 45 L. J. Q. B. 675; 35 L. T. 191; 24 W. R. 995.

(11) 7 A. 284; A. W. N. (1885) 40; 4 Ind. Dec. (N. S.) 543.

(12) 6 Ind. Cas. 162; 32 A. 525; 7 A. L. J. 543.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 101, 112, 113, 114 AND 115 OF 1916.

July 3, 1918.

Present:—Mr. Justice Chatterjea and Mr. Justice Smither.

SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—APPELLANT

versus

MONALAR MOOKERJEE AND OTHERS—CLAIMANTS—RESPONDENTS.

Land Acquisition Act (I of 1894), ss. 17, 26, 30—

KALLIANI AMMA v. MATATHIL VEETIL ACHUTHAN NAIR.

Award made by Collector—Objection taken by landlords alone—Enhancement of amount of compensation—Apportionment of compensation—Tenants, whether entitled to share in enhanced portion.

Where in a proceeding under the Land Acquisition Act the landlords alone take exception to the award of the Collector, and on their objection the amount awarded is enhanced by the Judge in respect of all the interests in the land, and not merely the landlords' interests, the landlords are entitled to receive payment in respect of their interests only, but the tenants, not having objected, are not entitled to any share of the amount by which the Collector's award is enhanced.

Appeals against the decrees of the Subordinate Judge, First Court, Hooghly, dated the 29th of February 1916.

Babus *Ram Charan Mitter* and *Sirish Chandra Chowdhury*, for the Appellant.

Babus *Biswa Nath Bose*, *Hira Lal Chakerbutty*, *Shib Chandra Palit* and *Tara Das Chatterjee*, for the Respondents.

JUDGMENT.

CHATTERJEA, J.—These appeals arise out of proceedings under the Land Acqisition Act and the question involved in the appeals relates to the valuation of the land acquired.

It has not been shown that the valuation arrived at by the learned Judge below upon the materials on the record in the present case is wrong. The valuation by the Judge, however, represents all the interest in the land, and not merely the landlord's interest. The landlord is, therefore, entitled only to his share of the excess amount as found by the Court below. The tenants accepted the award of the Collector and did not ask for any reference to the Judge nor take any exception to the award before the Judge. Under the circumstances, the tenants are not entitled to any share of the excess amount found by the Court below.

The result is that the cases must go back to the lower Court in order that there might be apportionment between the interests of the landlord and the tenants. The Collector will have to deposit the excess amount which would be payable to the landlords in respect of their interests only. He will not have to deposit anything on account of the tenants' share in the excess amount as found by the Court below.

Each party to bear his own costs in these appeals.

The cross objections in R. A. Nos. 113 and 114 of 1916 are not pressed and are, therefore, dismissed.

SMITHER, J.—I agree.

Cases sent back.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 83 OF 1918.

March 6, 1919.

Present:—Mr. Justice Kumaraswami Sastri.

KALLIANI AMMA AND OTHERS—PETITIONERS

versus

MATATHIL VEETIL ACHUTHAN NAIR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, scope of—Petition for leave to sue in forma pauperis—*Court, jurisdiction of, to enquire into merits.*

The primary object of an inquiry under Order XXXIII, of the Civil Procedure Code, is to determine the pauperism of the petitioner, and a Court is not justified in determining complicated questions of law in the course of such inquiry. If in the course of the inquiry it appears to be clear from the facts brought out in the evidence or from the facts alleged in the petition that the petitioner has no good subsisting cause of action, the Court can dismiss the petition, but it cannot treat the petition as calling for an adjudication of various questions which ought to be the subject of specific issues after all the pleadings have been filed. [p. 241, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Palghat, in Miscellaneous Petition No. 2107 of 1917, in Original Suit No. 63 of 1916.

FACTS appear from the judgment.

Mr. *T. A. Anantha Aiyar*, for the Petitioners.—The lower Court has misunderstood the scope of Order XXXIII, Civil Procedure Code. It was not justified in deciding the question of limitation in an enquiry into the petitioners' pauperism. That is not the stage in which it could deal with the merits of the case. The only matter for adjudication before it was whether the petitioner was a pauper. See *Govindasami Pillai* v. *Municipal Council, Kumbakonam* (1), *Koka Ranganayaka Ammal*

(1) 45 Ind. Cas. 95; 41 M. 620; 34 M. L. J. 399.

v. *Koka Venkatachellapati Nayudu* (2), *Rathnam Pillai* v. *Pappa Pillai* (3).

Mr. *C. Madhavan Nair*, for the Respondent.—Order XXXIII, rule 5 (*d*), gives the Court power to see if the petitioner has a good cause of action. In *Subramania Chetty* v. *Kulayappan* (4) Hannay, J., held that in a pauper enquiry, the Court may decide a question of limitation and dismiss the petition on the ground that the claim was barred.

JUDGMENT.—The plaintiffs, who are the petitioners, sued for a declaration that the consent decree in Original Suit No. 422 of 1910 and the Karar dated 30th April 1912 are not valid and also for a declaration that the properties specified in the plaint are Tarwad properties. They paid a Court fee stamp of Rs. 10 treating the suit as one for a mere declaration. The Subordinate Judge directed that an *ad valorem* fee should be paid on Rs. 18,000, the value of the properties as set out in the plaint. The fee payable would be Rs. 715 and the petitioners, alleging that they had no property sufficient to pay the *ad valorem* fee directed to be paid, filed a petition to sue *in forma pauperis*.

When the petition came on for disposal, the Subordinate Judge held that the suit was barred by limitation and dismissed it. Hence this revision petition.

The Subordinate Judge was of opinion that though all the plaintiffs were minors at the date of the transaction they seek to impeach, they are barred as there were two adult members who could have sued. It is contended by the petitioners' Vakil (1) that the order directing payment of *ad valorem* fees was wrong, (2) that the Subordinate Judge was wrong in going beyond the scope of the enquiry directed in Order XXXIII of the Code of Civil Procedure, (3) that on the facts found the suit will not necessarily be barred

As regards the first point, it is argued by petitioners' Vakil on the authority of *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (5) that the Subordinate Judge was wrong in having required *ad valorem* fees to be paid as the suit was for a mere declaration. It is unnecessary to consider this question on the present petition which relates to the pauperism of the petitioners. If the order directing *ad valorem* fees to be paid was wrong, the petitioners ought to have taken steps to have the order set aside. The application to sue *in forma pauperis* proceeded on the basis that *ad valorem* fees had to be paid and that petitioners were unable to pay it.

As regards the other points raised, I am of opinion that the Subordinate Judge acted with material irregularity in dismissing the petition on the ground that it was barred.

The scope of the enquiry under Order XXXIII of the Code of Civil Procedure is primarily to determine the pauperism of the petitioners and in *Govindasami Pillai* v. *Municipal Council, Kumbakonam* (1) it was held that upon an application to sue *in forma pauperis* the Court was not justified in determining complicated questions of law.

In the present case the question of limitation is not so clear as the Subordinate Judge imagines. If the *karar* and the *razinamah* were fraudulent and collusive as the plaintiffs allege, the question as to when the persons who could set it aside had knowledge of a collusion or fraud becomes material. It is no answer to plaintiffs to say that there were members (defendants Nos. 11 and 21) who subsequently attained majority and who were inactive. Assuming that there were members who subsequently attained majority and could have sued, it must be shown that they were aware of the fraud and kept quiet for three years afterwards. Having regard to the decisions of the Privy Council in *Nobin Chandra Barua* v. *Chandra Madhab Barua* (6) the question whether there were persons who could by their dissent or inaction bind the minor plaintiffs or give a valid discharge is one not free from doubt or difficulty. The question of limitation is not one which could be decided offhand on the scanty evidence before the Subordinate Judge.

(2) 4 M. 323; 1 Ind. Dec. (N. s.) 1061.
(3) 18 M. L. J. 292 (F. B.).
(4) 26 Ind. Cas. 90; 1 L. W. 668.
(5) 30 M. 18; 1 M. L. T. 412.

(6) 36 Ind. Cas. 1; 44 C. 1 at p. 9; 20 M. L. T. 130; 21 C. W. N. 97; 14 A. L. J. 1199; 18 Bom. L. R. 1022; 31 M. L. J. 886; 24 C. L. J. 503; (1916) 2 M. W. N. 565; 5 L. W. 452 (P. C.).

It is no doubt true that rule 5, clause (*d*), of Order XXXIII of the Code of Civil Procedure gives the Court power to reject the application to sue *in forma pauperis* if the allegations do not show a cause of action. It seems to me to be clear from the whole scope of Order XXXIII that the primary question to which the Court's attention ought to be directed is the fact of the petitioner's pauperism. If in the course of the enquiry it appears to be clear from the facts alleged in the petition or brought out in the evidence that the petitioner has no good subsisting cause of action, the Court can dismiss the petition but the Court ought not to treat the application for permission to sue as a pauper as calling for an adjudication of various questions which ought to be the subject of specific issues after all the pleadings have been filed.

In *Koka Ranganayaka Ammal* v. *Koka Venkatachellapati Nayudu* (2) it was held that the Court should not in an application to sue *in forma pauperis* go into the merits of the claim. In *Rathnam Pillai* v. *Pappa Pillai* (3) a Full Bench of this Court held, following *Koka Ranganayaka Ammal* v *Koka Venkatachellapati Nayudu* (2) and overruling *Vijendra Tirtha Swami* v. *Sudhindra Tirtha Swami* (7), that in an enquiry under section 409 of the old Code, corresponding to Order XXXIII, rule 7, the Court ought not to go into the evidence as to the merits of the case. The Chief Justice was of opinion that "the Munsif acted illegally in allowing evidence to be put in on behalf of the defendant with reference to the merits of the claim of the party applying for leave to sue *in forma pauperis* and in dismissing the application on the ground that on the evidence on record the applicant had no subsisting cause of action." A similar view was taken in *Sankararamier* v. *Subramania Aiyar* (8). In *Venkoba Row* v. *Thuniya Nataraja Chetty* (9) it was held by Benson and Sankaran Nair, JJ., that the enquiry under section 409 of the Code of Civil Procedure should be confined to the question of pauperism and should not be extended to matters touching the merits of the case. *Kamrakh Nath* v. *Sundar Nath* (10) and *Vijendra Tirtha Swami* v. *Sudhindra Tirtha Swami* (7) were dissented from and the Full Bench ruling in *Rathnam Pillai* v. *Pappa Pillai* (3) was followed.

A similar view was taken in *Debo Das* v. *Ram Charn Dass* (11), which was followed in *Gopal Chandra Neogy* v. *Bigoo Mistry* (12).

My attention has been called by Mr. Madhavan Nair to *Subramania Chetty* v. *Kulayappan* (4), where it was held by Hannay, J., that it was competent to the Court in an enquiry under Order XXXIII to go into the question as to whether the suit is barred by limitation No reference is made by the learned Judge to the decisions of this Court referred to by me above. All that was held in *Nawab Bahadur of Murshidabad* v. *Harish Chandra* (13) was that it was competent to the Court "to interrogate the petitioner as regards the merits of the claim obviously with a view to determine whether or not his allegations show a cause of action." It was held that in order to satisfy itself as to the existence of a subsisting cause of action the Court can refer not only to the petition but also to statements made by petitioner during the course of the enquiry. This decision is no authority for the proposition that the Court ought to frame an issue as to limitation, which is often a question dependent on facts and requires parties to go into the question which ought properly to be the subject-matter of an issue after the plaint is admitted.

I am of opinion that the Subordinate Judge acted with material irregularity in dismissing the petition on the ground that the claim was barred by limitation, and set aside his order and direct him to dispose of the petition according to law

Costs will abide and follow the result.

M. C. P.

Petition allowed; Cause remanded.

(7) 19 M. 197; 5 M. L. J. 193; 6 Ind. Dec. (N. S.) 842.
(8) 13 M. L. J. 425.
(9) 3 Ind. Cas. 829; 6 M. L. T. 359.
(10) 20 A. 293; A. W. N. (1898) 36; 9 Ind. Dec. (N. S.) 552.
(11) 2 C. W. N. 474.
(12) 8 C. W. N 70.
(13) 11 Ind. Cas. 55; 13 C. L. J. 593.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 21 OF 1919.

August 23, 1919.

Present:—Mr. Findlay, A. J. C.

YADO—DEFENDANT—APPLICANT

versus

BEHARILAL—PLAINTIFF—NON-APPLICANT.

Evidence Act (I of 1872), s. 92, proviso (2)—Negotiable Instruments Act (XXVI of 1881), s. 80—Promissory note—Oral agreement as to payment of interest, whether admissible—Interest, whether can be allowed—Finding of fact as to payment of money, whether can be challenged.

Where a promissory note makes no mention regarding the payment of interest, oral evidence is inadmissible, under the provisions of section 92, proviso (2) of the Indian Evidence Act, to prove a contemporaneous oral agreement to pay interest. All that can be awarded to a plaintiff suing on such a promissory note is interest at 6 per cent per annum under section 80 of the Negotiable Instruments Act [p. 242, col. 1.]

Fathuma Bivi v. *Hanumantha Row*, 17 M. L. J. 296; *Luchmi Chand Jhowar* v. *Hemendra Prasad Ghosh*, 26 Ind. Cas. 935; 18 C. W. N. 1260, *Banwari Lal* v. *Jagar Nath Prasad*, 35 Ind. Cas. 431; 1 P L. J. 71, followed.

The mere fact that a promissory note or other similar document is not executed for a sum of money alleged to have been advanced, is no ground for holding that the finding of a Court that such sum had been advanced is incorrect. [p. 242, col. 2.]

Application for revision of the judgment and decree of the Judge, Small Cause Court, Nagpur, dated the 6th January 1919, in Suit No. 1587 of 1918.

Mr. *G. R. Deo*, for the Applicant.

Mr. *K. P. Vaidya*, for the Non-Applicant.

ORDER.—The main question in this application for revision is whether a collateral oral agreement to pay interest on a promissory note can be proved or not. The promissory note in suit was for a simple sum of Rs. 325 and made no mention regarding the payment of interest. On the other hand the plaintiff-respondent alleged that there was a collateral oral agreement to pay interest at 2 per cent. per mensem and the lower Court has awarded interest at this rate. There is considerable case authority for the view that oral evidence is inadmissible to prove a contemporaneous agreement in a case like the present, having regard to the provisions of section 92, proviso 2, of the Indian Evidence Act and that all that can be awarded to the plaintiff is interest at 6 per cent. per annum under section 80 of the Negotiable Instruments Act. This view was taken by Benson and Wallis, JJ., in *Fathuma Bivi* v. *Hanumantha Row* (1) and by Jenkins, C. J., and Woodroffe, J., in *Luchmi Chand Jhowar* v. *Hemendra Prasad Ghosh* (2). The decision in the Madras case just referred to was quoted with approval by Stanyon, A. J. C., in *Rangappa* v. *Bismilla Khan* (3). Similar view was also taken by Mullick, J., in *Banwari Lal* v. *Jagar Nath Prasad* (4). Their Lordships of the Privy Council in *Ghanshiam Lalji* v. *Ram Narain* (5) apparently left this question open so far as a contemporaneous oral agreement to pay interest is concerned. I can, as at present advised, see no reason for differing from the view which has been taken in the various High Court decisions just quoted. The only consideration that has been urged on behalf of the respondent in this connection is that it is extremely unlikely that there would be no agreement to pay interest on the amount of the promissory note, but this is after all merely a matter of probability and having regard to the formal nature of the document, I am of opinion that the evidence to prove the alleged oral agreement was inadmissible in the circumstances of the case. In the circumstances the plaintiff-non-applicant is entitled to interest at 8 annas per cent. per mensem.

The second contention urged in revision is that there had been no sufficient proof of the further advance of the Rs. 15 for which a decree has also been given by the lower Court. This was after all a pure finding of fact, and the mere fact that a promissory note or similar document was not executed therefor would be no ground for holding that the lower Court's finding that this amount had been advanced is incorrect.

The result is that the application succeeds as regards the first contention on revision and the plaintiff will receive a decree for Rs. 325 with interest at annas 8 per cent. per mensem instead of the rate of Rs. 2 per mensem as allowed by the lower Court. The decree in respect of

(1) 17 M. L. J. 296.
(2) 26 Ind. Cas. 935; 18 C. W. N. 1260.
(3) 32 Ind. Cas. 238; 12 N. L. R. 9 at p. 11.
(4) 35 Ind. Cas. 431; 1 P. L. J. 71.
(5) 29 A. 33; 11 C. W. N. 105; 17 M. L. J. 35; 4 A. L. J. 29; 1 M. L. T. 427; 9 Bom. L. R. 1; 5 C. L. J. 7 (P. C.).

the Rs. 15 advanced with interest at Rs. 2 per cent. per mensem will stand. The non applicant-plaintiff will bear the applicant-defendant's costs in this Court, he having succeeded in his main contention, while in the lower Court costs will be borne by the parties proportionately to their success and failure. I fix Rs. 30 as Pleader's fees in this Court.

Order accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 837 AND 1405 OF 1917.

February 14, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

IN S. A. No. 837 OF 1917.

T. R. KRISHNASWAMI AIYAR—DEFENDANT No. 3—APPELLANT

versus

MANGALATHAMMAL AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

IN S. A. No. 1405 OF 1917.

PARVATHI AMMAL—DEFENDANT No. 2—APPELLANT

versus

MANGALATHAMMAL AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

Evidence Act (I of 1872), ss. 92, 99—Evidence, admissibility of, tendered by persons not parties to document in proof of its true character—'Varying' in s. 99, meaning of.

Section 99 of the Evidence Act is an enabling section just as section 92 is a disqualifying section. [p. 245, col. 2.]

The word 'varying' in section 99 of the Evidence Act covers the same ground as the words "contradicting, varying, adding to or subtracting from" in section 92 of the Act [p. 245, col. 2]

It is competent for persons who are not parties to a document to adduce oral evidence to show that the rights of parties to it are at variance with the rights ostensibly created and declared by the instrument [p. 245, col. 2.]

Maung Kyin v. *Ma Shwe Law*, 42 Ind Cas. 642; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; 20 Bom L. R. 278; (1918) M. W. N. 300; 9 L B. R. 114; 11 Bur L. T. 21; 44 I. A. 236 (P. C.), explained.

Second appeals against the decree of the Court of the Subordinate Judge, Kumbakonam, in Appeal Suit No. 125 of 1916, (Appeal Suit No. 371 of 1916 on the file of the District Court, Tanjore, and Appeal Suit No. 1 of 1918 on the file of the Court of the Subordinate Judge, Tanjore, transferred to it by the High Court for fresh finding), preferred against the decree of the Court of the District Munsif, Tiruvadi in Original Suit No. 13 of 1915.

These second appeals came on for hearing on the 24th and 25th July 1918.

FACTS appear from the judgment.

Mr. *K. V. Krishnaswami Aiyar*, for the Appellants.—Exhibit I is, in terms, an absolute conveyance. Under section 92 of the Evidence Act, oral evidence is inadmissible to show that only a mortgage was intended. *Mottayappan* v. *Palani Goundan* (1) and *Venkatasubba Sastrial* v. *Subramania Aiyar* (2).

Mr. *T. R. Venkatrama Sastri* (with him Mr. *S. Venkatarama Aiyar*), for Respondent No. 1.—The exclusion of oral evidence is only as between the parties to the document and where the litigation is between such parties. Third parties are at liberty to show the true character of the document. The plaintiff, as Vasudeva Aiyar's creditor, seeking to attach the property as his for her decree, is not Vasudeva Aiyar's representative and she is entitled to show that Exhibit I was intended to operate as a mortgage. See *Maung Kyin* v. *Ma Shwe Law* (3), *Pathammal* v. *Syed Kalai Ravuthar* (4). Under section 99 of the Evidence Act persons who are not parties to a document or their representatives-in-interest may give evidence to show a contemporaneous agreement.

Mr. *K. V. Krishnaswami Aiyar*, in reply.—Section 92 has not been properly interpreted in *Jagat Mohini Dasi* v *Rakhal Das* (5) and *Pathammal* v. *Syed Kalai Ravuthar* (4). The words 'no evidence shall be admitted as between the parties' to any instrument apply equally to evidence tendered by third parties.

JUDGMENT.—The 3rd defendant is the appellant in the one case and the 2nd defendant the appellant in the other case. They are alienees of different lands from the

(1) 20 Ind. Cas. 924; 36 M. 226 at p. 230; (1913) M. W. N. 650; 25 M. L. J. 290.

(2) 42 Ind Cas. 827; (1917) M. W. N. 674; 6 L. W. 703.

(3) 42 Ind. Cas. 642; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N 300; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.).

(4) 27 M. 329.

(5) 2 C. L. J. 388.

1st defendant. The 1st defendant's title to these lands (and other lands with which we are not concerned in these second appeals) arose out of a sale-deed Exhibit I, dated 11th February 1906, executed by one Vasudeva Aiyar to 1st defendant for Rs. 4,000. In execution of a decree against the vendor (Vasudeva Aiyar), the decree-holder (the present plaintiff) attached these lands in 1913 on the ground that notwithstanding the sale deed of 1906 in favour of the present 1st defendant, Panchapakesa Aiyar, the ownership in the lands remained with the plaintiff's judgment-debtor Vasudeva Aiyar. Then the 1st and 2nd defendants put in claim petitions (the former of which had been allowed before date of suit) and the properties were released on 23rd December 1913; hence this suit for a declaration that the properties are liable to be attached as Vasudeva Aiyar's property, in execution of the plaintiff's money decree passed in Original Suit No. 480 of 1912 against Vasudeva Aiyar.

The plaintiff (1st respondent), though she at first attacked the sale deed of 1906 in favour of the 1st defendant on the grounds of fraud, want of consideration, colourability and so on, gave up, before the judgment was pronounced in the first Court, all the other grounds of attack except this single one, *viz.*, that though Exhibit I is in form an absolute conveyance for Rs. 4,000 by Vasudeva Aiyar to the 1st defendant, there was a contemporaneous oral understanding by which the lands ostensibly conveyed were merely to remain as mortgage security for the re payment of the moneys which the 1st defendant undertook to pay in discharge of all the creditors of Vasudeva Aiyar, who was the 1st defendant's maternal uncle. It is found that the 1st defendant afterwards paid up Vasudeva Aiyar's debts to the extent of Rs. 6,728.

The District Munsif in a well-considered judgment made the following concluding observations: "The plaintiff has failed to show that Exhibit I was nominal or fictitious or that it was intended to have only a limited operation. The assertion that a transaction is not really what it purports to be, is one that will be regarded by the Courts with great suspicion and must be strictly made out by evidence. .....There is no evidence that the parties *mala fide* omitted to take into account or suppressed any genuine or subsisting debts at the time of Exhibit I which was preceded by prolonged investigation and negotiations. The sale did not leave the vendor destitute. Vasudeva Aiyar had no issue and he kept to himself lands measuring about an acre, which was sufficient for his subsistence. These, he, no doubt, gifted away under Exhibits XVII series" (September and August 1909). "If he did not really intend to make a sale in favour of the 1st defendant, why did he execute a sale-deed? The 1st defendant also got possession of the properties and enjoyed them with all the *indicia* of ownership. The 1st defendant is also in possession of the title-deeds, which is also an important element for consideration. I, therefore, hold that Exhibit I was intended to operate as an outright sale."

The lower Appellate Court reversed the judgment of the District Munsif and its conclusion is thus stated in paragraph 10: "In the result, I am clearly of opinion that no sale was intended under Exhibit I and that it was executed on the understanding that 1st defendant was to pay off all the debts due by Vasudeva or," probably a mistake for 'and,' "to have a charge on the lands for the sums paid by him." The lower Appellate Court accordingly granted a declaration that the properties in suit are liable to be sold in execution of the decree in Original Suit No. 480 of 1912 on the file of the Tiruvadi District Munsif, subject to 1st defendant's claim therein for Rs. 6,728.

The appellant's learned Vakil Mr. K. V. Krishnaswami Aiyar argued that, under section 92 of the Evidence Act, oral evidence was inadmissible to prove that the sale deed Exhibit I, which contained words intended by the parties to the document to express the meaning of absolute conveyance, should operate only as a mortgage and he relied on the cases in *Mottayappan* v. *Palani Goundan* (1) (Benson and Sundara Aiyar, JJ.) and *Venkatasubba Sastrial* v. *Subramania Aiyar* (2). It was held in those cases that oral evidence was inadmissible to prove that a different mode of operation was intended for a deed from the one which the executant stated in the deed and which they intended that the deed should state. It was, however, contended

for the 1st respondent that it is only where *the litigation* is between the parties to the document or their representatives that oral evidence is excluded to vary the operation of the document and as the plaintiff is a creditor of Vasudeva Aiyar seeking to attach properties as Vasudeva Aiyar's to recover her decree debts, she is not a legal representative of Vasudeva Aiyar and is entitled to show by oral evidence and by conduct of parties that Exhibit I was intended to operate only as a mortgage transaction. The 1st respondent's learned Vakils relied principally upon the Privy Council case in *Maung Kyin* v. *Ma Shwe Law* (3) and on the Madras case reported as *Pathammal* v. *Syed Kalai Ravuthar* (4). We might also refer to the case in *Bageshri Dayal* v. *Pancho* (6) decided by Mr. Justice Banerji and which is a direct authority in respondent's favour. In that case the plaintiff sued to recover one-fourth of the price of a house alleged to have been sold by the 1st defendant to the 2nd defendant, the plaintiff's claim being based upon a local custom. The transaction between the defendants was ostensibly not a sale but a usufructuary mortgage. The learned Judge held that the plaintiff, not being a party to the transaction, was entitled to give evidence to show that what purported to be a usufructuary mortgage was not in reality such but was in fact a sale. The learned Judge followed the decision in *Jagat Mohini Dasi* v. *Rakhal Das* (5) and *Pathammal* v. *Syed Kalai Ravuthar* (4) and dissented from *Rahiman* v. *Elahi Baksh* (7).

Against this contention of the respondent, the appellant's learned Vakil Mr. K. V. Krishnaswami Aiyar argued in reply that section 92 of the Evidence Act was not properly interpreted in *Jagat Mohini Dasi* v. *Rakhal Das* (5) and *Pathammal* v. *Syed Kalai Ravuthar* (4) and that the observations on section 92 of the Evidence Act in those cases were not necessary for the decision of those cases. If we understood him aright, his contention was that the words "no evidence shall be admitted *as between the parties* to any such instrument or their representatives in-interest" mean, not merely that the parties to that instrument cannot give such evidence in their own interest when they are *parties to a litigation*, but that the words also mean that *even a third party litigant* cannot be permitted to give evidence to show that the rights of the *parties to the instrument as between such parties* are at variance with the rights ostensibly created and declared by the instrument. The first answer to this contention is that it does violence to the words of the section, the language being "admitted as between," which clearly has reference to the parties opposing one another at the trial. The second answer is that it ignores section 99, which is an enabling section just as section 92 is a disqualifying section. It is well settled that the word 'varying' in section 99 covers the same ground as the words "contradicting, varying, adding to, or subtracting from" in section 92 *vide Pathammal* v. *Syed Kalai Ravuthar* (4). No construction of section 92 can modify the definite language of this section, which provides that persons not parties to the document or their representatives-in-interest may give evidence to show a contemporaneous agreement. Lastly the narrow construction sought to be put on the judgment of the Privy Council in *Maung Kyin* v. *Ma Shwe Law* (3) cannot be supported on its language. The appellant in that case was not a party to the sale impugned, and he sought to have it declared that the sale by the one party to the other was really a mortgage which left intact his right. The Board say, "wherever evidence is tendered as to a transaction with a third party, it is not governed by section 92:" and again, "both grantor and grantee in that document were dealing with the property of an owner who was a third person and the evidence led as to that third party's rights is admissible"—the evidence not being as to his title but to show that the parties meant the document to be a mortgage. We are, therefore, unable to accept this contention and must hold that the evidence is admissible.

The next contention of the appellant was that the lower Appellate Court has made several statements in the course of its judgment which are not supported by any evidence on the record and that it accordingly

(6) 29 A. 473; A. W. N. (1906) 89; 3 A. L. J. 314.
(7) 28 C. 70.

misdirected and prejudiced its own mind seriously in the consideration of the case. We think there is much force in this contention. In paragraph 4 of his judgment the Subordinate Judge says that the 1st defendant antedated Exhibit IX. Exhibit IX is a receipt executed by Vasudeva Aiyar and signed by him, and the date in it was written with his knowledge and consent by the writer. It is, to say the least, misleading to say that the 1st defendant antedated it. Even accepting the evidence of Vasudeva Aiyar, it only shows (see re-examination) that Exhibit IX was brought into existence in consultation between himself and the 1st defendant in order to get the sale-deed confirmed.

In paragraph 5 of the lower Appellate Court's judgment, there is even a more serious error. It is there stated that the 1st defendant "was forced to admit that the lands yielded 800 *kalams* of paddy worth Rs. 1,600 a year." The 1st defendant made no such admission. On the other hand, the evidence let in by him (see defendants' witness No. 5 printed by mistake as defendants' witness 13) was to the effect that Vasudeva Aiyar himself said that the yearly yield was between 100 and 150 *kalams* (worth Rs. 200 to 300). The 1st defendant admitted that for three years from the date of Exhibit I, that is, till 1909 he allowed his vendor (and maternal uncle) Vasudeva Aiyar to be in possession of the lands and that in those years he obtained only a very small quantity of paddy from Vasudeva Aiyar, who represented to him that the yield was very bad in those years. The learned Subordinate Judge, while conceding that the 1st defendant might allow his uncle to maintain himself out of the income even if the lands had become the property of the 1st defendant, provided the balance of the profits is accounted for to him by Vasudeva Aiyar, argues that as the profits were worth Rs. 1,600 a year and as Vasudeva Aiyar's maintenance could not absorb more than a small fraction of that sum, the 1st defendant would, if Exhibit I was intended to operate as a sale deed, not have allowed Vasudeva Aiyar to be in possession of the lands even during the first three years. As we have pointed out already, the whole foundation for this argument is based upon the error which the Subordinate Judge fell into, namely, that the 1st defendant admitted that the lands yielded Rs. 1,600 income a year.

In paragraph 7 of his judgment the Subordinate Judge misinterprets Exhibit XXV, which is the Police report that a case brought by the 1st defendant was "referred" as technically false, meaning as pointed out in the report itself that the complaint had been made "under a mistake of law or fact." The Subordinate Judge thinks that Exhibit XXV imputed dishonesty to the 1st defendant in making the complaint and that the 1st defendant's conduct in not proceeding further with that complaint was certainly "not the conduct of an honest person." He also ignores the *kist* receipts produced by the 1st defendant when arriving at the conclusion that even after 1909 and until 1911, the 1st defendant was not in possession.

In paragraph 8 again, he misinterprets Exhibit C (1) as showing that the 1st defendant agreed to give up his claim for Rs. 6,728 consenting to receive Rs. 3,700 and to reconvey the lands, ignoring the fact that some of the lands were under mortgage for Rs. 2,400, which debt had not then been discharged. On this misconstruction again he founds a further argument for his conclusion that Exhibit I was not intended to be a sale

There are some other mistakes in the judgment such as that all the property which Vasudeva Aiyar had on the date of Exhibit I, dated 11th February 1906, were conveyed under it to the 1st defendant. Exhibit XVII series shows that in August and September 1909 (3 years after date of Exhibit I) Vasudeva Aiyar made gifts of certain lands to two of his female relations. No doubt, those documents recite that the lands had been orally gifted away previously, but without a finding that those recitals are true, it is misleading to say that Vasudeva Aiyar owned no lands on the date of Exhibit I, except what he conveyed under it. However, this is a minor matter.

On the whole, we are unable to accept the finding of the learned Subordinate Judge upon the question whether Exhibit I was or was not intended to pass title as owner to the 1st defendant and whether

there was a contemporaneous oral arrangement that it should operate only as a mortgage-deed. We, therefore, remit the case for a fresh finding on that question, having regard to the above observations and also to the sound principle of law that even when it is a third party who lets in proof that the ostensible character of a deed was varied by a contemporaneous oral arrangement, Courts should require very cogent proof before finding in favour of such a variation.

While remitting the case for a finding, we shall transfer the appeal from the file of the Subordinate Judge of Kumbakonam to that of the Subordinate Judge of Tanjore, who is requested to submit his finding within 4 weeks of the receipt of the records. It is unnecessary for us to say that we are not entitled to arrive and have not arrived at any finding of our own on the question of fact remitted for fresh finding. Having regard to the very strong language used by the Subordinate Judge of Kumbakonam in arriving at the finding which we have been unable to accept, it seems to us desirable that another Appellate Court should arrive at a fresh finding, whether it be the same or a different finding. Ten days for objections.

In compliance with the order contained in the above judgment the Subordinate Judge of Tanjore submitted the following

FINDING.—The issue remitted to me for a finding is "Whether Exhibit I was or was not intended to pass title as owner to the 1st defendant and whether there was a contemporaneous oral arrangement that it should operate only as a mortgage-deed?"

* * * * *

56. On a consideration of the whole of the evidence, I am clearly of opinion that there was no outright sale and that Vasudeva Aiyar never intended to part with his ownership finally. I think they made only a temporary or provisional arrangement to be revised at a later period, and that it partakes more of the character of a security to 1st defendant, who in advancing moneys could rely upon the sale executed in his favour than a sale with an agreement to reconvey. Whether Vasudeva Aiyar intended to confirm that sale by a re-adjustment of prices in the future and obtain a reconveyance of such properties as were in excess of the value of the debts discharged by 1st defendant on his behalf, or whether from the beginning the properties were intended to be in 1st defendant's hands only as security for all payments made by him, it is difficult to state definitely. But taking the whole evidence and especially the case put forward by him in his plaint Exhibit XVIII, I incline to think that it was only a transaction of security and that the sale in 1st defendant's name was intended to create a charge upon the properties in 1st defendant's favour. The bad frame of the suit urging extravagant claims and putting forward unfounded assertions might account in some degree for the paucity of full particulars of the actual events. Anyhow, the amount due to the 1st defendant will not be Rs. 6,728, which is covered by Exhibit IX. The amounts covered by the mortgages executed by the 1st defendant over the properties in Exhibit 1 will have to be deducted therefrom and the sum of Rs. 605-14-10 paid by him to Vasudeva Aiyar's wife as per decree Exhibits XXVI series added thereto.

57. This is my finding on the issue referred. I would like to add a word of explanation for dealing with the matter at some length. The case was very fully argued before me in all aspects. As the plaintiff was the respondent before their Lordships, it was open to her to support the decree of the Kumbakonam Sub-Court in appeal upon any ground and it was possible that the respondent's Vakil might again suggest the case before their Lordships of a covinous transaction founded upon the case urged by the respondent in the Court of first instance and I believe also before Mr. Viswanatha Sastriar in the Kumbakonam Sub-Court in appeal.

These second appeals coming on for final hearing after the return of the finding of the Subordinate Judge of Tanjore upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT. -The finding, though unsatisfactory as based on inferences drawn with the help of weak reasonings and doubtful evidence, is a finding of fact and we are constrained to accept the same in second appeal.

Even accepting the finding, we do not

think that this is a case for allowing costs to the plaintiff, as the plaintiff did not admit in her plaint that a charge for 6,728 rupees or any lesser amount was at all claimable by the defendants.

Further, the lower Appellate Court ought to have declared that charge in favour of defendants Nos. 2 and 3 (this will be in the proportion of Rs. 1,420-7 0 to Rs. 5,307 9 0 as consented to before us), instead of in favour of the 1st defendant who had parted with his rights in favour of defendants Nos. 2 and 3. With the direction that the parties will bear their respective costs throughout (including the costs in these second appeals) and with the substitution of defendants Nos. 2 and 3 for 1st defendant as above noted as the holders of the charge, we dismiss these second appeals in other respects.

M.C.P.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1307 OF 1918.

June 20, 1919.

Present:—Mr. Justice Newbould.

MANMOHAN SINGHA ROY AND OTHERS —PLAINTIFFS—APPELLANTS

versus

BENODE BEHARI DUBEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Service tenure—Co-sharer landlord, whether entitled to sue tenant for assessment of fair and equitable rent on failure of service.

In the case of a service tenure created by all the co-sharers in a *zemindari* not governed by the provisions of the Bengal Tenancy Act, a co-sharer landlord is not competent to sue the tenant for assessment of fair and equitable rent payable in respect of his share for failure of service originally performed. [p. 249, col. 1]

Gholam Mohiuddin Hossein v. *Khairan*, 31 C. 786; 8 C. W. N. 325, relied on.

Appeal against the decree of the Subordinate Judge, 3rd Court, Hooghly, dated the 18th of March 1918, affirming the decree of the Munsif, 1st Court at Hooghly, dated the 17th of August 1916.

FACTS appear from the judgment.

Babu *Narendra Kumar Bose*, for the Appellants.—The question for decision is whether in the case of a service tenure a co sharer landlord can sue the tenant who has ceased to render any service for assessment of fair and equitable rent. The lower Appellate Court has erred in holding that the suit is barred by the provisions of section 188 of the Bengal Tenancy Act. The right to sue for determination of fair and equitable rent is a right conferred on the landlord not by the Bengal Tenancy Act but by the general law of the land. Section 188 of the Bengal Tenancy Act applies only where the act which the landlord seeks to do is one required or authorized by the Act itself. The case in *Gholam Mohiuddin Hossein* v. *Khairan* (1) was a suit for ejectment, and it is no authority for the proposition that a co sharer landlord is not competent to maintain a suit of this nature. See *Gholam Mohiuddin Hossein* v. *Khairan* (1). There is absolutely no foundation for the learned Judge's decision that the suit is not maintainable. I rely on *Barhamdat Misir* v. *Krishna Sahoy* (2), *Khondakar Abdul Hamid* v. *Mohini Kant Saha Chaudhuri* (3), *Ramnath Sil* v. *Siba Sundari Debya* (4). Further, apart from cases and rulings it is unjust that the plaintiffs should be debarred from getting a fair and equitable rent from the defendant, who is in collusion with the plaintiffs' co sharers.

Babu *Apurba Charan Mukerjee*, for the Respondents, was not called upon to reply.

JUDGMENT.—This is an appeal against an order holding that the appellants' suit was not maintainable. The plaintiffs as proprietors of 8 annas share of a superior interest in certain land sued the defendants originally for ejectment, but finally amended their plaint so that the suit was one in which the only relief claimed was an assessment of fair and equitable rent. The plaintiffs' co sharers were joined as co-defendants and the allegation was that the principal defendant was a holder of a service tenure, that he discontinued to serve the

(1) 31 C. 786; 8 C. W. N. 325
(2) 20 Ind Cas 910; 18 C. W. N. 466
(3) 4 C. W. N. 503.
(4) 40 Ind. Cas. 348; 25 C. L. J. 332

plaintiffs and that, therefore, he was liable to pay rent for the land of his holding. Both the lower Courts have relied on the decision of this Court in the case of *Gholam Mohiuddin Hossein* v. *Khairan* (1). I am unable to see how the facts of this case can be distinguished from the facts of that case. There it was held, firstly, that the co-sharer landlord was not competent to obtain a partial ejectment of the tenants to the extent of his share on the allegation of facts similar to those made in the present case. On that ground the appeal was dismissed. But it was further remarked that in the case of a service tenure created by all the co-sharers in a Zemindari, not governed by the provisions of the Bengal Tenancy Act, a co-sharer landlord is not competent to sue the tenants for fair and equitable rent payable in respect of his share for failure of service originally performed. Though the appeal was not decided on the basis of that finding, I can see no reason for differing from that decision and it is sufficient for the determination of this appeal. My attention has been drawn to several rulings, in which it has been held that a right to assess rent is not a right under the Bengal Tenancy Act but a right under the general law, and it was so held in the decision to which I have referred.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1034 OF 1918.

March 6, 1919.

Present:—Mr. Justice Bakewell,
and Mr. Justice Phillips.

IMBICHI BEEVI UMMA—DEFENDANT No. 8—APPELLANT

versus

ERANHIPPURATHA RAMAN NAIR AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 12 TO 15—RESPONDENTS.

Malabar Law—Tavazhi *of woman, whether can consist of branches—Gift to wife by one husband, whether enures for benefit of children by another husband—Presumption.*

The *tavazhi* of a woman may consist of two branches, one branch made up of children by one husband and the other branch of children by another husband, and each branch might own separate properties acquired from their respective fathers. In other words, a separate branch of a *tavazhi* can be established consisting of a woman and her children by one husband to the exclusion of the children by another husband. [p. 251, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suit No. 333 of 1917 (Appeal Suit No. 504 of 1917, on the file of the District Court, South Malabar), passed against the decree of the Court of the District Munsif, Parappanangadi, in Original Suit No. 594 of 1915.

FACTS.—Suit for redemption by plaintiff as Karnavan of his Tarwad. The mortgage was by one *K.* who was the eldest son of his mother by her second husband, who gave these properties to his wife and his children by her. Plaintiff was a descendant of hers by the 1st husband. The question was whether he was entitled to redeem, or in other words, whether the property belonged solely to the mother and her children by the second husband or whether the children by the 1st husband also were equally entitled so as to constitute plaintiff Karnavan and manager of the whole.

Mr. *O. V. Ananthakrishna Aiyar* (with him Mr. *K. P. Kamakrishna Aiyar*), for the Appellant.—The mother and the children by the second husband alone must be taken to form a separate *tavazhi* so far as these properties at least are concerned. For it is not likely that the donor would have intended that persons, other than his own children, should share in what he was giving. See per Sankaran Nair, J., in *Chakkara Kannan* v. *Kunhi Pokker* (1). No doubt *tavazhi* literally means descent through the mother without reference to the father and so the *tavazhi* would strictly include children by both husbands. But a gift by a husband to his wife and his children by her is intended to be enjoyed by them only. And they are to enjoy as a *tavazhi*. *Kunhacha Umma* v. *Kutti Mammi Haiee* (2). The law in Travancore also is the same. See Mr. Joseph's Marumakkathayam Law, page 231,

(1) 30 Ind. Cas 755; 39 M. 317 at p. 324 (F. B.); 18 M. L. T. 255; 29 M. L. J. 481; (1915) M. W. N. 740.
(2) 16 M. 201 (F. B.); 2 M. L. J. 226; 5 Ind. Dec. (N. S.) 847.

and 2 Travancore Law Journal, page 15, which is on all fours with the present case. See also 5 Travancore Law Report 116 and 22 Travancore Law Journal 239 (F. B.).

Even if the property is gifted directly by the husband, since the donees formed a *tavazhi* and the property stood in the name of the senior male and the senior female of such *tavazhi*, the presumption is that it is *tavazhi* property. See *Mari Veetil Chathu Nair* v. *Mari Veetil Mulamparol Sekaran Nair* (3). See also sections 23 and 24 of the Malabar Marriage Act. And further the property has been in the exclusive enjoyment of the *tavazhi* for long over the statutory period to perfect title by adverse possession. See also *Ettakkamana Manholi Govindan Nair* v. *Amaya Mangalath Puthia Veetil Govindan Nair* (4).

Mr. *K. P. M. Menon*, for the Respondents.—The finding is that there was no gift at least directly by the 2nd husband. So the rights of the *tavazhi* do not arise by virtue of gift. And the ordinary presumption is that when property stands in the name of a junior member it is Tarwad property. See *Kuttaseri Eriat Govindan Nair* v. *Kuttaseri Sankaran Nair* (5). And that presumption has not been rebutted in the present case.

Further, how can there be a *tavazhi* unless it includes all the children by one mother? The alleged donor could as well have expressed any distinction he wanted to make, in the absence of which it must be assumed that it was never his intention to make any difference. See per Sankaran Nair, J., in *Chakkara Kannan* v. *Kunhi Pokker* (1).

There can be no adverse possession by one co-owner against another. And so the finding on that question is right.

JUDGMENT.—Plaintiff sues as Karnavan of Eranhipurath Tarwad to recover the plaint properties from the 8th defendant. The plaint property was acquired in the names of Ooli Amma and Kelu Nair, who is her eldest son by her second husband. Ooli Amma married twice and had some children by her first husband Rarappan Nair, who divorced her. She afterwards married Raman Nair, by whom she had a son Kelu Nair and other children.

(3) 5 Ind. Cas. 143; 33 M. 250; 20 M. L. J. 86; 7 M. L. T. 382.
(4) 15 Ind. Cas. 103; (1912) M. W. N. 821.
(5) 2 Ind. Cas. 183; 32 M 351 (F. B.); 6 M. L. T. 106; 19 M. L. J. 350.

The real question for decision is whether the plaint property belonged to Ooli Amma and all her children by both the husbands, or whether it belonged to her and her children by the second husband alone. The main contention for the respondents is that there could be no separate *tavazhi* consisting of the children by one husband alone. The facts as found are as follows:—The plaint property was acquired in the names of Ooli Amma and Kelu Nair, the son of Raman Nair. The learned Subordinate Judge does not believe plaintiff's evidence that the property was given to Ooli Amma by her first husband Rarappan Nair, and he also finds that it is not proved that it was given to her and her children by her second husband Raman Nair. It is, however, admitted that Raman Nair did give certain properties to his wife and his children by her as is evidenced by Exhibits XVI and XVII, but the plaint property is not included in those documents. We, therefore, see that Ooli Amma had some properties which she got from her husband Raman Nair for herself and his children, as it does not appear that she had any other friends. The presumption would be that any additional property which she obtained was acquired out of the proceeds of the property she so held. The Subordinate Judge merely says that Rarappan Nair might have given something to Ooli Amma. This cannot be treated as a finding, but on the finding that the plaint property is not proved to have been given by Rarappan Nair, we are thrown back on the presumption that the property was acquired with the funds already in Ooli Amma's hands.

There remains the real question for consideration, and that is whether a separate branch of a *tavazhi* can be established consisting of a woman and her children by one husband to the exclusion of the children by another husband. Where property is given to his family by a father, it is held with all the incidents of Tarwad tenure, *Kunhacha Umma* v. *Kutti Mammi Hajee* (2), and this view is based on the presumed intention of the father to benefit his own children. If, therefore, the second husband gives property to his wife and his own children, it is difficult to presume that he intended also to benefit the children by the former husband or even children by a subsequent

husband, in the absence of any expression of such intention. No doubt the word *tavazhi* may be, as suggested by Sankaran Nair, J., derived from *tayor* (mother) and *vazhi* (way), and would naturally include all the descendants of that woman. But even though that is the real meaning of *tavazhi*, it has been held that branches of a Tarwad consisting of persons who have acquired separate property from their father are constituted as *tavazhi* by virtue of the possession of that property. If, therefore, the property was intended for that man's children alone, there is no reason for adding to the branch which is to enjoy that property the children by another husband. The very fact that these *tavazhis* are very frequently called *puthravakkasam tavazhis* leads to the inference that they are not merely descendants of one female but also branches of the family which are benefited by a gift from their father and are thereby constituted as *tavazhis*. In this view there is no real difficulty in supposing that the *tavazhi* of a woman could consist of two branches, one branch made up of children by one husband and the other of children by another husband, and each branch might own separate properties obtained from their respective fathers. This has been recognised by Sadasiva Aiyar, J., in *Chakkara Kannan* v. *Kunhi Pokker* (1) and apparently is the view taken in Travancore. No doubt Sakaran Nair, J., in the same case at page 324* suggests that children born by another husband, would benefit in the gift made by the first husband, and he proceeds on the assumption that a *tavazhi* must consist of a woman and all her children by whomsoever begotten. Srinivasa Iyengar, J., also assumes that a *tavazhi* must consist of a woman and all her children by the various husbands, but he goes on to say that "it is certainly difficult to presume an intention in the first husband to grant the property to his wife's children by another husband. Such cases are likely to occur very rarely." Neither of these learned Judges has considered the possibility of branches within the *tavazhi* and as pointed out by Sadasiva Aiyar, J., when there are branches within a Tarwad there is really no reason why there could not be similar branches within the *tavazhi*. If the possibility of that is conceded, then undoubtedly Ooli Amma and her children by Raman Nair would constitute a separate branch and we think that that was the effect of the gifts in their favour by Raman Nair. If that is so, plaintiff as the Karnavan of the main Tarwad would have no interest in these properties, although he is a descendant of Ooli Amma by Rarappan Nair, and would have no right to interfere with the alienation of the property by members of the branch consisting of the children of Raman Nair.

Apart from this point, there is the question of adverse possession. The plaint property has been dealt with ever since 1875 by the sons of Raman Nair, although at the time these dealings took place there were members of the Tarwad senior to them. In fact at one period Kanaran Nair, son of Ooli Amma by Rarappan Nair, was Karnavan of the Tarwad when the property was dealt with by the children of the other husband, and also later on Benares Govindan Nair was the Karnavan and his claim in respect of other properties of the sub *tavazhi* was disallowed in a suit brought by him. No doubt the learned Subordinate Judge has found that there was no adverse possession by this *tavazhi*. But for coming to this conclusion he has relied upon a proposition for which there is apparently no support on the record, for he says that "it is not uncommon in Malabar to take demises in the names of junior members of the Tarwad." This may be correct, but it is not in evidence in this case, and when it is remembered that the demise was taken in the name of a man who was not only a junior member of the main Tarwad but might be also the Karnavan of a branch, the case bears a somewhat different appearance. The delaying of this property by this *tavazhi* was to the knowledge of the plaintiff's predecessors and apparently of plaintiff himself, and consequently the fact that it has been so dealt with for the last 40 years would constitute adverse possession against the Tarwad of which plaintiff is now the Karnavan.

The appeal must accordingly be allowed and the suit dismissed with 8th defendant's cost throughout.

Appeal allowed.

M. C. P.

*Page of 39 M.—*Ed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 13 OF 1919.

July 21, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

BILASIRAI LAXMINARAYAN—

PLAINTIFF—APPELLANT

versus

CURSONDAS DAMODARDAS—

DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O IX, rr. 8, 9—Dismissal of suit for default—Restoration, application for—Sufficient cause, failure to establish—Inherent power of Court, exercise of—Precedents, value of—Question of fact—Discretion of Court.

Order IX, rule 9 of the Civil Procedure Code, makes it compulsory on a Court to set aside a dismissal under Order IX, rule 8 of the Code, where the plaintiff satisfies it that there was sufficient cause for his non-appearance. This rule, however, does not take away the Court's power to restore the case for any other valid reason. The Court can exercise its inherent jurisdiction for the ends of justice, provided the defendant is amply protected in the matter of costs. [p. 253, col 1.]

The decision of one Judge on the facts before him, that sufficient cause has not been shown for the restoration of a suit, cannot provide a precedent for other Judges on similar applications. [p. 253, col 1.]

On questions of fact or matters of discretion there can be no precedent. Each Judge is entitled to come to the conclusions he thinks right on questions of fact and in matters of discretion. [p. 253, col. 1.]

FACTS appear from the following judgment by

PRATT, J.—This a motion by the plaintiff in Suit No. 1664 of 1918 under Order IX, rule 9.

On the suit being called on for hearing on the 7th January, Counsel applied for an adjournment on the ground that the plaintiff had not appeared. Counsel could give no reason for plaintiff's absence and suggested that he might have succumbed to the prevailing epidemic. The adjournment was refused. Counsel asking for an adjournment is not an appearance [*Hinga Bibee* v. *Munna Bibee* (1)] and Counsel admitted that he did not appear in the suit.

The suit was accordingly dismissed under Order IX. rule 8.

Plaintiff now prays for restoration on the ground that not expecting the suit to be called on so soon he went to fetch a witness. He says he returned a quarter of an hour after the suit was disposed of.

I do not think this is "sufficient cause" under Order IX, rule 9. The plaintiff knew the suit was on the board for the day and took the risk of its not being called on in his absence. I feel bound by the precedent in this Court of the very similar case: *Manilal Dhunji* v. *Gulam Husein Vazeer* (2).

If the plaintiff had moved the Court the same day or asked me to note his presence in Court that day, I might have considered whether there was a case for an order under the inherent jurisdiction of the Court, but he did not do so.

I dismiss the motion with costs.

Mr. *Desai*, for the Appellants.

Mr. *Bahadurji*, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—This suit was called on for hearing on the 7th of January 1919, when Counsel, who had been instructed on behalf of the plaintiff, finding that his client was not in Court to give evidence, asked for an adjournment. The defendant appeared and opposed the application, which was refused, and thereafter the suit was dismissed under Order IX, rule 8. The plaintiff then asked for the restoration of the suit on the grounds mentioned in his affidavit of the 21st of January 1919. In paragraph 4 he said:

"I say that I could not attend the Court in time, as I had been that morning to the firm of Messrs. Sadasuk Gambhirchand to bring with me to Court Mr. Revamal Kasturchand, the Moonim of the said firm, who is my principal witness in this suit. I had been to the said firm to fetch the Moonim at about 11 A. M. but was told that the Moonim was out and would soon return. As I was told that he would soon return I waited for him. The said Moonim returned about 12-30 noon and soon after he returned, I came with him to the Court but I found that the suit was called on and dismissed. As the suit was fourteenth on the Board List for that day, I did not expect it to be called on before 1 P. M."

The learned Judge did not think that the facts alleged in that affidavit provided sufficient cause under Order IX, rule 9,

(1) 31 C. 150; 8 C. W. N. 97.

(2) 13 B. 12; 7 Ind. Dec. (N. S.) 8.

and he said he was bound by the precedent in the case of *Manilal Dhunji* v. *Gulam Husein Vazeer* (2). But it is difficult to see how a decision of one Judge on the facts before him, that sufficient cause has not been shown for the restoration of a suit, can provide a precedent for other Judges on similar applications. On questions of fact or matters of discretion there can be no precedent. Each Judge is entitled to come to the conclusion he thinks right on questions of fact and in matters of discretion. Apart from that I agree with the remarks of the learned Judges in *Lalta Prasad* v. *Ram Karan* (3). Their Lordships say:

"On appeal, we are asked to hold that there was sufficient cause. While we think that it might be difficult to hold that there was sufficient cause in view of the fact that the case was actually called and repeatedly called for 20 minutes in the manner in which cases are called in Mofussil Courts both within the Court room and outside the Court room, so that persons in attendance in the Court compound were sure to hear, we are of opinion that the case is one of those in which the Court may exercise its inherent powers of passing orders necessary for the ends of justice. Nothing in the Code of Civil Procedure can limit or otherwise affect such powers under which, in our opinion, a Court can restore such a case as this on grounds other than sufficient cause for non-appearance. Order IX, rule 9, makes it compulsory on a Court to set aside a dismissal under Order IX, rule 8, where the plaintiff satisfies the Court that there was sufficient cause for non appearance. It, however, cannot take away the Court's power to restore the case for any other valid reason."

I am of opinion that this is a case in which, whether there was sufficient cause or not, we should exercise the inherent jurisdiction of the Court for the ends of justice, provided the defendants are amply protected in the matter of costs.

The plaintiff must pay the costs of the adjournment and any costs caused to the defendants by his non-appearance, including the costs of his application of the 23rd of January 1919. Those must be paid before the suit can be restored. Then he must deposit Rs. 1,000 for the security of defendants' costs, and on those costs being paid and the security given the suit must be restored.

The costs of this appeal to be costs in the cause.

The security to be furnished within three weeks.

HEATON, J.—I concur.

Appeal allowed.

(3) 14 Ind. Cas. 187; 34 A. 423 at p. 423; 9 A. L. J. 666.

MADRAS HIGH COURT.

CIVIL APPEAL NO. 158 OF 1918.

February 6, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswamy Sastri.

MURUKONDA RAMASWAMI—PLAINTIFF—APPELLANT

versus

MURUKONDA LAKSHMIDEVI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Gift to female—Presumption—Construction of document—Absolute words of conveyance, effect of—Deed purporting to be sale in consideration of unpaid marriage present.

Where the words of a gift are capable of conferring an absolute estate, the fact that the donee is a Hindu female will not detract from the grant. It is not necessary that there should be express words to the effect that no restriction is placed on the donee's enjoyment or words expressly conferring rights of alienation. It is enough if, from the whole tenor of the document, it can be gathered that the donor intended that the donee should enjoy the property absolutely. The presumption in favour of a limited grant arises only in the absence of such an intention [p 255, col 2.]

Manika Mudali v. *Muthachi Kavandan*, 30 Ind. Cas. 685; 18 M. L. T. 346: 2 L. W. 857, dissented from.

Mahomed Shumsool Hooda v. *Shewukram*, 2 I. A. 7; 14 B. L. R. 226 (P. C.); 22 W. R. 309; 3 Sar. P. C. J. 505: 3 Suth. P. C. J. 47, explained.

A, a Hindu, by deed of sale conveyed to his wife, *M.*, certain immoveable property, in consideration of a sum of money given on the occasion of his marriage for jewellery, but which sum was spent for the family maintenance. *M.* was put in possession with directions to cultivate the lands, enjoy them and pay the *kist* thereon Some years after *A.*'s death *M.* executed a deed of gift of the property in favour of her daughter, and the present suit was

brought by the reversioners of *A.* for a declaration that the gift would not affect their reversionary interest It was contended that the conveyance to *M.* was not of an absolute estate, but only of an estate to be enjoyed for her lifetime, and, therefore, she was not competent to make the gift:

Held, that the plaintiffs' suit must fail; the facts that the conveyance to *M.* was by means of a deed of sale and that the transferee was given the same rights as the transferor possessed himself, *viz*, the right of one possessing an absolute estate, were strong circumstances indicating that the intention was to pass an absolute estate and the gift, therefore, in favour of the daughter was not open to attack. [p. 255, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Guntur, in Original Suit No. 94 of 1917.

FACTS appear from the judgment.

Mr. *V. Lakshminarayana*, for the Appellant.—The 1st defendant took only a life-interest in the so called sale to her by her husband and she could not convey a larger interest to the 2nd defendant. There is a general presumption in favour of limited grants to Hindu women. The Privy Council have laid down in *Mahomed Shumsool Hooda* v. *Shewukram* (1) that gifts to females should be construed in accordance with the notions and wishes of the Hindus in regard to the devolution and enjoyment of property among the members of their families. Exhibit A is virtually a deed of gift and does not contain express words of alienation by the donee.

Mr. *T. Ethiraja Mudaliar*, for the Respondents.—There is no general presumption of law in favour of limited grants. It is only when the intention of the donor is not fairly clear from the terms of the document that the presumption can be resorted to. In this case there is consideration for the transfer, the transferor's interest is conveyed and there is a general direction to the transferee to enjoy the lands. It is clear that 1st defendant took an absolute estate.

JUDGMENT.

SPENCER, J.—This is a suit to obtain a declaration that the gift deed, Exhibit C, dated 22nd June 1917, which was executed by the plaintiff's step-mother, the 1st defendent, in favour of her daughter, the 2nd defendant, is not binding on the plaintiff's reversionary interest.

It appears that in 1890 the plaintiff and his father, Lakshmanna, became divided. Shortly afterwards in the same year the father executed a document in the form of a sale-deed conveying certain immoveable property in favour of his wife. He died in 1900, and in 1917 the 1st defendant transferred her interest in this property by gift to her daughter by a document which is now attacked as being one not binding on the plaintiff. If the first defendant acquired an absolute right of disposal over the suit property, it follows that the gift in favour of the 2nd defendant will not be open to attack in this form from the plaintiff.

In a previous suit—Original Suit No 814 of 1907 on the file of the Bapatla Munsif's Court—it was decided that the sale by Lakshmanna in favour of his wife had no consideration but that it was not a sham transaction. The question we have to consider is whether by this document (Exhibit A) an absolute estate was conveyed to the 1st defendant or only an estate to be enjoyed for her lifetime. The document recites that as Rs. 200 were given for jewels at the time of the donee's (1st defendant's) marriage and as this sum was spent for the family maintenance, the donor discharges his debt, being unable to pay it in any other manner, by selling the property specified in the deed with the executant's right thereto. He adds that he puts the transferee in possession of this property and he directs that she should cultivate the lands, enjoy them and pay the *kist* thereon. Now in my opinion the fact that this document was executed in the form of a sale-deed is a strong circumstance to show that the transaction was intended to be an absolute one and not to convey a mere life-interest for the transferee's life, as that would not ordinarily be the estate that a sale-deed would transfer without anything being said to the contrary. There is also the fact that the executant says that he conveys the property with his own right thereto, *i. e.*, that he gives the transferee the same right as he possesses himself, which was the right of one possessing an absolute estate.

We have been referred to *Seshayya* v.

(1) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 409; 3 Sar. P. C. J. 405; 3 Suth. P. C. J. 43 (P. C).

Narasamma (2) and other decisions, in which it has been held that in the case of a gift to a Hindu female we must infer an intention of the donor to act in accordance with the notions and wishes of Hindus regarding the devolution and enjoyment of property among the members of their families. That was the effect of the decision of the Privy Council in *Mahomed Shumsool Hooda* v. *Shewukram* (1). That decision has been subsequently considered in several recent cases in this Court, including Appeal No. 1 of 1918 [*Ramachandra Rao* v. *Ramachandra Rao* (3)], Second Appeal No. 2018 of 1917 [*Muthuvenkatanarayanan* v. *Athipandurenga Naidu* (4)] and Second Appeal No. 2298 of 1917. In *Gomattam Ramanuja Aiyangar* v. *Satagopachar* (5) Seshagiri Aiyar, J., stated his opinion to be that where the words of a gift are capable of conferring an absolute estate on a person, the fact that the person is a female will not detract from the grant.

Similarly in Second Appeal No. 2018 of 1917, Sadasiva Aiyar, J., points out that the Privy Council decision in *Mahomed Shumsool Hooda* v. *Shewukram* (1) "should not be taken as laying down the broad proposition that a gift to a Hindu female (and especially to a wife or widow by her husband) should be construed with a prejudice in favour of the view that only a life-interest was intended." The learned Judge said that, in his opinion, no such rule of law should be deduced from the Privy Council decision. In this case even if there were such a general presumption against wives and other female relatives taking more than a life-interest in property, we have here sufficient indication in the document itself that the donor's intention was to pass an absolute interest. I am, therefore, of opinion that the case was rightly decided in the lower Court and that this appeal must be dismissed with costs.

KUMARASWAMI SASTRI, J.—I agree with the conclusion arrived at by my learned brother and his construction of the deed executed by the 1st defendant's husband in her favour.

Having regard to the attendant circumstances which have been pointed out by my learned brother and the terms of the document, I am of opinion that the intention of the donor was to confer on the 1st defendant an absolute estate in the property. The main argument, so far as I can gather, of the appellant is that the document (Exhibit A) should be construed as a deed of gift and as it does not contain express words empowering the donee to alienate the property, it must be assumed that she had only a life estate. There can be no doubt that the observations in some of the earlier decisions of this Court support the view that, in the absence of express words empowering a widow or a limited owner to alienate the property, only a life interest is intended to be created. The later decisions of this Court, however, place a more liberal construction on documents executed in favour of persons who would get only a limited estate under the Hindu Law but for the deed of gift in their favour. A distinction has been drawn between cases where a gift is made to a widow or daughter who but for the gift would be heirs and cases of gifts to females not heirs. So far as the latter are concerned, there is no rule of law which constrains us to hold that in construing gifts in their favour we must start with a presumption that the donor gave property to them with the intention of giving them only a limited interest. The case, however, is different when we find gifts in favour of persons who would, under the Hindu Law, be heirs of the donor or the testator and where no words are used expressly giving them the right to alienate and no indication is given as to the nature of the estate conferred. I do not think there should be express words in a gift or Will to the effect that there should be no restriction placed on their enjoyment or words expressly conferring rights of alienation, if from the whole tenor of the document it can be gathered that the donor or the testator intended that the donee should enjoy the property absolutely. I would respectfully disagree with the view taken in *Manika Mudali* v. *Muthachi Kavandan* (6). I think the cases referred to by my learned brother, Appeal No. 1 of 1918 [*Ramachandra Rao* v. *Ramachandra Rao* (3)], Second Appeal No. 2018 of 1917 [*Muthuvenkatanarayanan* v. *Athipandurenga Naidu* (4)] and Second Appeal No. 2298 of 1917 are clearly in favour of the

(2) 22 M. 357; 8 Ind. Dec. (N. S.) 255.
(3) 52 Ind. Cas. 94; 36 M. L. J. 306; 42 M. 283.
(4) 51 Ind. Cas. 217; (1919) M. W. N. 103.
(5) 24 Ind. Cas. 20; 27 M. L. J. 329.
(6) 30 Ind. Cas. 685; 18 M. L. T. 346; 2 L. W. 887.

view that it is not necessary that in addition to the words indicative of the intention of the donor, the document should contain express powers of alienation. Where, however, a document contains no words indicating the intention of the donor one way or the other and where, from the surrounding circumstances, it is difficult to gather what his intention was, I think the decisions of the Privy Council in *Mahomed Shumsool Hooda* v. *Shawukram* (1) and *Radha Prasad Mullick* v. *Ranee Mani Dassee* (7) are clear and point to the duty of the Court to construe the document in the light of "what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property." The decision their Lordships of the Privy Council in *Radha Prasad Mullick* v. *Ranee Mani Dossee* (7) is, I think, quite clear on this point and leaves no room for doubt as to what the rule of construction ought to be in such cases.

Reference was made to section 8 of the Transfer of Property Act, which is to the same effect as section 82 of the Indian Succession Act. Section 82 of the Indian Succession Act declares that "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended for him," and section 8 of the Transfer of Property Act says: "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof." In *Radha Prasad Mullick* v. *Ranee Mani Dassee* (7) section 82 of the Indian Succession Act was strongly relied upon as showing that an absolute interest passed but their Lordships of the Privy Council pointed out that if, under the terms of the Will, there was an indication to limit the estate section 82 would have no application, and their Lordships came to the conclusion that there was an intention to limit the estate because of the notions which a Hindu would have in giving property to female relations.

If there is a rule of Hindu Law as regards the construction of gifts, section 2 of the Transfer of Property Act would prevent section 8 from being given full effect to. Section 2 provides: "Nothing in the Second Chapter of this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist Law." I am, therefore, of opinion that in cases of gifts by a person to his widow or daughter or other persons, who would under the Hindu Law get only a limited estate, the presumption which the Privy Council pointed out as applicable in *Mahomed Shumsool Hooda* v. *Shewukram* (1) and *Radha Prasad Mullick* v. *Ranee Mani Dassee* (7), would prevent the Court from drawing any inference that the whole estate passed where there are no words in the Will which show that an absolute estate was intended to be conferred. But in construing gifts I think that where there are words which would indicate an intention to the contrary, they should be given a liberal interpretation and an absolute estate should not be cut down because of any presumption. It is not necessary that there should be *express* words giving powers of alienation to confer an absolute estate. In my opinion the plaintiff has failed to prove that the 1st defendant has only a limited estate in the property and she was, therefore, fully competent to convey the property to her daughter and the plaintiff has no right to question the alienation.

The appeal fails and must be dismissed with costs.

M. C. P.

Appeal dismissed.

(7) 35 C. 896; 12 C. W. N. 729 (P. C.); 10 Bom. L. R. 604; 8 C. L. J. 48; 5 A. L. J. 460; 18 M. L. J. 287; 4 M. L. T. 23; 35 I. A. 118.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 285 OF 1915.

April 7, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Leslie Jones.

Musammat SATTO AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AMAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 149—Appeal—Insufficient Court-fee on memorandum of appeal—Permission to make up deficiency, when to granted—Discretion of Court.

Where insufficient Court-fee has been paid on a memorandum of appeal, the Court will not in its

discretion under section 149, Civil Procedure Code, allow the deficiency to be made up on the day of the hearing, unless it is satisfied that some grounds exist for the exercise of its discretion

Where, therefore, a memorandum of appeal had been insufficiently stamped and it appeared that in the lower Court also the plaint was insufficiently stamped but upon objection being taken Court-fees were realized *ad valorem* upon the market-value of the land in suit:

Held, that under the circumstances the mistake was not a *bona fide* one and did not deserve the exercise of the discretion vested in the Court under section 149, Civil Procedure Code.

Saidunnessa v. *Tejendra Chandra Dhar*, 44 Ind. Cas. 398, followed.

Sahib Ji v. *Piru*, 49 Ind. Cas. 188; 10 P. R. 1919, distinguished.

First appeal from the decree of the Senior Subordinate Judge, Shahpur, at Sargodha, dated the 10th November 1914, dismissing the claim.

The Hon'ble Mr. *Fazl-i Hussain*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, the Hon'ble Pandit *Sheo Narain* and Mr. *M. L. Puri*, for the Respondent.

JUDGMENT.—In this and in the connected Appeals Nos. 286 and 287 of 1915 Pandit Sheo Narain on behalf of Amar Singh, the chief defendant respondent, raises the preliminary objection that the memoranda of appeal are insufficiently stamped and asks that the appeals should, therefore, be dismissed. He points out that the stamps on these appeals are Rs. 195, 54-12 and 40 respectively, whereas they should be Rs. ,015, 385 and 285 respectively. In the lower Court the plaints also were insufficiently stamped and upon objection being taken, Court-fees were realized *ad valorem* upon the market-value of the land in suit in each case. The propriety of the lower Court's order in this respect has never been and is not now questioned. Counsel for the appellants say that they are now prepared to pay up the deficient amount of Court fees and ask that the Court should exercise its discretion under section 149, Civil Procedure Code, and allow the balance to be now paid. All the appeals were filed by Mr. Asquith, Pleader, and the contention on behalf of the appellants is that the mistake was his and that they are not to blame. Pandit Sheo Narain, however, urges that the plaintiffs, having had to make up the deficiency of Court-fees in the lower Court, knew perfectly well how much they had to pay upon the memoranda of appeal and that their Pleader also must have known, as he filed copies of the decrees which shewed the amount of Court-fees upon the plaints. He urges that there was gross negligence both on the part of the appellants and on that of their Pleader. He cites the case reported as *Saidunnessa* v. *Tejendra Chandra Dhar* (1). In that case where insufficient Court-fee had been paid on a memorandum of appeal, it was held that the Court would not in its discretion under section 149, Civil Procedure Code, allow the deficiency to be made up on the day of the hearing, unless it was satisfied that some grounds existed for the exercise of its discretion. Of these grounds the principal one is that a *bona fide* mistake was made. It is contended by Pandit Sheo Narain that in the present case no *bona fide* mistake at all was made. For the appellants *Sahibji* v. *Piru* (2) is cited, but in that case the Court was satisfied that the deficiency in the Court-fee was due to a *bona fide* mistake on the part of the appellant's Pleader. The case is distinguishable from the present one. In our opinion *Saidunnessa* v *Tejendra Chandra Dhar* (1) cited by Pandit Sheo Narain is in point and after considering all the circumstances of the case, we do not think that we should exercise the discretion vested in us under section 149, Civil Procedure Code.

We accordingly dismiss the appeals with costs.

Appeal dismissed.

(1) 44 Ind. Cas. 398.
(2) 49 Ind. Cas. 188; 10 P. R. 1919.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 319 OF 1913.

April 29, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Bakewell.

VUPPU SITARAMAYYA—DEFENDANT No. 2—APPELLANT

versus

MINCHULA GOPALAKRISHNAMMA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr.

22 (a), 90—*Civil Procedure Code (Act XIV of 1882)*, ss. 248, 311—*Execution of decree—Attachment, order for Execution petition, dismissal of, for default—Attachment, whether subsists—Sale, application for—Notice to judgment-debtor, failure to issue, effect of—Irregularity.*

The dismissal of an application for the sale of property attached in execution of a decree does not in any way affect the continuance of the attachment. [p. 259, col. 2]

Where there is a subsisting attachment and a Court proceeds to sell the property in pursuance of that attachment, it would not be acting without jurisdiction if no notice is given of the application for an order for sale. The absence of notice is a mere irregularity and does not render the sale null and void. [p. 260, cols. 1 & 2.]

Appeal against the decree of the Court of the Subordinate Judge, Cocanada, dated 15th April 1918, in Appeal Suit No. 92 of 1917, preferred against the decree of the Court of the District Munsif, Cocanada, in Original Suit No. 106 of 1916.

FACTS appear from the judgment.

Messrs. *V. Ramesam* and *U. Rama Rao*, for the Appellant.—No notice is required on an application for sale when a valid attachment has been made. For the essential application in execution is the one for attachment, as execution is started by it; all further applications are only secondary. Compare sections 235, 245 and 248 of the Code of 1882. While the Code provides for notice in cases of attachment, it is silent on the point when dealing with sales. In this Court, the Rules of Practice have been expressly amended providing for a notice before proclamation is drafted. The general rule as to notice is laid down in *Syam Mandal* v. *Sati Nath Banerjee* (1), *Subba Chariar* v. *Muthuveeram Pillai* (2) clearly says that an application like the one in question does not initiate any new execution. See also *Venkataramanamma* v. *Purushottam* (3). *Sheo Prasad* v. *Hira Lal* (4) is exactly in point but it is not followed in this Court.

[ABDUR RAHIM, J.—What do you say is the reason for the amendment of the Rules of Practice? What, if no notice be given?]

Some inaccuracies may creep into the proclamation for sale and may furnish ground for setting it aside.

[Mr. *P. Somasundaram*, for the Respondent.—The attachment has ceased, because a prior application in execution was dismissed. See Exhibit H.]

The attachment does not cease. That has always been held to be the law under the old Code. I. L. R. XXXI Madras and other cases. The new Code, Order XXI, rule 57, expressly provides that the attachment shall cease. Section 243 does not, therefore, apply to the present case.

See also *Malharjan* v. *Narhari* (5), *Raghunath Das* v. *Sundar Das Khetri* (6), *Ambica Pershad Singh* v. *Surdhari Lal* (7), *Paroosh Ram Das* v. *Kali Puddo Banerjee* (8), *Qamar-ud-din Ahmad* v. *Jawahir Lal* (9), *Bommarazu Venkata Perumal* v. *Subramanya Nayani Varu* (10).

Mr. *P. Somasundaram*, for the Respondent.—An application for sale is an independent application in execution and so notice is necessary.

The attachment does not continue. For whether it continues or not is a question of intention.

[BAKEWELL, J.—There is nothing in the old Code to say that you are bound to apply for sale at all.]

Even as regards the preparation of the proclamations I had no notice. Section 248 contemplates personal service of notice.

See *Raghunath Das* v. *Sundar Das Khetri* (6), *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (11), *Sahdeo Pandey* v. *Ghasiram Gyawal* (12).

The omission to give notice is an illegality and not a mere irregularity.

See *Ram Kinkar Tewari* v. *Sthithi Ram Panja* (13), *Dhonkal Singh* v. *Phakkar Singh*

(1) 38 Ind. Cas. 493; 44 C. 954; 24 C. L. J. 523; 21 C. W. N. 776.
(2) 14 Ind. Cas. 264; 36 M. 553; 24 M. L. J. 545.
(3) 24 M. 188; 10 M. L. J. 342.
(4) 12 A. 440 (F. B.); A. W. N. (1890) 103; 6 Ind. Dec. (N. S.) 1026.
(5) 25 B. 337 (P. C.); 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739.
(6) 24 Ind. Cas. 304; 42 C. 72; 41 I. A. 251; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154 (P. C.).
(7) 10 C. 851 (F. B.); 5 Ind Dec. (N S.) 569.
(8) 17 C. 53; 8 Ind. Dec. (N. S.) 574.
(9) 27 A. 334 (P. C.); 2 A. L. J. 397; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 32 I. A. 102; 7 Bom. L. R. 433; 8 Sar. P. C. J. 810.
(10) 31 Ind. Cas. 87.
(11) 20 C. 370; 10 Ind Dec. (N. S.) 251.
(12) 21 C. 19; 10 Ind. Dec. (N. S.) 645.
(13) 46 Ind. Cas. 221; 27 C. L. J. 528.

(14), *Thakur Prasad* v. *Fakirullah* (15), *Bando Krishna Kanbargi* v. *Narsinha Konher Desh Pande* (16), *Bhaguan Jethiram* v. *Dhondi* (17), *Malukchand Ratanchand* v. *Bechar Natha* (18).

Notice is required even in the case where the application is a mere step-in-aid. *Pasumarti Payidanna* v. *Ganti Lakshminarasamma* (19).

JUDGMENT.

ABDUR RAHIM, J.—The whole question in this appeal is whether the suit to set aside the sale held on 29th April 1899 is barred by limitation. The suit was instituted about 15 years from the date of the sale and at the date of the sale, the father of the plaintiff was living. Therefore, the suit will be barred unless the case be treated as a case where the sale is to be regarded as null and void. The learned Subordinate Judge held that the sale was void inasmuch as no notice had been issued under section 248 of the old Civil Procedure Code. That section says that the Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him (*a*) if more than one year has elapsed between the date of the decree and the application for its execution, or (*b*) if the enforcement of the decree be applied for against the legal representatives of a party to the suit in which the decree was made. The second clause has no application and the question is whether under the circumstances notice had to be issued under clause (*a*) and if so, whether the non-issue of notice made the entire proceedings null and void. It is somewhat strange that there is no authority bearing directly upon the point which arises in this connection. Here it appears that attachment was ordered on 1st December 1894 on the application made within one year of the date of the decree. But then this application, which apparently asked not merely for attachment but also for sale, was dismissed on 13th January 1895 for want of further prosecution. But it cannot be doubted that the dismissal of the application did not in any way affect the continuance of the attachment, and we must take it that the attachment subsisted until the date of the sale. After the first application Exhibit H, several other applications were made, Exhibit H, series. The next two applications after Exhibit H were made within one year of the decree, and admittedly no notice is required to be given of those applications under section 248. But the 4th application, Exhibit H 3, was made more than a year after the decree and no notice was issued or served upon the judgment-debtor. It would appear from the finding of the Subordinate Judge that the judgment-debtor had left his village and was living at Vijianagaram and, as often happens in such cases, notice was not properly served. So we may take it that the judgment-debtor did not receive any notice of the application for execution made subsequent to the attachment. But the attachment subsisted and the property was sold under the provisions of section 254 of the old Civil Procedure Code, which says that "any Court may order that any property which has been attached, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same." It may be observed that this section does not speak of any notice being given to the judgment-debtor before the property is actually sold. But if an application comes within the purview of section 248, notice has undoubtedly to be given to the judgment-debtor in the terms of that section, that is, requiring him to show cause why the decree should not be executed against him. Much reliance has been placed on behalf of the respondent on a ruling of the Privy Council in *Raghunath Das* v. *Sundar Das Khetri* (6). But in that case the property of the judgment-debtor had become vested in the Official Assignee after the attachment but before the sale. Their Lordships found upon the facts that the Official Assignee had not been properly brought before the Court and no order binding on him had been obtained, and it was

(14) 15 A. 84 (F. B.); A. W. N. (1893) 36; 7 Ind. Dec. (N. S.) 770.

(15) 17 A. 106 (P. C.); 5 M. L. J. 3; 22 I. A. 44; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393.

(16) 17 Ind. Cas. 210; 37 B. 42 at p. 50; 14 Bom. L. R. 841.

(17) 22 B. 83; 11 Ind. Dec (N. S.) 637.

(18) 25 B 639; 3 Bom. L. R. 275.

(19) 29 Ind. Cas. 314; 38 M. 1076; 28 M. L. J 525.

upon that ground that they held that the Court had no jurisdiction to sell the property so as to bind the Official Assignee. The property having vested in the Official Assignee, it was necessary that he should be properly before the Court, otherwise an order for sale would not bind him so as to affect the rights of other creditors. That comes clearly under clause (*b*) of section 248. Their Lordships do not lay down that the absence of notice in any other case coming under section 248 would make the proceedings in execution null and void, being held without jurisdiction. The ruling of the Calcutta High Court in *Syam Mandal* v. *Sati Nath Banerjee* (1) by Mookerjee and Cuming, JJ., has also been relied on before us. The learned Judges, however, do not appear to have noticed that in the Privy Council case the Official Assignee in whom the insolvent judgment-debtor's property had vested was not properly before the Court, while in the case they had to deal with the proper parties were apparently represented in the proceedings. Further, it was not a case where there was a subsisting attachment. It has been repeatedly pointed out that there is a distinction in law between an application for execution and an application for taking a step-in-aid of execution [*Venkataramanamma* v. *Purushottam* (3) and *Subba Chariar* v. *Muthuveeram Pillai* (2)]. Here the object of the application made after the attachment was to take a step in furtherance of an execution already initiated and even if we assume that such an application should comply with the provisions of section 235 of the old Civil Procedure Code, the further question remains whether failure to give notice of an application, made in order to bring the property to sale after attachment, goes to the root of jurisdiction of the executing Court or is merely an irregularity making the sale liable to be set aside under section 311 of the old Civil Procedure Code. It seems to us difficult to hold when there is a subsisting attachment that a Court proceeding to sell the property in pursuance of that attachment would be acting without jurisdiction, if no notice was given of the application for an order for sale when the property has been attached in accordance with law. It is not contended that the property in dispute was not so attached in this case. It may be presumed that the judgment debtor knew of the attachment, and as he was properly before the Court in the execution proceedings, the absence of notice of any further application can at the worst amount only to an irregularity. It seems to us, therefore, that the sale in this case cannot be said to be null and void.

Then the learned Pleader for the judgment-debtor further argued that this is a case of fraud and, therefore, the suit would be in time as the plaintiff came within three years of the date when the fraud came to his knowledge. No such case was really sought to be made in the Court of trial. Issue No. 2 does not raise any question of fraud and the plaint, so far as we can judge from the summary of it, does not contain any specific allegations of fraud. The Subordinate Judge, no doubt, in one or two places in his judgment says that the judgment-creditor acted fraudulently in not serving the judgment-debtor with notice. But in this he seems to have gone further than the issues properly raised in the case. As the sale was not void and as there was no case of fraud, the suit is clearly barred as it was instituted 15 years after the date of the sale which, as already mentioned, took place in the lifetime of the plaintiff's father.

The result is that the appeal must be allowed, the judgment of the Subordinate Judge reversed and that of the District Munsif restored with costs here and in the lower Appellate Court.

BAKEWELL, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 810 OF 1918.

June 23, 1919.

Present :—Mr. Justice Newbould.

BARKAT ALI AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

DAS (DOST) KAZI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11—Civil

BARKAT ALI v. DAS KAZI.

Procedure Code (Act V of 1908), O. XXI, rr. 58, 61, 63—Execution of decree—Claim, dismissal of—Order, whether affects persons not parties to proceedings—Landlord and tenant—Occupancy tenant claiming by virtue of settlement from co-sharer landlord, position of—Co-sharer landlord, right of, to make settlement.

R. had two sons *S.* and *I. S.* had two sons, defendants Nos. 9 and 10, and *I* had two sons, defendants Nos. 11 and 12. *R* devised his properties to his four grandsons in equal shares. Plaintiffs obtained a settlement of an 8-annas share in the tenure from defendants Nos. 9 and 10. Subsequently in execution of a money decree against *S.* and *I.* the whole tenure was sold after the claims preferred by the defendants Nos. 9 to 12 were rejected. No suit was brought to set aside the order in the claim case. In a suit by the plaintiffs, who were not parties to the claim case, for a declaration of their occupancy right in the 8-annas share of the disputed property:

Held, (1) that defendants Nos. 9 and 10 were, as co-sharer landlords, entitled to make a settlement proportionate to their share; [p. 262, col. 1.]

(2) that though the order in the claim case and Article 11, Schedule I of the Limitation Act, were a bar to a suit by the defendants Nos. 9 and 10, the plaintiffs in the present case were entitled to prove that at the time of the settlement defendants Nos. 9 to 12 had a good title to the interest claimed by them; [p. 262, col. 1.]

(3) that Article 11 of Schedule I to the Limitation Act could have no application to the present suit, as the plaintiffs were no parties to the claim case. [p. 262, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Tipperah, dated the 19th January 1918, reversing that of the Munsif, 1st Court at Brahmanbaria, dated the 11th January 1917.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Gopal Chandra Das*), for the Appellants.—Defendants Nos. 1 and 2 are the appellants. The appeal arises out of a suit for declaration of plaintiffs' 8-annas *ryoti* right to a plot of land and recovery of joint possession with defendants Nos. 1—8. The plaintiffs' allegation was that defendants Nos. 9—12 settled 8annas with the plaintiffs in 1314, since when they had been in possession till 1321, when the defendants brought a section 9 case against them, which was decreed. Hence the suit. Our case was that the original tenant's son executed a Kobala for the entire *ryoti* interest in our favour and that he has been recognised by the landlord and has been in possession. The plaintiffs having dispossessed him, the section 9 case was brought. The first Court dismissed the suit. The lower Appellate Court decreed it.

My points are:—(1) That by the alleged settlement of the 8 annas from defendant No. 9, the plaintiffs could not and did not acquire any title under the law. See *Kader Bakhsh* v. *Ram Manikya Das* (1). (2) In view of the fact that no suit was brought by defendants Nos. 9 and 10 to set aside the order in the claim case, they had no subsisting title at the time of the suit. Order XXI, rule 63, Civil Procedure Code, is clearly in my favour. They ought to have brought a fresh suit and until this is done, the order in the claim case is conclusive. (3) In any view of the case the defendants Nos. 9 and 10 having effected a compromise giving them a title only to a 4-annas share, they can have no right to the whole land.

Babu *Gobinda Chandra De Roy* (with him Babu *Monomohan Banerjee*), for the Respondents.—It was not shown before the lower Appellate Court how title was extinguished. The first point was not formulated in the Court below Supposing Article 91 of the Limitation Act governs the case, my learned friend's argument is infructuous. The execution proceedings were against the sons of Ram Gopal. The execution sale is a nullity, because the property was Ram Gopal's. As regards the other point, two of the grandsons of Ram Gopal settled the properties with me. It does not stand to reason that I should be no *ryot* because all the co-sharers did not join in settling the land.

Dr. *Basak* replied briefly.

JUDGMENT.—The plaintiffs brought this suit for declaration of their occupancy right in 8-annas share of a certain piece of land and for joint possession thereof with defendants Nos. 1 to 8.

It is found that the land in suit originally belonged to one Ram Gopal. Ram Gopal died leaving two sons Sarat Chandra and Ishan Chandra Sarat Chandra had two sons, Mohim defendant No. 9 and Sris defendant No. 10. Ishan had also two sons, Kailash defendant No. 11 and Nibaran defendant No 12. Ram Gopal left a Will and by that Will his property descended not to his sons but to his grandsons in equal shares. In May 1907 the plaintiffs obtained settlement of the 8 annas interest from the two grandsons of Ram Gopal

(1) 19 Ind. Cas. 395.

defendant Nos. 9 and 10. About this time a money decree was obtained against the two sons, Sarat and Ishan. In execution of that decree the tenure which had belonged to Ram Gopal was attached as belonging to his sons, and his grandsons preferred a claim which was rejected. The whole tenure was sold on the 20th August 1908 and purchased by the defendant No. 11. No suit was brought to set aside the order in the claim case. Subsequent to the auction sale defendants Nos. 1 to 8 obtained a *raiyati* settlement from the defendants Nos. 11 and 12. The suit brought by the plaintiffs was dismissed in the Court of first instance, but has been decreed in the lower Appellate Court.

Three points have been argued in second appeal. The first is that the settlement by undivided 8-annas landlords cannot give the plaintiff any title. In support of this contention reliance is placed on an unreported case, Second Appeal No. 3402 of 1910 [*Kader Bakhsh* v. *Ram Maniyar Das* (1)] decided by a Bench of this Court on the 24th February 1913. That decision does not support the appellants' contention. In that case settlement was made by a person claiming the right to make settlement of a share in the land in which he had in fact no such right. The settlement was made in good faith and it was held that as the settlement was made by an undivided co sharer landlord, the principle of *Binad Lal Pakrashi* v. *Kalu Pramanik* (2) could not apply. It was not held in that case that a person who really had the right of a co sharer landlord could create no rights in a tenant with whom he made settlement proportionate to his interest.

The next point taken is that as no suit was brought by the defendants Nos. 9 and 10 to set aside the order rejecting their claim in the execution case, they had no subsisting title to the land at the time of this suit. But though this order in the claim case and the provisions of Article 11, Schedule I to the Limitation Act, would bar a suit by defendants Nos. 9 and 10, I see no reason why the plaintiffs in the present suit should not be allowed to prove that at the time the settlement was made with them the plaintiffs had a good title. They were no parties to the claim case and the provisions of Article 11 cannot apply to this suit. They have been able to show to the satisfaction of the lower Appellate Court, which is the final Court of fact, that when the settlement was made these defendants had a good title to the interest they claimed. The effect of failing in the claim case and omitting to sue within the time of limitation may deprive these defendants of their former title, but it cannot take away the right previously created by them in favour of the plaintiffs.

The last point urged is that on the case made, the defendants Nos. 9 and 10 after the failure of their claim case effected a compromise with defendants Nos. 11 and 12 and were content to accept 4 annas share only in settlement of their dispute and that consequently the plaintiffs at the most can only claim 4-annas share. This contention fails on the same ground as I hold the second contention fails, that is to say, the interest of the plaintiffs was not affected by the subsequent conduct of their lessor.

These are the only three points taken in this appeal; and I accordingly dismiss it with costs.

Appeal dismissed.

(2) 20 C 703 (F. B.); 10 Ind. Dec. (N. S.) 477.

MADRAS HIGH COURT.

APPEALS Nos. 254, 286, 375, 415, 416 AND 417 OF 1917.

February 19, 1919.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

KADIRI KANAKKAPILLANTAKATH ABDUREHEMAN KUTTI HAJI, MANAGING PARTNER OF M KUNHI KADIRI AND SONS, CANNANORE, AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KOCHIPALLI HUSSAIN KUNHI HAJI, KARNAVAN AND MANAGER OF KOCHIPALLI TARWAD AND OTHERS—DEFENDANTS—RESPONDENTS

Malabar Law—Tarwad, *incidents of*- Karnavan, *right of, to carry on trade out of* tarwad *assets—Trade carried on by member Right of succession by* tarwad—*Continuance of trade by* karnavan—*Liability of* tarwad *for debts contracted in course of trade—Malabar Wills Act (Mad. V of* 1898*), s.* 9—*Validity of oral bequests.*

The pursuit of trade does not come within the ordinary powers of a Malabar *karnavan*, nor is trade the chief occupation or *kolachar* of the Nairs or Moplahs of Malabar. [p. 265, col 2; p 269, col. 1.]

The members of a *tarwad* are liable for debts contracted by the *karnavan* in the course of a trade carried on by him, if it is proved either that the business was a family business or that the members consented to the trade being carried on for and on behalf of the family. [p. 267, col. 2.]

Though it is the exception and not the rule to find a *karnavan* conducting a trade on behalf of the *tarwad*, any profit that might be made by an individual by trading would, on his death, become part of the *tarwad* assets in the absence of a valid bequest by the deceased. [p. 264, col. 1.]

There is no presumption of law that properties acquired by one member of a *tarwad* in his own name belong to the *tarwad* and that is a matter which must be proved like any other question of fact. [p. 269, col. 1.]

The fact that the male members of a *tarwad* habitually pursue trade as their occupation would not in itself make the trade which an individual member carries on on his own account and which, on his death, is inherited by the *tarwad*, a family concern, unless the *tarwad* inheriting the assets of the deceased member's trade can be held to have continued it as the business of the *tarwad* through its *karnavan*. [p. 266, col. 2.]

Under section 9 of the Malabar Wills Act all Wills, whether relating to immoveable property or not, must be in writing Oral bequests are invalid. [p. 264, col 2; p. 270. cols. 1 & 2.]

Incidents of a Malabar *tarwad* discussed.

Appeals against the decrees of the Court of the Temporary Subordinate Judge, North Malabar at Tellicherry, in Original Suits Nos. 29, 37, 2, 25 and 43 of 1917 and 15 of 1914, respectively.

Messrs. *O. V. Anantakrishna Aiyar* and *T. S. Narayana Aiyar*, for the Appellants.

Messrs. *K. P. M. Menon*, *B. Pocher* and *K. Kuttikrishna Menon*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The main question in these appeals is as to the liability of the Kochipalli Tarwad, of which the 1st defendant Kochipalli Ussain Kunyi Haji is the Karnavan, for debts incurred on *hundis* drawn in the course of a trade which he carried on along with Kotti Kollone Muhammad Kunhi *alias* Mamu Haji, the 2nd defendant in Original Suit No. 15 of 1914 (Appeal No. 417 of 1917), now deceased and represented in the suits subsequently filed by the present Karnavan of the Kotti Kollone Tarwad, Kotti Kollone Pallikunyi. The claim against the latter Tarwad has not been pressed.

The business was conducted in the firm name of "Kochipalli Ussain Kunyi Haji Muhammad Kunyi", the names of the two defendants above mentioned, and the *hundis* were signed in the name of the firm. As found by the Subordinate Judge, trade is the chief occupation of the male members of this Tarwad as it is, I may observe, of many Moplas, and the properties belonging to it were acquired by Kunyi Kuttali Haji, who was Karnavan until 1886, and by Bachikutty, who succeeded him in Karnavanship and held the position till his death in 1908 when he was succeeded by the 1st defendant. Kunyi Kuttiali Haji carried on his business in partnership at first with a stranger and then he and his younger brother Hussain Kunyi bought up that partner's share and Hussain Kunyi became a partner with Kunyi Kuttiali Haji and continued to be so until their business collapsed in 1901. Hussain Kunyi was not at the time the next in succession to Kunyi Kuttiali Haji but was only a junior Anandravan, the senior Anandravan being Bachikutty. That the business of Kunyi Kuttiali Haji and Hussain Kunyi did not belong to the Tarwad but belonged to them personally cannot be doubted and has not been seriously, disputed before us. It is sufficient in this connection to refer to the proceedings in Original Suit No. 485 of 1903, which was a suit instituted by Bachikutty claiming the shop in which the trade was conducted as belonging solely to Kunyi Kuttiali and that on his death it lapsed to the Tarwad. It was never contended that the shop belonged to the Kochipalli Tarwad. The other evidence in the case also amply bears out that the business which Kuttiali Haji carried on did not belong to the Tarwad. It is settled law that the self acquisitions of a member of a Tarwad fall at his death to be inherited by the Tarwad or, otherwise expressed, lapse to it. [See the Full Bench decision in *Govindan Nair* v. *Sankaran Nair* (1).]

Bachikutty during the lifetime of the then Karnavan, Kunyi Kuttiali, had a separate business of his own and apparently in his own name, since 1878. It is not seriously contended before us that that business belonged to the Tarwad and it could hardly have been so contended, considering that Bachikutty being an

(1) 2 Ind. Cas. 183; 32 M. 351; 19 M. L. J. 350; 6 M. L. T. 106 (B.)

Anandravan, he would not have the authority to carry on any trade on behalf of the Tarwad. When he died, all his properties including the assets of the business were inherited by the Kochipalli Tarwad of which he was a member. It may be taken to be proved that the 1st defendant, who became the Karnavan on Bachikutty's death, continued Bachikutty's trade along with Bachikutty's son the 2nd defendant, who, as already stated, is a member of a different family. This is the finding of the Subordinate Judge and it is amply supported by the evidence and the facts of the case. The 1st and the 2nd defendants purported to have acquired Bachikutty's business under an oral bequest from Bachikutty, and these two persons obtained a succession certificate to collect the debts due to Bachikutty. In that petition, Exhibit U, they alleged that "the deceased made a verbal Will on the 22nd of April 1908 (*i.e*, shortly before his death) that the outstandings due to him should be collected by the 1st petitioner, the direct Anandravan of the deceased and the present Karnavan of the Tarwad (meaning the 1st defendant), and the 2nd petitioner, the son of the deceased, and that the business of the deceased should be conducted jointly by the two petitioners together". It does not appear that there was any opposition on behalf of any of the members of the Kochipalli Tarwad to the petition; and on the strength of the alleged Will and the certificate so obtained the 1st and 2nd defendants, members of the two different Tarwads, continued to carry on Bachikutty's trade. The debts now in question were incurred in the course of that business by the first two defendants, for it is proved that when Bachikutty died he left no debts.

In the absence of a valid bequest the trade assets, including the outstandings and the goodwill, if any, would be inherited by the Tarwad and there can be little doubt that the alleged oral Will of Bachikutty, if true, is not valid. The provisions of the Malabar Wills Act, V of 1898, are, to my mind, clear on the point. Section 9 of that Act says, "All Wills and codicils made on or after the date of the commencement of this Act within the Presidency of Madras, and all such Wills and codicils made outside the said Presidency, so far as they relate to immoveable property situated within the said Presidency, must be executed according to the rules" laid down therein. And those rules contemplate that the Will must be in writing and signed by the testator and attested by two or more witnesses. The contention on behalf of the respondent that only Wills relating to immoveable property are required to be in writing is manifestly untenable, because that section and other sections of the Act undoubtedly imply that all Wills made within the Presidency, whether relating to immoveable property or other properties, must be made in writing. And it may be taken that so far as the 1st defendant the Karnavan of the Kochipalli Tarwad is concerned, the Tarwad having inherited the assets of the business in the absence of a valid bequest, he as Karnavan could not acquire any right to it by adverse possession against his Tarwad. That would not apply to the 2nd defendant, who is a stranger to the Tarwad. The question, however, now is, not as to the right of the Tarwad to the assets of Bachikutty's trade, but as to their liability for debts incurred in the course of the trade by the 1st defendant and the 2nd defendant. The properties of the Tarwad, which are sought to be made liable for these debts, were not acquired by the 1st defendant or by him and the 2nd defendant with the profits of the business but had been acquired mainly, as already stated, by the two preceding Karnavans, Kunyi Kuttiali Haji and Buchikutty, with the income of their private and separate businesses.

The question, therefore, that has to be determined is whether the Karnavan of a Malabar Tarwad is entitled to carry on a trade on behalf of the Tarwad and thus saddle the Tarwad with liabilities arising in the course of that business. It is a significant fact that neither the learned Pleader for the appellants nor the learned Counsel for the respondents has been able to bring to our notice a single instance of a Malabar Tarwad carrying on trade in its corporate capacity. On the other hand, there are numerous instances in this Presidency of trading families governed by the ordinary Hindu Law, in fact there are trading castes like Nattukottai Chetties in which most families carry on trade as the concern of

the entire family. In such cases, all the properties of the family which may and often do consist of minors are liable for trade debts. The nature of the liability of a member of a joint Hindu family for debts incurred in the course of an ancestral trade was fully discussed by Chief Justice Sausse of the Bombay High Court in the oft cited case of *Ramlal* v. *Lakhmichand* (2), and the law laid down there may be taken to be the accepted law in all the Presidencies. It is stated at page LXXI, "the case of *Petumdoss* v. *Ramdhone Doss* (3) before Sir L. Peel is an authority that an ancestral trade, like other Hindu property, will descend upon the members of a Hindu undivided family; and we think that such a family can, by its manager or its adult members acting as managers, enter into co-partnership with a stranger. In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to and flowing out of the *carrying on* of that trade, whether it be singly or with a co-partner. The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade." In that case the trade was carried on by a Hindu widow, who had succeeded to it as the heiress of her deceased husband. To the same effect are the rulings of this Court: See *South Indian Export Company* v. *Subbier* (4) and *Malaiperumal Chettiar* v. *Arunachalla Chettiar* (5). See also *Joykisto Cowar* v. *Nittyanund Nundy* (6). In *Raghunathji Tarachand* v. *Bank of Bombay* (7) Chandavarkar, J., traces the law on the subject to ancient authorities. He observes at page 76:* "According to Hindu Law-givers from Manu downwards, traders formed a part of the Hindu polity, and the profession of trade was meant for the third and last of the twice-born castes, namely, Vaisbyas. The Brahmins and the Kshatrias were allowed to trade only in case of necessity and in times of distress. There are special rules laid down for traders. Where a caste or a joint family takes to trading and that is handed down from one generation to the next and so on, it is called a trading caste or a trading family and trade becomes its duty or practice. In that case the duty or practice is called *kulachara*." Later on at page 81:* "Where a minor is a co-parcener in a joint family, his share in the family property is liable for debts contracted by his managing co-parcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm, the same rule must apply, with this difference that the term *family purpose or purposes incidental to it* must here give way to the expression *trading purpose or purpose incidental to it* having regard to the nature and objects of the family business". On the other hand, the manager of a joint family is not entitled to embark on a new business, that is, which is not a family or ancestral business, and bind the members of the family with liabilities incurred in the course of it. [See *McLaren Morrison* v. *Verschoyle* (8).]

Here what the family of the Kochipalli Tarwad inherited was not a business carried on by Bachikutti as Karnavan of the Tarwad but only a private and separate concern of his own. Therefore, it could not be said that the present case falls within the principle of the rulings above mentioned Even supposing that that principle could be applied to a Malabar Tarwad, it cannot be said that trade is the chief occupation or *kuluchara* of the Nairs, who mainly form the community in which the legal conception of a Tarwad is the peculiar feature of the family system. One of the earliest cases in regard to the competence of a Karnavan to engage in commercial pursuits on behalf of the family was raised in Original Suit No. 14 of 1874 on the file of the Subordinate Judge of North Malabar—Mr. K Kunjan Menon. That learned Judge held: "It is clear that as a

(2) 1 B. H. C. R. App. Li (51.)
(3 Taylor Rep. 279; 2 Ind Dec (o. s.) 168.
(4) 29 Ind. Cas. 957; (1915) M. W. N. 489; 28 M. L. J. 696.
(5) 41 Ind. Cas. 221; 6 L. W. 417.
(6 3 C. 738 at p. 740 (F. B.); 2 C. L. R. 440; 3 Ind. Jur. 117; 1 Ind. Dec. (N. S.) 1053.
(7) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.
(8) 6 C. W. N. 429.

*Pages of 34 B.—*Ed.*

rule the coffee or cardamom trade is not within the ordinary scope of a Karnavan's authority. It was simply a private concern which he chose to carry on. A Karnavan is simply a manager of the common property of the members of the Tarwad who are all joint tenants with him. This position entitles him to pledge their credit for all purposes requisite for the performance of the said duty and no further. The carrying on of a trade like this was clearly without the ordinary duty of a Karnavan and any liability he has incurred in the carrying on of it must be presumed to be an individual one." The judgment of the High Court in the appeal against the Subordinate Judge's decree is not available, but the above propositions were apparently confirmed as the decree would show.

A similar question arose in another case, Suit No. 145 of 1885, which came up on second appeal to the High Court. This Court directed the Subordinate Judge who had heard the first appeal to try two issues, "whether the trade carried on by the Karnavan was carried on with the knowledge and consent of the Tarwad", and "whether the amount secured by the bond sued on was borrowed by the Karnavan for the purpose of that trade." Mr. K. Kunjan Menon in his finding on the issues remitted to him observed in that case: "His evidence, read as a whole, would clearly lead to the conclusion that the trade he carried on was his own private trade, and mercantile pursuits do not usually fall within the scope of the ordinary duties of a Malabar Karnavan. * * *. He does not say that any part of the plaintiffs' money was utilised by him for his own trade, and there is nothing to show that the trade he carried on was a family trade or that the other members assented to his carrying on such trade. * * *. Even granting that this explanation is false, the mere fact that the Anandravans of a Tarwad had agreed to pay off a portion of a trade-debt contracted by their Karnavan cannot, in itself, render the Tarwad liable for all his debts contracted in such trade, unless there is clear evidence that the trade was a family trade or that the other members were assenting parties to such trade, and, as the evidence now stands, I have no alternative but to return a finding in the negative on both the issues remitted to me for trial." That finding was accepted by the High Court and a decree was passed accordingly. The fact that the male members of a particular Malabar Tarwad habitually pursue trade as their occupation, would not in itself make the trade, which an individual member carried on on his own account and which on his death is inherited by the Tarwad, a family concern unless the Tarwad inheriting the assets of the deceased member's trade can be held to have continued it as the business of the Tarwad through its Karnavan. Can, then, the Karnavan at his option and without any special authority or consent of his Tarwad carry on such a trade on behalf of the family and not merely for the purpose of winding it up? That again depends on the more general question whether the carrying on of trade is within the scope of his ordinary authority as Karnavan.

The legal incidents of a Malabar Tarwad differ in some important respects from those of an ordinary joint Hindu family. In the case of the latter, each member of the family has a share in the family properties, which he can enforce by partition and which he can alienate at least according to the law in this Presidency. The member of a Malabar Tarwad is not entitled to any share and he cannot sue for partition. All that he is entitled to is maintenance from the family properties. But neither the manager of an ordinary joint Hindu family nor the Karnavan of a Tarwad can alienate the family property without necessity. It may be said generally that, as regards the disposal of the income, the Karnavan of a Tarwad has a much larger discretion than the manager of a joint family. The ordinary function of a Karnavan, however, is to manage the family property to its best advantage and maintain the members of the Tarwad in a manner benefiting the position of the Tarwad. The law is well summarised in one of the older decisions of this Court in these words: "In cases where the Marumakkathayam rule of inheritance prevails, the property is considered indivisible, the management thereof and the collection of the rents and income being invariably vested in the senior

male, on whom devolves the duty of providing for the support and maintenance, as far as the funds will admit, of the other branches of the family, especially of the woman and children." (See Moore's Malabar Law, page 95.) Then at page 99 the learned author cites another judgment of the High Court (Kernan and Kindersley, JJ.), in which the position of a Karnavan is thus described: "In him (*i. e*, the Karnavan) is vested actually (though in theory in the females) all the property, moveable and immoveable, belonging to the Tarwad. It is his right and duty to manage alone the property of the Tarwad, to take care of it, to invest it in his own name (if it be moveable) either on loans on Kanom or other security, or by purchasing in his own name lands, and to receive the rent of the lands. * * * . His management may not be as prudent or beneficial as that of another manager would be, but, unless he acts *mala fide* or with recklessness or incompetency, he cannot be removed from such management. Almost the only restraint on him in such management is that he cannot alienate the lands of the Tarwad." In *Kunhamad Hajee* v. *Kuttiath Hajee* (9) this is how the law is stated by Turner, C. J., and Muthusami Aiyar, J.: at page 175: "The respect for elders, which is a marked feature of all Hinduism, is nowhere stronger than in Malabar, and, consequently, although the individual interest of the manager of a Tarwad in Tarwad property is considerably less than that of a manager of a Hindu family, he has, in the management of the Tarwad property, somewhat larger powers than are accorded to a Hindu manager. While, equally with the manager of a joint Hindu family, he is incompetent to alienate the estate without the consent of the other members of the Tarwad, except to supply the necessities of the Tarwad or to discharge its obligations, he cannot only make leases at rack-rents ordinarily for the term of five years for cultivation, but also leases with fines repayable on the expiry of the terms, in the nature of mortgages (Kanoms and Ottis) in which little more than a right to redeem may be left to the family."

I am unable to find that the pursuit of trade comes within the ordinary powers of a Malabar Karnavan within the rule enunciated in the passages I have cited. I take it, therefore, that the unreported cases referred to above correctly indicate the circumstances in which the members of a Tarwad can be held to be bound by debts contracted by a Karnavan in the course of a trade carried on by him; that is to say, it must be shown that the business was a family business as explained above or that the members of the Tarwad consented to the trade being carried on on behalf of and for the family. As regards such consent, the presence of minors in the family would give rise to difficulties. But assuming that the consent of the adult members would be sufficient—and as at present advised, I am rather inclined to think it would—I have to see whether the evidence in this case makes out such a consent. There is no evidence to show that any of the Anandravans took part in the business or helped the 1st defendant in the conduct of it. The defendant, however, tried to suppress the accounts and it was only two days before the closing of the case that they were produced. The writer of the accounts examined by the plaintiff, as observed by the learned Subordinate Judge, was not willing to render any assistance to the plaintiff. From the accounts, such as they are (Exhibit A series), it is difficult to come to a definite conclusion that the proceeds of the business were used for the benefit of the members of the family. That some portion of the income might have been so utilised by the 1st defendant who was the Karnavan may be taken for granted. But without any clear evidence as to the amount of the income from the business which was so spent, or the way in which it was spent, for the benefit of the family and as to whether any of the members were aware of the source from which such moneys came, it is not possible to draw any very definite conclusion. The only other evidence on which reliance is placed on behalf of the appellant consists of certain statements made by the 1st defendant. In Exhibit EE, a power-of attorney executed by him in favour of the 2nd defendant in 1912, there is a passage to this effect: "As I desire to go to Calcutta on trade business, I hereby entrust you to manage till my return all properties, moveable and immoveable, and also all trade concerns that appertain to

(9) 3 M. 169, 1 Ind. Dec. (N. s.) 675.

Kochipalli Tarwad and to cause the same to be managed and conducted; and you have undertaken to do this, and you are to conduct my trade business with my partners and cause the same to be conducted, to conduct renewals of Tarwad properties, etc." This cannot be said to be at all a clear statement that the trade belonged to the Tarwad. Then in Exhibit XI, which is a power of attorney executed in the year 1910, he speaks of "our joint trade" which would *prima facie* read as belonging to himself and the 2nd defendant. It has already been noticed that soon after the death of Bachikutti he and the 2nd defendant obtained a succession certificate on the allegation that the trade had been bequeathed to them by Bachikutti and not bequeathed to them on behalf of the Tarwad. Upon these facts, though the matter is not free from doubt, I am not prepared to differ from the conclusion of the learned Subordinate Judge that it was not proved either that the trade which gave rise to these liabilities was a family business or that it was carried on by the 1st defendant with the consent of the members of the Tarwad. There is also evidence, as pointed out by the Subordinate Judge, that the plaintiff and other creditors who dealt with the defendants Nos. 1 and 2 acted under the belief that the trade carried on by them was their separate trade.

I, therefore, concur in the conclusion of my learned brother, whose judgment I have had the advantage of reading, that the appeals should be dismissed with costs.

The memoranda of objections are not pressed and are also dismissed with costs.

SPENCER, J.—The outstanding question in all these appeals is whether the trade conducted by the 1st and 2nd defendants, who are the Karnavans of Kochipalli and Kottikollen Tarwads respectively, was the trade of the Tarwads or whether it was their individual trade. Upon the answer to this question depends the liability of all the junior members of the Tarwads. As the plaintiff did not press his case against the 2nd defendant's Tarwad, we have only to consider the liability of the defendants in respect of the Kochipalli Tarwad. Decrees have been given against the 1st and 2nd defendants personally and the suits were dismissed as against the Tarwads of the defendants.

The history of the Kochipalli Tarwad is given in paragraph 5 of the lower Court's judgment. It appears from this that the trade was started by Kunhi Kuttiyali Haji and that up to 1873 he was trading as a partner with a stranger named Mammi Kutti. Under Exhibit LL he bought out this partner in 1873 and thereafter traded with his own brother Assam Kunhi. Bachikutti joined this partnership. Kunhi Kuttiyali Haji and Assam Kunhi were his cousins, that is to say, his mother's sister's sons. At that time Bachikutti was not the Karnavan of his Tarwad but he became so afterwards. Kunhi Kuttiyali Haji died in 1886, Assam Kunhi in 1907 and Bachikutti in 1908. After Kunhi Kuttiyali Haji's death, Assam Kunhi became involved in debts and his trade collapsed in 1901. Defendants Nos. 1 and 2 continued the trade of Bachikutti after his death and in the course of that trade they executed the *hundies*, Exhibit BB and CC series, which are the subject matter of these suits.

The plaintiff has to prove that the defendants are liable upon these *hundies*. If this were a family with an ancestral trade, it might be presumed that all the members of the family were liable for the trade debts; but we have not been referred to any case of a trading Tarwad with an ancestral trade like the trade of a family of Nattukottai Chetties or Marwaris, in whose case a presumption would generally arise that the entire family credit and the joint family properties were devoted to the business of the family. See *Malaiperumal Chettiar* v. *Arunachalla Chettiar* (5), in which such a presumption was raised in the case of a Nattukottai Chetti family. There are other cases of Nattukottai Chetti families in which similar presumptions have been raised. The Subordinate Judge has found that in this case all the male members of this Tarwad have taken trade as their occupation. But he observes that "in the case of Marumakkathayam Tarwads it should be admitted that Tarwad trade is very rare". The defendants are Mappillas following Marumakkathayam Law. The junior members of a Tarwad cannot compel the Karnavan to partition the family property, nor can they ask him for accounts of the manner in which he spends the family assets. Even in the case of a Hindu family it has been

held in *Vadilal* v. *Shah Khushal* (10) that there is no presumption that all the co-parceners are partners in the business because one of the persons carrying on business is a co-parcener in a joint family, and that partnership has to be proved by evidence of an agreement to combine property, labour and skill in the business and to share the profits and losses thereof. In the case of a co-parcenary it must be shown that at least the family funds were utilized in order to start the business. There is no evidence here that the Tarwad properties were made use of in the first instance. It is only proved that the properties of the Tarwad were required by the trade of the male members. There is no presumption of law that properties acquired by one member of the Tarwad in his own name belong to the Tarwad, and that is a matter which must be proved like any other question of fact, see *Govinda Panikkar* v. *Nani* (11). In the case of families governed by the ordinary Hindu Law there are certain trading castes among whom trade becomes the duty or habit of a particular caste and it is handed down from one generation to the next, and in such a case the trade becomes one of the *kulacharas* of the family, and that fact attracts to itself all the necessary incidents of trade, such is the explanation given by Chandavarkar, J., in *Raghunathji Tarachand* v. *Bank of Bombay* (7) of the origin of trading families. It is difficult to conceive of the existence of a *kulachara* among Mappillas, who are Mussulmans by religion and follow either the Muhammadan or the Marukkathayam Law of succession.

In Appeals Nos. 6, 12, 20 and 21 of 1875 this High Court confirmed a decision of the Subordinate Judge's Court of North Malabar in which the learned Subordinate Judge made several interesting observations on the powers of Karnavans to bind their Tarwads by trade transactions. He said that a Karnavan was certainly not authorised to embark on any hazardous enterprise by the usage obtaining in Malabar families. He observed that any Judge who had any experience in Malabar and who had any idea of the constitution of Malabar Tarwads could not for a moment doubt that the entering into any speculation connected with trade would be, not a duty of a Karnavan's office, but an individual act of a person of an enterprising character and, therefore, it was an exception to the general rule to find Karnavans conducting trading operations on behalf of the Tarwad. On the evidence he found that there was no hereditary trade made out in the case of the family in that suit. But he pointed out that the members of the Tarwad had no power to restrain the Karnavan from carrying on an individual business of his own so long as he committed no misconduct and the law would not make them liable for his private debts. In Second Appeal No. 223 of 1887 the Subordinate Judge's Court of North Malabar returned a finding, in a case where the question was raised 'whether the trade carried on by the Karnavan was carried on with the knowledge and consent of the Tarwad', that the trade carried on in that case was the Karnavan's private trade; and the learned Subordinate Judge observed that "Mercantile pursuits do not usually fall within the scope of the ordinary duties of Malabar Karnavans" and that "the mere fact that the Anandravans of a Tarwad had agreed to pay off a portion of a trade debt contracted by their Karnavan cannot in itself, render the Tarwad liable for all his debts contracted in such trade, unless there is clear evidence that the trade was a family trade, or that the other members were assenting parties to such trade". In a case reported as *Sircar* v. *Unniravi Kunjen* (12) where the Karnavan of a Tarwad rented an Abkari farm jointly with a stranger, it was held that the presumption was that it was not the concern of the Tarwad, but the learned Judge declined to express any opinion upon the general question whether the Karnavan of a Tarwad was competent to bind the family by trade speculations. In the present case the onus clearly lies heavily upon the plaintiff to prove that the trade conducted by the 1st and 2nd defendants, who happened to be the Karnavans of their Tarwads, was in fact the trade of their Tarwads. I will now deal with some of the more important documents. Exhibit EE is a power-of-

(10) 27 B. 157; 4 Bom. L. R. 963.
(11) 21 Ind. Cas. 211; 36 M. 304.
(12) 8 Trav. L. R. 72.

attorney executed by the 1st defendant to the plaintiff's 5th witness. It contains the sentence: "All the powers of management and responsibility regarding all kinds of properties and the trade carried on in the town of Cannanore belonging to my Kochipalli Tarwad rest with me". It is argued that the words 'belonging to my Kochipalli Tarwad' govern both 'properties' and 'trades'. If this were so, it would be a significant admission that the Tarwad owned some interest in the trade conducted by the 1st and 2nd defendants. But the language is ambiguous and the effect is neutralised to some extent by the use of the words 'my trade' and 'my partners' further on in the document. On the side of the defendants there is also the evidence of Exhibits X and XI, which are Muktearnamahs executed by this 1st defendant to Kochipalli Mahamad Kunhi and Kottikollon Mahamad Kunhi respectively two years before Exhibit EE. It is a material fact in defendants' favour that separate documents were drawn up, one in favour of the 1st defendant's Anandravan for the Tarwad property and another in favour of his partner, the 2nd defendant, for the trade which he speaks of as our joint trade. Then there is Exhibit U, an application for a succession certificate which was granted to the 1st and 2nd defendants on the strength of an oral Will made by the deceased Bachikutti to enable them to collect the debts left by Bachikutti. In it Bachikutti is described as the 1st petitioner's Karnavan and the father of the 2nd petitioner. The certificate was granted without any opposition on the part of the junior members of Bachikutti's Tarwad. It is argued that an oral Will made in Malabar would be invalid under the Malabar Wills Act, V of 1898. This Act applies to Wills of all persons governed by the Marumakkathayam or Aliasantanam Law, whether they are domiciled in the Madras Presidency or not. It lays down that Wills executed, by such persons within the Madras Presidency, and even outside the Presidency if they purport to dispose of immoveable property within it, must be executed in a certain manner, namely, the testator must sign or affix his mark to the Will and the attestors, of whom there must be two, must sign in his presence and by his direction. It is not distinctly declared in the Act that oral Wills are not valid. But assuming that that is implied by the language of section 9, the inference of fact to be drawn in this case from the act of the parties would be the same. Bachikutti leaves his trade to be conducted after his death by the 1st defendant who happens to be the Karnavan of his Tarwad and by the 2nd defendant who is a total stranger and belongs to another Tarwad. This is an indication that the trade was not considered by Bachikutti to be a Tarwad trade.

Similarly we find in 1873 Kochipalli Kunhi Kuttiyali severing his connection with his then partner and taking in as partner, not his next Anandravan, but only his younger brother. Exhibit MM series are extracts from the income tax registers, in which a certain amount of income derived by house-rent is included in the income-tax assessment of the 1st defendant and the 2nd defendant's brother (6th defendant in these suits). There is nothing in these documents to prove that the Kochipalli Tarwad admitted their liability to contribute to the income of the firm. The houses upon which house-rent is valid for the purpose of this income-tax case were houses belonging to the Kotti Kollone Tarwad. No inference can be drawn against the Kochipalli Tarwad from this circumstance.

Exhibit Q is a judgment in Original Suit No. 485 of 1903 on the file of the Cannanore Munsif's Court in a suit brought by Bachikutti to recover a shop, and Exhibit R is the appeal judgment in the same case. A question arose whether the plaint property was the self-acquisition of Kunhi Kuttiyali Haji and whether after his death it lapsed to the Tarwad represented by the plaintiff in that suit. The District Munsif found that the shop did not become the property of the Tarwad and that the plaintiff's title, as Karnavan of the Tarwad, to recover it was barred by limitation. The District Judge on appeal also found that the shop belonged to Kunhi Kuttiyali Haji exclusively and dismissed the appeal. Exhibit AA series are the account-books of the firm, but as they have not been properly proved in evidence, no conclusion can be drawn from the entries therein.

On the oral evidence the Judge has come to the conclusion that all the male members

of the Tarwad have taken up trade as their occupation. At the same time he says that there is no reliable evidence that the other members of the Kochipalli Tarwad assisted 1st defendant in this trade. In Exhibit Q, the judgment already referred to, it was found that the Anandravans did assist Kunhi Kuttiyalli Haji in his trade. But the statements of the plaintiff's 6th and 8th witnesses on this important point in this case have been discredited on account of their demeanours and, therefore, we cannot rely upon the fact as proved by the evidence in this case. The plaintiff's 7th witness states that the Tarwad jewels were pledged for trade purposes, but he admits in cross-examination that they were Mamu Haji's wife's jewels. He also says that the 1st defendant admitted to him that the trade belonged to the Tarwad and he states that he has seen the members of the Tarwad taking articles from the shop in the cantonment. But as this witness is the plaintiff in Original Suits Nos. 2 and 29 of 1916 out of which Appeals Nos. 375 and 254 of 1917 have arisen, no weight can be given to his evidence. This man, when getting a conveyance executed for a small portion of immoveable property (see Exhibit F), insists on all the Tarwad joining but not so when he lends money to the extent of Rs. 14,000 to the 2nd defendant's Muktear. Hundis, Exhibit BB and CC series, have been signed by the Muktear of the firm on behalf of the firm. There is no indication from these documents that the Tarwad incurred any liability. In Exhibit DD the 2nd defendant and the 2nd defendant's brother, who was his Muktear, notified to one of the persons with whom they had dealings that they were trading in partnership under the firm name of Kochipalli Hussain Kunhi and Kottikolone Mamed Kunhi, that is, the name of the 1st and 2nd defendants. These two persons belong to different Tarwads. There is no evidence that the Tarwad property has been used or pledged in the business with the exception of the case of the jewels already referred to, as to which there is no clear evidence that the jewels did not belong to the individual women who wore them rather than to the Tarwad as a body.

On the whole I am of opinion that the conclusion formed by the Subordinate Judge that the plaintiff had failed to prove that the trade was that of the Tarwad of Kochipalli was correct. So far as the custom of Malabar Tarwads is known, it would appear to be an exception to the general rule to find a Karnavan conducting a trade on behalf of the Tarwad, though, of course, any profit that might be made by any individual by trading would on his death become part of the Tarwad assets. I must confirm the judgment of the lower Court and dismiss these appeals with costs.

The memoranda of objections have not been pressed and are dismissed with costs.

Appeal dismissed.

Memo. of objections dismissed.

M.C.P.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 544 AND 645 TO 656 OF 1918.

June 26, 1919.

Present:—Mr. Justice Newbould.

RAKHAL CHANDRA CHATTERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHABADEB CHATTERJEE—PLAINTIFF—RESPONDENT.

Bengal Putni Regulation Act (VIII of 1819), s. 11 (3) proviso—Bengal Tenancy Act (VIII B. C. of 1885), ss. 105, 195 (e)—Putni *tenure—Resident hereditary cultivators—Enhancement of rent, whether permissible—Lease fixing rent in perpetuity, effect of*—Bona fide *engagment with* putnidar, *effect of—Occupancy rights, entry of, effect of.*

Resident hereditary cultivators, to whom the proviso to section 11 of the Bengal Putni Regulation of 1819 is applicable, are not liable to pay higher rent on proof of the condition on which their rent is liable to enhancement under the Bengal Tenancy Act. Such tenants are not liable to pay any rent in excess of their engagements with the previous *putnidar*, unless such engagements are cancelled on the ground that they were not made in good faith. [p. 273, col. 1.]

The acceptance of a lease by a resident hereditary cultivator fixing the rent payable by him in perpetuity does not take away the status which he had as resident hereditary cultivator so as to make the rent payable by him enhanceable under the provisions of the Bengal Tenancy Act. [p. 273, col. 1.]

Sheikh Mahomed Assanoollah Chowdhry v. *Shamshir Ali*, 4 C. L. R. 165, *Sarbananda Nath Bhowmik* v. *Rana Gazi*, 21 Ind. Cas. 530; 18 C. L. J. 334, relied on.

RAKHAL CHANDRA CHATTERJEE v. BHABADEB CHATTERJEE.

In the absence of a lease proving a *bona fide* engagement made with the tenant by the previous *putnidar* fixing the former's rent, the tenant as a resident and hereditary cultivator gets no protection from the proviso to section 11 of the Bengal Putni Regulation. [p 273, col 2.]

Where a *putnidar* can only enhance the rent of his tenants by special procedure under the Putni Regulation, he cannot do so by an entirely different procedure under the Bengal Tenancy Act. [p 273, col. 2.]

Where tenants hold land under a lease fixing the rent payable by them in perpetuity, the fact that they have allowed themselves to be entered in the Record of Rights as occupancy tenants does not put an end to their rights under their leases nor does their action amount to estoppel. [p. 273, col. 2.]

Appeals against the decrees of the District Judge, Burdwan, dated the 8th December 1917, affirming the decrees of the Settlement Officer of that district, dated the 29th September 1916.

FACTS appear from the judgment.

Babu *Gunada Charan Sen* (with him Babu *Surendro Nath Das Gupta*), for the Appellants.—These appeals arise out of applications for enhancement of rent under section 105 of the Bengal Tenancy Act. The defendants are not liable to pay enhanced rents, because they are hereditary and resident cultivators within the meaning of section 11 of Regulation VIII of 1819. Refers to the proviso to section 11 of the Putni Regulation. The engagements made between the tenants and the previous *putnidar* fixing the rent in perpetuity are binding upon the parties, and unless those engagements are set aside on grounds mentioned in the Putni Regulation, the rents cannot be enhanced. Their rents cannot be enhanced by proving conditions under which the rent is liable to be enhanced under the provisions of the Bengal Tenancy Act. See section 195 (*e*), Bengal Tenancy Act. Further to enhance the rent of a hereditary and resident cultivator under the Putni Regulation the *putnidar* must adopt a special procedure provided for in Regulation VIII of 1819 and he cannot get enhancement of rent of such tenant by adopting the special procedure under the Bengal Tenancy Act. My submission is that the *putnidar* must bring a regular suit for getting the enhancement of rent after setting aside the engagements made by his predecessor-in-interest.

Dr. *Jadu Nath Kanjilal*, for the Respondent.—So far as Appeal No. 655 of 1918 is concerned, it has not been proved by the defendant in that case that there was any *bona fide* engagement fixing the rent in perpetuity and so the proviso to section 11 of Regulation VIII of 1819 does not apply to that case.

As regards the other appeals, my submission is that when the tenants have been recorded as occupancy *raiyats* and when they have allowed the landlord to treat them as such, they cannot fall back upon their engagements with the previous *putnidar*. They are now estopped from contending that by virtue of the terms in the lease their rent is not enhanceable.

The next point is that after having accepted the leases, the tenants cannot claim the benefit of the proviso to section 11 of Regulation VIII of 1819, because after the acceptance of such leases they cannot claim the rights of resident hereditary cultivators.

Further, the contention of my learned friend that a regular suit is necessary to get the enhancement of the rent has no substance in it, because the rent can be enhanced by means of proceedings under Chapter X of the Bengal Tenancy Act.

Babu *Gunada Charan Sen*, in reply, referred to the cases reported as *Sheikh Mahomed Assanollah Chowdhry* v. *Shamshir Ali* (1) and *Sarbananda Nath Bhowmik* v. *Rana Gazi* (2) to show that after the acceptances of the leases the tenants continued to be resident and hereditary cultivators.

JUDGMENT.—These 13 appeals arise out of the same number of applications for enhancement of rent before the Settlement Officer and subsequent appeals to the District Judge of Burdwan. The applications were made under section 105 of the Bengal Tenancy Act, and the Settlement Officer granted increase of rent at 6 annas in the rupee on the ground of the general rise in price of local food stuffs.

The defendants-appellants' main contention was that they were not liable to pay enhanced rent, as they had leases which gave them the right to hold the land at

(1) 4 C. L. R. 165.
(2) 21 Ind. Cas. 530; 18 C. L. J. 334.

the same rent in perpetuity. There appears to have been some delay in producing them and pleading on the basis of these leases. But they were produced before the parties went to trial and an issue was framed: "Are these *jamas* not liable to enhancement on the ground that *mokarari* right was confirmed under contract by *pattas* granted by previous *putnidars*?" The first Court held that the *mokarari* right created by these leases was an incumbrance from which the *putni* right is free under section 11 of the Patni Regulation, VIII of 1819. The lower Appellate Court held that the Settlement Officer was wrong in treating the defendants as tenure-holders whose rights become voidable on the sale of the *putni* under the Regulation. He held that they were hereditary resident cultivators, to whom the proviso to section 11 of that Regulation was applicable. But he held that that proviso did not protect them from liability to pay higher rent on proof of the condition which made their rents liable to enhancement under the Bengal Tenancy Act.

Here I think the lower Appellate Court was wrong. On the finding that the defendants were resident hereditary cultivators, they were clearly entitled to the protection of the proviso in the 3rd clause of section 11 of the Patni Regulation. That clause provides that nothing contained in the section shall entitle the purchaser of a Taluk to cancel *bona fide* engagements made to such tenants by the late incumbent, except it be proved in a regular suit, to be brought by such purchaser for the adjustment of his rent, that a higher rate would have been demandable at the time such engagements were contracted by his predecessor. The language of the section seems perfectly clear, and in fact the learned Pleader for the respondent has not tried to support the view taken by the District Judge that it is sufficient to prove what is a fair rate allowable at the present moment. It has been proved in all the cases to which these appeals relate except one, and that is Suit No. 1688 of 1892 which corresponds to Second Appeal No. 655 of 1918, that there were engagements made between the tenants and the previous *putnidar*. No suggestion is made that these engagements were not made in good faith, and until these engagements are cancelled, the defendants are not liable to pay any rate in excess of these engagements.

It is contended that these tenants, by allowing themselves to be entered in the Record of Rights as occupancy *raiyats* and by allowing the plaintiff landlord to treat them as occupancy *raiyats*, in effect consented to the cancellation of the engagements under which they were allowed to hold the land at a fixed rate. It seems to me perfectly clear that such conduct on their part could not have the effect of putting an end to their rights under their leases, nor does their action amount to an estoppel.

It is also contended on behalf of the respondent that the tenants, by accepting these leases and becoming *raiyats* at fixed rates, lost the status which they had as resident hereditary cultivators. The answer to this objection will be found in the case of *Sheikh Mahomed Assanoollah Chowdhry* v. *Shamshir Ali* (1) and in the case of *Sarbananda Nath Bhowmik* v. *Rana Gazi* (2). The defendants, being protected by the provisions of this clause, that is, 3rd clause of section 11, are entitled to rely on their leases granted by the previous *putnidar* and are not liable to have their rents enhanced under the provisions of the Bengal Tenancy Act. Section 95 (*e*) provides that the provisions of the Patni Regulation relating to *putni* tenures shall not be affected by the Bengal Tenancy Act. If under this Regulation the holder of a *putni* can only enhance the rent of his tenants by special procedure under that Act, he cannot do so by an entirely different procedure under the Bengal Tenancy Act. Further, even if it be held that a proceeding under section 105 for enhancement of rent is equivalent to a regular suit referred to in this proviso to section 11, it must be held that the plaintiff cannot succeed in this suit as he had produced no evidence whatever to show that a higher rate of rent would have been demandable at the time when the permanent leases were granted.

In Appeal No. 655 of 1918 already referred to, in the absence of a lease it cannot be held that there was any *bona fide* engagement proved to have been made with the tenant permanently fixing his rent. In the absence of proof of such engagement the tenant as a resident and hereditary cultivator gets no protection from this proviso.

In the result, therefore, Second Appeal No. 655 of 1918 is dismissed with costs. The remaining Appeals Nos. 544, 645 to 654 and 656

of 1918 are decreed, the judgments and decrees in these cases are set aside and the suits dismissed with costs in all Courts.

I assess the hearing fee in each case at one gold *mohur*.

Appeal No. 655 *dismissed*;
Remaining appeals allowed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 173 OF 1916.

April 24, 1919.

Present:—Sir John Wallis, KT., Chief Justice, Justice Sir William Ayling, KT, and Mr. Justice Sadasiva Aiyar.

VAITHINATHA PILLAI—PLAINTIFF No. 1—APPELLANT

versus

KUPPA THEVAR AND OTHERS—DEFENDANTS NOS. 1, 3, 4, 5 AND 6—RESPONDENTS.

Civil Procedure Code (Act V of 1908, s. 100, O. XLI, r. 27—Additional evidence, refusal of Appellate Court to admit—Appeal, second—High Court, interference by.

Per *Wallis, C. J.* and *Ayling, J.* (*Sadasiva Aiyar, J.* dissenting.—The High Court cannot, in second appeal, interfere with an order of a lower Appellate Court rejecting an application made to it by a party to the appeal before the hearing of the appeal to admit certain material evidence discovered since the date of the decree appealed against which was not available to the said party with the exercise of due diligence during the trial of the suit [p. 28, col. 2.]

Prem Chand Moonshee, In the goods of, Upendra Mohan Ghose v. *Gopal Chandra Ghose*, 21 C. 4--; 0 Ind. Dec. (N. S.) 952, *Beckwith* v. *Kishto Jeebun Buckshee*, Marsh. 278; 2 Hay 286, *Mohesh Chunder Sheet* v. *Shoshee Mookhee Debia*, 6 W. R. 96, *Golam Mukdoom* v. *Hajeezoonissa*, 7 W. R. 48-, *Kulpo Singh* v. *Thakoor Singh*, 15 W. R. 429, *Ram Piari* v. *Kalu*, 23 A. 12-; A. W. N. (1901) 11, *Durga Prasad* v. *Jai Narain*, 9 Ind. Cas. 265; 33 A. 379; 8 A. L. J. 175, followed.

Per *Sadasiva Aiyar, J.*—The High Court has power, in second appeal, to consider the propriety of the exercise of its discretion by a lower Appellate Court as regards the admission of additional evidence, though that discretion would not be interfered with lightly any more than the discretion of a Court rejecting a review petition would be lightly interfered with in revision. The question whether the Appellate Court exercised its discretion properly is a question of law as it is now settled that good grounds for review are also good grounds for the Appellate Court to allow further evidence to be adduced. [p. 28-, col. 2.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 557 of 1914, preferred against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 10 of 1913.

The appeal coming on for hearing on the 2nd October 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit, and upon hearing the arguments of Mr. *K. Bhashyam Aiyangar* and Mr. *S. Panchapakesa Sastri*, for the Appellant and of Mr. *S Viswanatha Aiyar*, for the 1st Respondent, Mr. *G. S. Ramachandra Aiyar* for Mr. *T. R. Ramachandra Aiyar*, for the 2nd and 3rd Respondents, and respondents Nos. 4 and 5 not appearing in person or by Pleader, and the case having stood over for consideration till the 5th December 1917, the Court (Abdur Rahim and Kumaraswami Sastri, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH

ABDUR RAHIM, J.—In this case the point on which I felt considerable doubt was whether we could say that the decree of the District Judge was wrong on the ground that he refused to admit in evidence the decree in Original Suit No. 25 of 1 79. That document had undoubtedly a material bearing on the question whether the property in dispute was validly dedicated to charity as found by the District Judge. The decree was not produced in the Court of first instance, but the appellant's affidavit shows that the appellant who is the purchaser of the property was not aware of the existence of this decree. He discovered it after the Court of first instance had pronounced judgment and an appeal had been preferred to the District Judge. An application was made to the lower Appellate Court for admission of this decree, but it was rejected on the ground that if such an application was granted, there would be no end to litigation.

Can we in second appeal admit that document on the ground that the lower Appellate Court's refusal to exercise the power it had under Order XLI, rule 27 of the Code of Civil Procedure—supposing the application came within the scope of the rule—was wrong? The well-known ruling

of the Privy Council in *Kesowji Issur* v. *Great Indian Peninsula Railway Company* (1) on the subject has been considered in a number of recent rulings of this Court. It may now be taken to be well established so far at least as this Court is concerned that the words "but if an Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause" entitle an Appellate Court to admit fresh evidence if it finds it necessary to do so to enable it to pronounce judgment to its own satisfaction. The words "any other substantial cause" should not be read in an *ejusdem generis* sense so as to confine the application of the rule to cases of *lacuna*. [See *Andiappa Pillay* v. *Muthukumara Thevan* (2), *Ambuja Ammal* v. *Appadurai Mudali* (3), *Subba Naidu* v. *Ethirajammal* (4), *Peddibhotla Kameswaramma* v. *Bezwada Chelapathi* (5), *Venkatachela Pillai* v. *Ranga Pillai* (6)]

It has been further held in *Andippa Pillay* v. *Muthukumara Thevan* (2) and *Venkatachela Pillai* v. *Ranga Pillai* (6) that an Appellate Court acting under rule 27 of Order XLI, clause (*b*) may admit fresh evidence on the same grounds as would justify the Court of first instance to admit a review. In all these cases, the Appellate Court had in fact admitted fresh evidence and the question discussed before the High Court was whether it had the power to do so.

In the present case the lower Appellate Court refused to admit the evidence produced by the appellant. Supposing it went wrong in this, as I am inclined to think it did; are we entitled to say that it ought to have 'required the document to be produced to enable it to pronounce judgment or for any other substantial cause'? The very statement of the proposition shows to my mind that it is untenable. It cannot come within the scope of the rule even interpreting it and the ruling of the Privy Council as liberally as any of the decisions mentioned above have done. As pointed out in *Ambuja Ammal* v. *Appadurai Mudali* (3) the test laid down by the Legislature has reference to the state of mind of the Judge hearing the appeal when he has heard the argument with a view to pronouncing judgment in the case. Here the order refusing to admit further evidence was passed on an especial application made by the appellant before the hearing of the appeal and the lower Appellate Court apparently found no difficulty in pronouncing judgment without that evidence. I am of opinion, therefore, that the judgment of the District Judge cannot be assailed on this ground. But as my learned brother takes a different view and the question is one of general importance I would refer it to the Full Bench for its opinion, in these terms:—'Whether the High Court can interfere in second appeal with an order of the lower Appellate Court rejecting an application made to it by a party to the appeal before the hearing of the appeal to admit certain material evidence discovered since the date of the decree appealed against and which was not available to the said party with the exercise of due diligence during the trial of the suit?'

I may mention that on the other questions raised before us, namely, as to the identity of the lands specified in Exhibit IX and mesne profits subsequent to the institution of the suit I agree with my learned brother and to this extent there should be a further enquiry and finding.

KUMARASWAMI SASTRI, J.—The 1st plaintiff is the appellant. He sued in the Subordinate Judge's Court at Negapatam to recover possession of certain properties sold to him by the 1st and 2nd defendants for 18,000 rupees. The 3rd and 4th defendants are the sons of the 1st defendant and the 5th and 6th defendants are persons claiming under an agreement to sell prior to the date of the sale to plaintiff. Several defences were raised by the defendants but the only question material to the second appeal is as to the dedication of certain items of property conveyed to the plaintiff to a charity. This defence was raised by the 3rd and 4th defendants. In paragraph 5

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M L. T. 435.

(2) 14 Ind. Cas. 140; 36 M. 477; (1912) M. W. N. 450; 11 M. L. T. 241.

(3) 30 Ind. Cas 402; 38 M. 414.

(4) 28 Ind. Cas. 640.

(5) 26 Ind Cas. 50; (1914) M. W. N. 534.

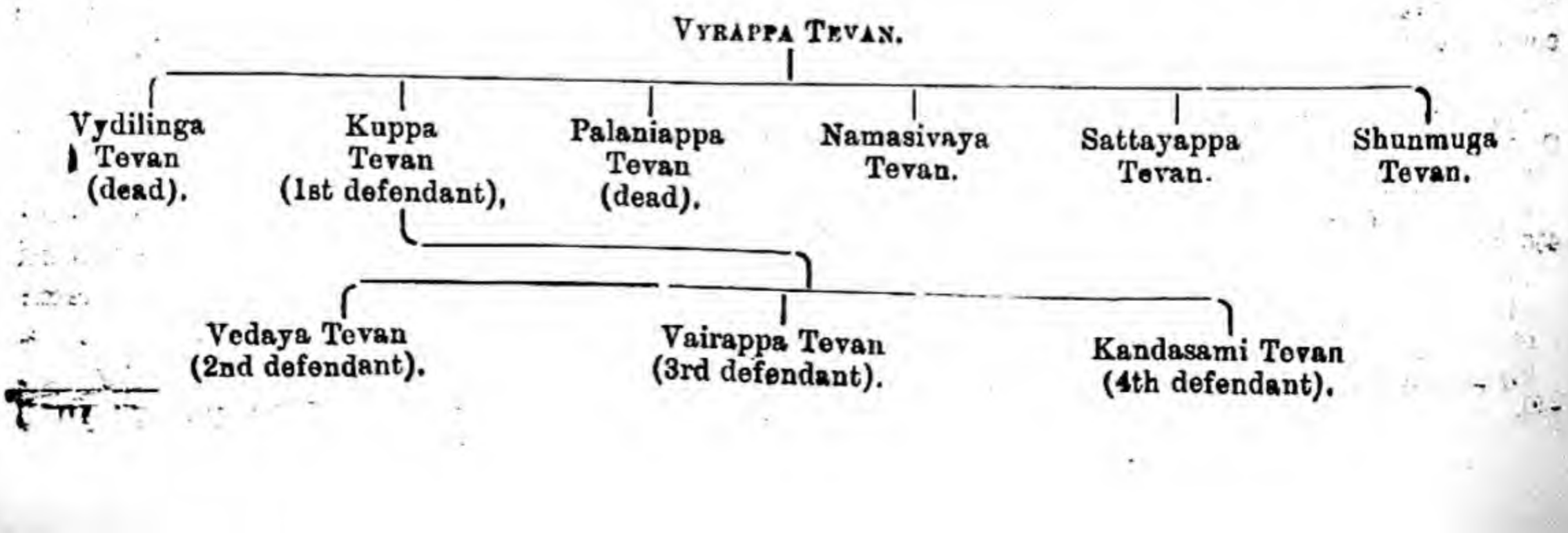
(6) 28 Ind. Cas. 634; 28 M. L. J. 334; 17 M. L. T 320.

of their written statement they made the bald allegation that 36 acres of the said lands had been set apart by the family for charities; when or how is not stated. Issues were settled on the 24th February 1912, but no issue was asked for or raised as to this alleged dedication though as many as eleven issues were raised with respect to the allegations in the written statements. On the 3rd March 1913, two additional issues were raised but even then no issue was raised as to the dedication. After the commencement of the trial and the examination of the plaintiff's witnesses and on the 25th February 1914, the following additional issue was raised on a petition of the 3rd and 4th defendants. "Whether the items noted in the petition of the 3rd and 4th defendants, dated 25th February 1914 are properties burdened with charity and are not liable to be alienated by the 1st defendant?" The trial went on on that date, and on the 27th February, the case was adjourned to the 2nd March and was closed on the 18th March 1913. Judgment was delivered on the 23rd March. The Subordinate Judge held that the sale of the items referred to in paragraph 11 of his judgment making 31 acres and 5 cents was invalid "as they relate to an endowment for maintaining a choultry at Tagattur" and gave a decree in favour of the plaintiff for the remaining items claimed. The defendants beyond filing Exhibit IX, an agreement of partition, dated 29th August 1870, adduced no evidence on the point. The plaintiff filed documents showing that the property had been dealt with by the 1st defendant as his own property from 1882.

Plaintiff appealed against the decree of the Subordinate Judge in so far as it dismissed his suit and during the pendency of the appeal applied for the admission of a decree of the Subordinate Court of Negapatam in Original Suit No. 26 of 1879 which according to him showed that there was no dedication of lands in Ekkar village as alleged by the 3rd and 4th defendants but that on the contrary the lands fell to the share of the 1st defendant. He alleged he was not aware of the decree before the suit was disposed of by the Subordinate Judge. The District Judge dismissed his application, not on the ground that he was aware of the existence of the suit or the decree or could have known it if he had exercised reasonable diligence, but that the admission of the document would necessitate a remand and that "there would be no end to litigation if parties were allowed to call further evidence in this way."

I have already pointed out how the issue as to dedication was raised during the trial of the suit and what little time the plaintiff who is found to be a *bona fide* purchaser who paid the large sum of Rs. 18,000 had to adduce evidence on the point. He was a stranger and it is not suggested what means he had of knowing of a partition suit between the members of the family of the vendor about 32 years before his purchase. He did his best and the District Judge does not find that the non-production of the decree was due to any neglect or default of the plaintiff and the reasons he has given for refusing to admit it are unsound. There can be little doubt that the decree sought to be filed was a very material document.

The following table sets out the relationship between the parties :—



The agreement of partition, Exhibit IX, relied on by the 3rd and 4th defendants as evidencing the dedication to charity was executed by Vairappa Tevan, Kuppa Tevan, Palaniappa Tevan, Namasivaya Tevan and Vairappa Tevan and purports to set apart over 30 acres of land in Ekkur village for the upkeep of the choultry, besides other lands in other villages. Sattayappa Tevan and Shunmuga Tevan, the sons of Vairappa Tevan, who were alive at the date of Exhibit IX were not parties to the deed of partition and they filed Original Suit No. 26 of 1879 for a partition of all the family properties. The plea raised was that there had been a prior partition effected by Vairappa Tevan evidently under Exhibit IX. The parties entered into a *razinamah* and a decree was passed in terms of the *razinamah*. This is the decree sought to be put in. It appears from the decree that the lands in dispute in this appeal were not dedicated to charity but fell to the share of the 1st defendant. It is contended that the agreement of partition, Exhibit IX, would not bind the sons of Vairappa not parties to it as it purported to alienate a considerable extent of lands (about 120 acres) for the upkeep of the choultry and that the power of a Hindu father to effect a division is only validly exercised when it is a fair and equitable partition, he having no power to give properties to strangers. The decision of the Privy Council in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (7) is relied on.

It is also contended that when the sons not parties questioned the partition, Exhibit IX, and there was a *razinamah* decree between the parties whereby other lands were given for the charity it was *prima facie* the only valid source of title for all parties including the charity.

It may be that defendants have a good answer but unless they show that Exhibit IX continued in force in spite of the decree in Original Suit No. 26 of 1879 or was not affected by it, the decree will *prima facie* support the contention of the 1st plaintiff.

As the document was very material and as the allegations in the 1st plaintiff's affidavit (printed at page 68 of the documents) have neither been traversed by the other side nor found to be false by the District Judge, I think that, having regard to the fact that the issue as to dedication was raised only during the course of the final hearing, the decree in Original Suit No. 26 of 1879 (as to the genuineness of which there is no dispute) should have been admitted in evidence by the District Judge.

I am of opinion that the District Judge had power under the circumstances to admit the document in appeal. In *Andiappa Pillay* v. *Muthukumara Thevan* (2) it was held that the words "or for any other substantial cause" in section 563 of the Code of Civil Procedure of 1882 (which corresponds to Order XLI, rule 27 of the present Code) need not be *ejusdem generis* with the causes stated in the previous part of the section. In *Ambuja Ammal* v. *Appadurai Mudali* (3) a similar view was adopted and it was held that the words confer a wide discretion on the Appellate Court to admit additional evidence when the ends of justice require it. The learned Judges were of opinion that section 107 of the Code of Civil Procedure conferred on the Appellate Court all the powers of the Court of first instance and were not inclined to follow the view taken by Abdur Rahim, J. (differing from Phillips, J.) in *Subba Naidu* v. *Ethirajammal* (8) that the expression 'any other substantial cause' in Order XLI, rule 27 is not to be understood in a wide and unrestricted sense but should be construed *ejusdem generis* with the causes in the other parts of the rule. The decision of Phillips, J. was confirmed in Letters Patent Appeal. See *Vellayappa Chetty* v. *Nellaya Pillay* (9). In *Venkatachela Pillai* v. *Ranga Pillai* (6) it was held that the expression "for any other substantial cause" gave power to the Appellate Court to admit fresh evidence on the same grounds that would justify the Court of first instance in granting a review and that the discovery of fresh and material evidence after disposal of the suit,

(7) 20 Ind. Cas. 958; 40 C. 966; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 857; 14 A. L. J. 865; 25 M. L. J. 512; 14 M. L. T. 163; (1913) M. W. N. 631; 10 N. L. R. 1; 40 I. A. 213 (P. C.).

(8) 12 Ind. Cas. 673; 22 M. L. J. 14; 10 M. L. T. 409; (1911) 2 M. 21 N. 440.

(9) 10 Ind. Cas. 675; 9 M. L. T. 317.

the decree in which is appealed against, would be a substantial cause within the meaning of Order XLI, rule 27. In *Peddibhotla Kameswaramma* v. *Bezwada Chelapathi* (5) the decision in *Andiappa Pillay* v. *Muthukumara Thevan* (2) was followed. *Arasappa Pillai* v. *Manika Mudaliar* (10) is distinguishable on the ground that the party had declared in the first Court that he had no evidence and the District Judge *suo motu* remanded the case for fresh evidence to be taken The learned Judges while referring to *Andiappa Pillay* v. *Muthukumara Thevan* (2) were not prepared to extend the rule to such cases. In *Marimuthu Pillai* v. *Velu Pollai* (11) no grounds were shown why the evidence was not adduced in the lower Court and the District Judge acted *suo motu* and remanded the case.

It is argued that where fresh evidence is discovered after judgment which would justify the original Court in granting a review, the party should withdraw the appeal and apply for a review. This would obviously work hardship where the fresh document or evidence would only cover one or more of the issues and would not affect the decision of other matters decided by the lower Court which are included in the grounds of appeal. Besides if Order XLI, rule 27, empowers the Appellate Court to admit the evidence so discovered there is no reason why a party who has paid Court fees for the appeal should be again compelled to pay Court fee for a review of judgment, especially as he will have to pay the full Court fee if the review is presented after 90 days and one-half if it is paid before.

As the District Judge had power to admit the document, there can be little doubt that he failed to exercise his discretion judicially. The only ground given by him for not admitting the document is that there would be no end to litigation if parties were allowed to produce further evidence in appeal. His duty was to see if the applicant's allegations were proved and the document sought to be filed was material and was discovered after the judgment in the lower Court was passed. If he had thought that the document was not material or that even if it was admitted it would not have influenced him in coming to a decision as to the correctness of the lower Court's judgment it would be another matter. But he did not apply his mind to any such question but dismissed the petition on a ground that is in my opinion irrelevant to the question in issue.

It is argued that the District Judge had a discretion under Order XLI, rule 27 and that the High Court cannot in second appeal interfere even if he did not exercise his discretion properly. It is well settled that an Appellate Court has power to interfere even if the matter is one relating to the exercise of discretion if the lower Court has exercised the discretion on a wrong principle or has disregarded any principle of law. *Oriental Bank Corporation, In re* (12), *Berdan* v. *Greenwood* (13), *Terrell, In re* (14). As pointed out by Lindley, L. J. in *Young* v. *Thomas* (15) the Appellate Court will interfere if the judgment of the lower Court proceeded on an erroneous principle and had not really exercised any discretion at all. In *Sanderson* v. *Blyth Theatre Company* (16) Sterling, L. J. was of opinion that to enable the Appellate Court to interfere there must be either a disregard of principle or a misapprehension of facts.

Section 100 clause (*c*) of the Civil Procedure Code gives a right of second appeal when there has been a substantial error or defect in the procedure provided by the Code which may possibly have produced error or defect in the decision of the case upon the merits. This applies obviously to error or defect of procedure of the lower Appellate Court as well as the original Court.

I fail to see why the refusal of the lower Appellate Court to exercise its discretion under Order XLI, rule 27, when such refusal is based on a mis-apprehension of the law or the nature and extent of the powers of an Appellate Court under rule 27, cannot be said to be an error or defect in the procedure adopted by it in hearing the appeal, within the meaning of section 100, Civil Procedure Code. The evidence rendered may be such as to show that the decision appealed against cannot be sup-

(10) 25 Ind. Cas. 587; 16 M. L. T. 301.
(11) 32 Ind. Cas. 908.
(12) (1887) 56 L. T. 868.
(13) (1882) 20 Ch. D. 764*n*; 46 L. T. 524*n*.
(14) (1883) 22 Ch. D. 473; 47 L. T. 588; 31 W. R. 208.
(15) (1892) 2 Ch. 134; 61 L. J. Ch. 496; 66 L. T. 575; 40 W. R. 468.
(16) (1903) 2 K. B. 533; 72 L. J. K. B. 731; 52 W. R. 33; 89 L. T. 159; 12 T. L. R. 660.

ported and the party may have been perfectly *bona fide*. To hold that in such cases an Appellate Court may, on a totally erroneous view of its powers under Order XLI, rule 27, reject the evidence tendered, and that the High Court in second appeal though convinced of the error cannot interfere, would lead to obvious hardship. There is nothing in the provisions of section 100 which compel the Court to place such a restriction on its powers. In *Moni Lal Bandopadhya* v. *Khiroda Dasi* (17) which was a case where the District Munsif refused to grant an adjournment asked for to produce certain witnesses, it was held that this was a substantial error in procedure which would justify the High Court in interfering in second appeal. The report also contains a judgment by three learned Judges of the High Court where they held that it was open to the High Court in second appeal to examine the proceedings to see whether the Court below exercised a sound discretion or not. In *Hafiz Abdul Karim* v. *Sri Kissen Rai* (18) it was held that improper admission of evidence by the Appellate Court in the exercise of its discretion may be set aside in second appeal and in *Arasappa Pillai* v. *Manika Mudaliar* (10) and *Marimuthu Pillai* v. *Velu Pillai* (11) already referred to by me, the High Court in second appeal set aside the Appellate Court's decree on the ground that evidence was wrongly admitted. If a discretion wrongly exercised in admitting evidence under Order XLI, rule 27 can be set aside I fail to see why a wrong exercise of discretion in refusing to admit material evidence should be allowed to stand.

Two other questions remain for determination. There is nothing to show that the lands specified in Exhibit IX are included in the sale-deed to the plaintiff and form part of the plaint mentioned items. The lands in Exhibit IX are described by *paimash* numbers and there is nothing to show what the corresponding survey numbers are. I find no admission appearing anywhere to show that the items excluded by the decree of the Subordinate Judge as charity properties are the items in Exhibit IX. The allegations by the Vakil for the appellant that certain items specified in the 3rd defendant's petition to raise additional issues (printed at page 8 of the printed papers) are not in the decree, and certain items not in the petition find their place in the decree, is not shown to be incorrect. There should be a clear finding as to which of the items claimed in the plaint and covered by the sale-deed to plaintiff were included in Exhibit IX and dedicated to charity.

As regards mesne profits no reason has been assigned for not granting the prayer of the plaintiff for future mesne profits in respect of the lands which have been decreed to him. Order XX, rule 12 empowers the Court to assess future mesne profits and there is no reason to drive plaintiff to another suit.

I would reverse the decree of the Subordinate Judge in so far as it dismisses the plaintiff's suit and direct the District Judge to dispose of the appeal after admitting the document sought to be filed in the light of the above observations. It will be open to the District Judge to raise further issues. Costs will abide and follow the result.

As my learned brother takes a different view as to the powers of the High Court to interfere in second appeal, I agree to the order of reference to the Full Bench proposed by him.

This second appeal came on for hearing in pursuance of the Order of Reference to a Full Bench on the 7th and 8th April 1919.

Mr. *K. Bhashyam Aiyangar*, for the Appellant.—The High Court has the power to interfere. The second appeal comes under section 100 clauses (*b*) and (*c*). The admission or rejection of evidence by the Appellate Court is allowed under Order XLI, rules 26 and 27.

Abelakh Roy v. *Guggun Bhuggut* (19) is an exact case.

[WALLIS, C. J.—That was a case of improper refusal to admit evidence. Here the whole evidence was duly adduced and a decree passed.]

Suppose the lower Court has exercised a discretion, it is open to the Appellate

(17) 20 C. 740; 10 Ind. Dec. (N. S.) 499.
(18) 11 C. 189; 5 Ind. Dec. (N. S.) 851.

(19) 23 W.R. 263.

Court to see whether the discretion has been wrongly or properly exercised.

Ram Piari v. *Kallu* (20). In the present case no discretion has been exercised, the only reason for rejection being that the trial would be lengthened. Grounds for admitting fresh evidence in review are grounds for the same in appeal.

Andiappa Pillay v. *Muthukumara Thevan* (2), *Subba Naidu* v *Ethirajammal* (4), *Ambuja Ammal* v. *Appadurai Mudali* (3). Section 107 is referred to. *Venakatachela Pillai* v. *Ranga Pillai* (6) which was a case where additional evidence was admitted. In *Peddibhotla Kameswaramma* v. *Bezwada Chelapathi* (5) it was held that, where a document is improperly admitted, that would constitute an error of law.

Arasappa Pillai v. *Manika Mudaliar* (1C), *Marimuthu Pillai* v. *Velu Pillai* (11), *Muhammad Siddiq* v. *Mahmud-un-nissa Bibi* (21) (evidence was admitted).

[WALLIS, C. J.—Where the lower Appellate Court has admitted evidence, the High Court can consider whether it was properly admitted or not. Does it follow that the High Court can do so where the lower Appellate Court has refused to admit evidence?]

The one equally applies to the other so far as the power to interfere is concerned. It cannot be said that a discretion when exercised one way can be controlled, but if exercised in another way cannot be controlled. But see *Durga Prasad* v. *Jai Narain* (22) following *Ram Piari* v. *Kallu* (20), *Gauri Rai* v. *Bhaggina* (23) (also a case of admitting evidence).

[WALLIS, C. J.—We are satisfied as to cases where evidence was admitted in the Court below.]

Compare section 35, Civil Procedure Code, with Order XLI, rule 27—entire discretion uncontrolled in the one case while not quite so in the other. But still it has been held that a wrong order as to costs can be considered by the Appellate Court.

[WALLIS, C. J.—The present case can be put upon a much narrower ground :— Where an issue, after the close of the case, is sprung unexpectedly upon a party so that he is not able to adduce necessary evidence, the Court should either vacate the judgment or *ex debito justitiæ* admit fresh evidence to enable parties to have a fair trial of the issue.]

Quite so. My point is that if the issue had been framed in time, I could have found out these documents to file them in time. So if it was a discretion, the discretion can be controlled, *e g.*, in cases of adjournments, the discretion has been questioned. *Moni Lal Bandopadhya* v. *Khiroda Dasi* (24), *Talewar Singh* v. *Bhagwan Das* (25) following *Minakshi* v. *Velu* (26), *Devidas Jagjivan* v. *Pirjada Begam* (27). In *Queen* v. *Adamson* (28) a refusal to issue summons was held to be a failure to exercise discretion.

[AYLING, J.—What is there in it that can be compared with your case.]

The words are "as they think fit." See *Leslie Williams* v. *Haines Thomas Giddy* (29), ("a fraud on the exercise of judgment"). See also *Veeraraghava Iyer* v. *J. D. Muga Sait* (30).

Sanderson v. *Blyth Theatre Company* (16), *Berdan* v. *Greenwood* (13), *Terrell, In re* (14), *Young* v. *Thomas* (15), *Brij Indar Singh* v. *Kanshi Ram* (31), *Sharpe* v. *Wakefield* (32).

Page 965 of the "Yearly Practice" of the Supreme Court 1918 gives all the English cases on the point.

Mr. *T. M. Krishnaswamy Aiyar*, for the Respondents.—Order XLI, rule 27, applies only if the Court "requires" the evidence for "any substantial cause" in clause (*b*). In other words clause (*a*) prescribes an external

(20) 23 A. 121; A. W. N. (1901) 11.
(21) 33 Ind. Cas. 334; 38 A. 191; 14 A. L. J. 121.
(22) 9 Ind. Cas. 265; 33 A. 379; 8 A. L. J. 175.
(23) 31 Ind. Cas. 873.
(24) 20 C. 740; 10 Ind. Dec. (N. S.) 499.
(25) 12 C. W. N. 312; 8 C. L J. 147.
(26) 8 M. 373; 3 Ind. Dec. (N. S.) 256.
(27) 3 B. 377; 4 Ind. Dec. (N S.) 625.
(28) (1876) 1 Q. B. D. 201; 45 L. J. M. C. 46; 33 L. T. 840; 34 W. R. 250.
(29) 11 Ind Cas. 509; 21 M. L. J. 641; 15 C. W. N. 669; 10 M. L. T. 288 (P. C.).
(30) 26 Ind. Cas. 287; 39 M. 24; 27 M L. J. 535; 1 L. W. 887; 16 M. L. T. 473; (1915) M. W. N. 162.
(31) 42 Ind Cas. 43; 45 C. 94 at pp. 106, 107; 33 M. L. J. 486; 22 M. L. T. 862. 6 L W. 592; 126 P. W. R. 1917; 15 A L J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.).
(32) (1891) A. C. 173 at p. 179; 60 L. J. M. C. 73; 64 L. T. 150; 39 W. R. 551; 55 J. P. 197.

standard which has to be satisfied but in clause (*b*), the standard is internal. So the Court cannot be compelled to "require."

[WALLIS, C. J.—The word "may" in clause (*a*) means an application made by the parties.]

Still less can a second Appellate Court exercise that compulsion. The cases are:—*Mohesh Chunder Sheet* v. *Shoshee Mookhee Debia* (33), *Golam Mukdoom* v. *Hafeezoonissa* (34), *Kulpo Singh* v. *Thakoor Singh* (35), *Prem Chand Moonshee, In the goods of, Upendra Mohan Ghose* v. *Gopal Chandra Ghose* (36), (the test is the requirement of the Court itself), *Beckwith* v. *Kishto Jeebun Buckshee* (37), *Ram Piari* v. *Kallu* (20). *Durga Prasad* v. *Jai Narain* (22). This view is adopted in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1). The test is laid down in *Ambuja Ammal* v. *Appadurai Mudali* (3), *Garden Reach Spinning & Manufacturing Company* v. *Secretary of State for India* (38). In fact the order and the judgment are on the same date and so it must be assumed that the discretion has been exercised.

Mr. *K. Bhashyam Ayyangar*, in reply.—Against the current of Madras decisions Order XLI, rule 27 contemplates these contingencies. "Or for any substantial cause" is separate from the requirement of the Courts.

[Mr. *Krishnaswami Aiyar*.—This suggestion was put forward in the Privy Council (see at page 386*) but overruled at page 390*.]

[SADASIVA AIYAR, J.—Their Lordships perhaps have ignored this point. Is that what you want?]

See *Andiappa Pillay* v. *Muthukumara Thevan* (2) as to how *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1) has been understood in the Court, see *Satis Chandra Bose* v. *Takurdas Mandal* (39), where three contingencies are set out. *Kaniz Mustafa* v. *Musi Imran* (40). The substantiality of the cause is therefore not dependent on the mind of the Judge and so is a matter which can be controlled by the High Court. When the exercise of discretion has not been judicial, the High Court can interfere.

(33) 6 W. R. 196.
(34) 7 W. R. 489.
(35) 15 W. R. 429.
(36) 21 C. 484: 10 Ind. Dec. (N. s) 952.
(37) Marsh. 276; 2 Hay 286.
(38) 28 Ind. Cas. 865; 42 C. 675; 19 C. W. N. 401.
(39) 89 Ind. Cas. 886; 25 C. L. J. 473 at p. 475.
(40) 88 Ind. Cas. 669; 15 A. L. J. 21 at p. 23.

*Pages of 81 I B.—Ed.

OPINION.

WALLIS, C. J.—The attention of the learned Judges who made the reference does not appear to have been called to the long catena of decisions in Calcutta and to the decisions to the same effect in Allahabad. Shortly after the coming into force of the Code of 1859 it was decided by Sir Barnes Peacock and Jackson, J.—*Beckwith* v. *Kishto Jeebun Buckshee* (37) that no special or second appeal lay from a refusal by the lower Appellate Court to admit fresh evidence under section 355 of that Code which re appears as Order XLI, rule 27 of the present Code. The decisions in *Mohesh Chunder Sheet* v. *Shoshee Mookhee Debia* (33), *Golam Mukdoom* v. *Hafeezoonissa* (34), *Kulpo Singh* v. *Thakur Singh* (35), *Prem Chand Moonshee In the goods of, Upendra Mohan Ghose* v. *Gopal Chandra Ghose* (36) are to the same effect, as are the decisions of the Allahabad Court in *Ram Piari* v. *Kallu* (20) and *Durga Prasad* v. *Jai Narain* (22). There are no reported decisions in Madras and Bombay as there must have been if this long line of authorities had ever been questioned in these Courts. It has, I think, long been the practice of all the High Courts not to entertain second appeals from refusals of the lower Appellate Court to admit fresh evidence under this rule. I am not prepared to depart from this practice and would answer the question in the negative.

AYLING, J.—In my opinion the answer to the reference must be in the negative. The effect of Order XLI, rule 27, clause (*b*) is to empower an Appellate Court to admit additional evidence provided it requires the evidence to enable it to pronounce judgment or for any other substantial cause. Whether it requires the additional evidence or not is for the Appellate Court itself to say, and it is not for a superior Court to control its discretion, or to say that it ought to have required it, where, as a fact, it did not. I would respectfully adopt the reasoning of Sale, J., in *Prem Chand Moonshee, In the goods of, Upendra Mohan Ghose* v. *Gopal Chandra Ghose* (36) which is in accordance with a long catena of

early Calcutta decisions beginning with a judgment of Peacock, C., J., and Jackson, J., reported in *Beckwith* v. *Kishto Jesbun Buckshee* (37). That the word "requires" in the corresponding section 568 of the old Code means nothing more than "needs" or "finds needful" has been expressly decided by the Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1) and this pronouncement, as it seems to me, concludes the matter if authority were needed.

SADASIVA AIYAR, J.—I regret that I have the misfortune to differ from my Lord and Ayling, J., on this reference. It having been now settled in this Court that good grounds for review are also good grounds for the Appellate Court to allow further evidence to be adduced, the question whether the Appellate Court exercised its discretion properly in refusing to admit such evidence seems to be clearly a question of law which we are entitled to consider in second appeal.

As regards clause (*b*) of Order XLI, rule 27, I am clear that 'or for any other substantial cause' is not governed by the expression "the Appellate Court requires." The 355th section in the old Civil Procedure Code (Act VIII of 1859) from which this Order XLI, rule 27 has come down clearly shows that "or for any other substantial cause" is an independent ground and is not governed by the words in the first portion of clause (*b*), there being no division into clauses in the old Act of 1859, section 355. It cannot be argued for a moment that if the Appellate Court notwithstanding that the condition in clause (*a*) has been fulfilled, (namely, the Court from whose decree the appeal is preferred having refused to admit evidence which ought to have been admitted) refuses in appeal to admit such evidence, the second Appellate Court cannot interfere with that discretion so improperly exercised by the first Appellate Court. I do not see why when the condition in what I call the third clause, namely, the existence of any other substantial cause is fulfilled and yet the discretion to admit additional evidence in such a case is wrongly exercised by the first Appellate Court, the second Appellate Court should be prevented from interfering. As regards the Allahabad and Calcutta cases, if they meant more than that the discretion given in cases falling under clause (*b*) to the first Appellate Court should not be lightly interfered with by the second Appellate Court, I respectfully differ from those decisions. Let me put the following illustration. The trial Court in a clear case where it ought to have granted a review on the ground of conclusive evidence which was not in the power of a party to produce having been afterwards discovered rejects the application for review—such rejection is not appealable. But this Court has power under its general revisional powers to direct the trial Court to accept the application for review. If so, why should the Court be powerless because a second appeal has been preferred from the decision of an Appellate Court which, in a similarly clear case, refused to exercise its discretion to admit additional evidence, such a case being (as I said) fully analogous to an application for review? Further section 105 clause (1) shows that even where an appeal might not lie from an order made by the Appellate Court (such as an order refusing to admit additional evidence) where the decree of the Appellate Court itself is appealed against in second appeal, the error in the interlocutory order refusing to admit additional evidence may be set forth as a ground of objection in the memorandum of second appeal.

Again, suppose that treating the order of a District Court refusing to admit additional evidence as an independent order, a revision petition had been filed to this Court against that order, I see nothing to prevent us, in a clear case, from setting aside that order in revision. Why should such a prayer for revision of that order be not embodied as a ground in the memorandum of second appeal,

In the result, I agree with Kumaraswami Sastri, J., in saying that this Court has power in second appeal to consider the propriety of the exercise of the discretion of the District Judge as regards the admission of additional evidence though, of course, that discretion would not be interfered with lightly any more than the discretion of a Court rejecting a review petition, would be lightly interfered with in revision. I think that the power to consider and

decide on the question should be affirmed as existing in this Court in second appeal.

Answered in the negative.

M. C. P.

MADRAS HIGH COURT.

CIVIL APPEAL No. 56 OF 1918.

December 10, 1918.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

V. SUBRAMANIA IYER—PLAINTIFF—APPELLANT

versus

P. S. KALYANASUNDARAM IYER AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration—Settlement by agreement of parties, whether award—Persons not parties to settlement, whether bound—Contract for sale or exchange of land—Possession, suit for, maintainability of—Specific performance, decree for, whether necessary—Contract, whether can be enforced as against some of several vendees—Specific Relief Act (I of 1877), s. 16—Civil Procedure Code (Act V of 1908), O. VI, r 17—Amendment of plaint—Possession, suit for—Specific performance, prayer for, whether can be added.

Where a person is asked to act as mediator in the settlement of a dispute, and records a settlement agreed on by the parties, his act is not that of an arbitrator, and the record made by him is not an award, and if that record is at all operative, it is so only as a contract as between those who have signed it. It can have no operation whatever against a person who never joined in it. [p. 286, col. 1.]

Gobardhan Das v. *Jai Kishen Das*, 22 A. 224; A. W. N. (1900) 52; 9 Ind. Dec. (N. S.) 1180, distinguished.

Where there is a contract for sale or exchange of land, no decree for possession can be given unless the title is completed by specific performance of the contract. [p. 286, col. 2.]

A plaint in a suit for possession can be amended by the addition of a prayer for specific performance of the contract by the execution of a conveyance by the defendant. [p. 286, col. 2.]

The amendment can be allowed even by a Court of Appeal if the evidence on which a decree can be passed on the plaint as amended, is before the Court or can be easily obtained and the defendant can be compensated by costs for any prejudice he may have sustained or may sustain. [p. 287, col. 2.]

Where a number of persons combine to sell property, parts of which are owned by some of them with other persons individually, a claim by the vendee for enforcement of the contract as against some portions only of the property will be sustained if the portions claimed can reasonably be enjoyed independently of the remainder. [p. 287, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in Original Suit No. 89 of 1916.

JUDGMENT.

OLDFIELD, J.—The judgment under appeal was pronounced irregularly during the Christmas Holidays on the last day of the year, and it is easy to understand why it is obscure and ill-arranged. But the facts in dispute, taken in order, are fairly simple. The plaintiff's allegations, which are traversed at each stage by his brothers, the defendants, are that in 1911 he and they and another brother, Sivasami, became divided except as regards certain houses, which were retained in common for convenience. Plaintiff, however, found cultivation of the isolated plots he received difficult and induced the others, except Sivasami, to agree to a re-adjustment of the various items by 3rd defence witness who is described as an arbitrator and gave what is called an award, Exhibit A, on 13th May 1913. This re-adjustment gave plaintiff the whole of his share in one village, Pachampet, subject to his paying Rs. 4,000 to defendants; and he took possession of the Pachampet land and paid Rs. 1,800 of this amount. Defendants, however, have subsequently ousted him and he, therefore, sues, offering to pay the balance due, to recover the land with profits.

The first matter on which the parties are at issue, the partition of 1911, can be dealt with shortly. Third defendant denied it *in toto*. Fourth defendant did not plead as to it explicitly, but put plaintiff to proof of all his allegations. First, and 2nd defendants said that there was only an attempted partition which came to nothing after a document detailing each brother's share had been signed by them, Sivasami and 4th defendant, but not by plaintiff or 3rd defendant, and that common enjoyment continued until 1913, when Sivasami insisted on enjoying what was intended to be his share separately, they and plaintiff continuing common enjoyment of the remainder. This is no doubt consistent with the evidence of plaintiff that the cultivation owing to the inconvenience of separate management was managed by 2nd

defendant. He added, however, that the income was being divided and this agrees with the statement of 6th plaintiff's witness, Sivasami's brother-in law, who alone besides the parties has given direct evidence on the point. But it is clear that plaintiff's account represents the truth, the evidence of 3rd defence witness proceeds on the assumption that a re-adjustment of a previous division was in question. The pre-amble of Exhibit A will be given in the sequel and, whatever the effect of that document it involves that one partition had already taken place and, as 1st, 2nd, 4th defendants signed it, there can be no further question as regards them, the probability being, as the lower Court held, that the partition lists are with the 1st defendant. Sivasami certainly accepts the partition of 1911 as completed. The evidence of 3rd defendant, like that of 1st defendant, contains admissions, to which the lower Court has referred at length, involving that they became divided in 1911. Third defendant no doubt says that he was absent in the course of his employment in the Police and knew nothing of what was done. But he was only in the adjacent district, Madura, and in view of the considerations already referred to it is impossible to believe him. The lower Court's finding that the family became divided in 1911 and that, although the land may have been managed by the 2nd defendant, it was divided among the brothers, must in these circumstances be accepted.

The occurrences in 1913 are more obscure. It is admitted by all concerned that plaintiff and 1st, 2nd and 4th defendants at least joined in the proceedings which resulted in Exhibit A, and signed at the end of that document. The first question is whether it is, as plaintiff contends, a valid award by 3rd defence witness, as arbitrator between him and 1st, 2nd, 3rd and 4th defendants. My conclusion is that it is not, because 3rd defendant did not join in the proceedings at any stage and because it is not an award at all. On the first point we have no doubt the evidence of plaintiff that the allotment made in 1911 being found inconvenient, he says by 1st and 2nd defendants, he agreed at their request to a reference of the whole matter to 3rd defence witness in order to re-adjustment and that all the brothers, including 3rd defendant, but not Sivasami, concurred therein, although there was no submission in writing. 2nd plaintiff's witness said that about the end of April 1913, Exhibit A being dated 13th May 1913, 1st, 3rd defendants came to plaintiff's house and 3rd defendant agreed with plaintiff that their dispute might be settled by 3rd defence witness. There is nothing definite against this witness. But he is uncorroborated he was not mentioned by plaintiff and there is nothing in the latter's evidence which clearly refers to this conversation; plaintiff in fact only said generally that 3rd defendant agreed to the reference, that no one else was present when he and 1st and 3rd defendants made it and that they made it in his house in April—May 1913. But 3rd defence witness spoke to no such interview or agreement and could not remember when he saw 3rd defendant last, except casually, before July 1913. After Exhibit A was drawn up, he tried to obtain 3rd defendant's signature to it but 3rd defendant refused to look at it and plaintiff on hearing of this said he would bring him round; and the remainder of the account given by 3rd defence witness, who is the only impartial witness regarding this part of the case, shows that in fact 3rd defendant's previous concurrence was unnecessary and need not be presumed to have been obtained for what actually was done. Another portion of the evidence, given by 5th and 6th plaintiff's witnesses is that 3rd defendant asked the former, who is father-in-law of plaintiff's son, whether he had paid plaintiff the Varadakshinai of Rs. 2,000 in connection with that marriage, adding that plaintiff was expected to pay him and others out of it in connection with the partition of their land. But both these witnesses are connected closely with plaintiff (though not with defendants) by marriage and it would not be safe to base any conclusion on their report of a casual conversation to which very little test by cross-examination can be applied. First defendant admits that in fact he received Rs. 1,300 from plaintiff about this time, but not in connection with the partition, and 7th plaintiff's witness, who was present, does not say on what account the money passed. There is in the circumstances, no reason for preferring the evidence of plaintiff to that of 1st defendant on this point. It is possible

that 3rd defendant may, as 2nd plaintiff's witness says, on some visit to Trichinopoly have expressed his general willingness to abide by decision of 3rd defense witness. But neither the evidence of that witness nor of 5th and 6th plaintiff's witnesses justifies the conclusion that he joined in any definite submission to him or in accepting its result.

The alternative case that Exhibit A was not a valid award has been argued first on the ground that there could be no such award without a valid submission and there could be none without a matter in difference between the parties, not merely as here, a question, which they desired to have determined by a reference to another person. That is consistent with the decision in *Collins* v. *Collins* (1) and *Carus Wilson & Green, In re* (2) followed in *Chooney Money Dassee* v. *Ram Kinkur Dutt* (3), *Macnaghten* v. *Rameshwar Singh* (4). But the facts of this case afford clearer ground for a similar conclusion. For they are that there was not a submission and arbitration, but after discussion between 3rd defence witness and plaintiff, a mere suggestion of a settlement which the others were always free to accept or reject.

It is clear from the foregoing that very little assistance can be looked for from the parties' statements, since it has been found impossible to act on plaintiff's as regards the division in 1911. The remaining evidence as to the origin of Exhibit A, the alleged award, was given by 3rd defendant's witness. He is a Public Works Officer of some standing and a friend of the family, and his somewhat remote connection by marriage with 1st defendant does not justify any belief that he would be inimical to plaintiff. His account, which is clear and consistent, may accordingly be accepted as substantially the truth. It is that he was asked by 1st defendant to settle the difference between the brothers and bring about a division between them, as the existing arrangement of shares was not convenient. He sounded plaintiff, who explained his views and asked him to effect a distribution in accordance with them offering to keep all the land in one village, Pachampet, and to pay Rs. 2—3,000 to the other defendants in order to equalize the shares. Third defence witness returned to 1st and 2nd defendants, who objected to the exchange in itself and he then gave up the matter. Later plaintiff increased his offer to Rs. 4,000 and 1st and 2nd defendants, accepting it, all three asked 3rd defence witness to reduce these terms in writing in the form (here the difficulty arises) of an award, and 4th defendant, who came at this stage, also agreed. Accordingly, 3rd defence witness put down the terms with a pre amble, given him by 1st defendant, a Pleader, as follows:—"whereas you brothers (the five names are given) have requested me to settle some re-arrangement in the properties possessed and enjoyed by you as per a partition already arranged so as to secure more profits, I award the following":— and to the whole clause, signed by those present, was added "all will sign in this document, if you accept these arrangements as irrevocably binding on you all." Lastly Exhibit A (*sic*) containing a clearer and fuller statement of the provisions in Exhibit A regarding the financing of a litigation then pending in connection with the Pachampet land, was added subsequently by plaintiff and 3rd defence witness in consultation and signed separately by 1st, 2nd and 4th defendants.

If this evidence is accepted, as in the absence of better it must be, there was nothing determined or to be determined by 3rd defence witness, as arbitrator. For although he said that he obtained the value of the lands from plaintiff and a relative, one Narayanaswamy Iyer, once it had been settled that one sharer was to have the Pachampet land, the only further question was how much he should pay the others; and that was settled not by any adjudication, but the acceptance of the last of plaintiff's successive offers. Third defence witness further said that he wanted to keep Exhibit A until regular documents of exchange were executed and that, there being no pretence of 3rd defendant's actual adhesion to Exhibit A at the time he himself added the last clause. This clause is clearly inconsistent with the

(1) (1858) 26 Beav. 306; 28 L. J. Ch. 184; 5 Jur. (N. S.) 80; 7 W. R. 115; 53 E. R. 916; 122 R. R. 127.

(2) (1887) 18 Q. B. D. 7; 56 L. J. Q. B. 530; 55 L. T. 864; 35 W. R. 43.

(3) 28 C. 155; 5 C. L. J. 242.

(4) 30 C. 881.

character of the document as an award. In favour of that character there is only the pre amble and 3rd defense witnesse's signature. But for the former 1st defendant and the other parties were responsible and as regards the latter its position, not where an arbitrator's signature naturally would be, but at the left hand side, the prominent place being taken by the signatures of plaintiff and 1st, 2nd and 4th defendants, is significant. Neither the use of the word "award" nor the signature can prevail to fix a lay man, such as 3rd defence witness, with a *quasi judicial* character, which on his own showing he did not possess and with which the final clause cannot be reconciled. We have been pressed on these facts with *Gobardhan Das* v. *Jai Kishen Das* (5) in which an award was enforced, although it had been reached by the arbitrators without any judicial consideration of the matter in dispute and was merely an adoption of the settlement agreed on and brought to them by the parties. It is unnecessary to express an opinion as to the soundness of that decision, because it dealt with a regular submission to and appointment of arbitrators, whilst here there was none. The conclusion must be that 3rd defence witness was a mediator not an arbitrator, and that Exhibit A is operative, if at all, between plaintiff and 1st, 2nd and 4th defendants who signed its final clause, only as a contract, the terms of which are embodied in the prior portion. Against 3rd defendant, who never joined in it, it can have no operation whatever.

So far, therefore, as plaintiff's suit is founded on an award it must fail. But, although an award is referred to throughout the plaint and possession is claimed in pursuance of it, we have been asked to grant relief, after allowing any necessary amendments, on some other construction of the averments; and first on the basis that the claim is to a division of the property assigned to plaintiff and 1st, 2nd and 4th defendants in 1911. But plaintiff's own statement in paragraph 5 of the plaint is that a specific share was then assigned to each brother and no reunion has been alleged, in virtue of which any joint or common property can be available for division. Next the suggestion is that Exhibit A series constitute a contract, either a completed transfer of property entitling plaintiff to an immediate decree for possession, or an agreement to transfer it, on which the suit lies against 1st, 2nd and 4th defendants for possession and specific performance. But, apart from other difficulties, the claim in the first of these forms is open to the objection that it depends on Exhibit A which must for this purpose be read as creating a right to property of the value of more than Rs. 100 and, being unregistered cannot be proved, and the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* (6) which after full consideration of *Mahomed Musa* v. *Aghore Kumar Ganguli* (7) and *Venkayyamma Rao* v. *Venkatanarasimha Appa Rao* (8) has been followed by a majority of a Full Bench of this Court in *Ramanathan Chetty* v. *Ranganathan Chetty* (9) entails that no decree for possession can be given unless the title is completed by one for specific performance. The claim, therefore, can be considered only in the 2nd form above referred to, Exhibit A being regarded as covered by section 17 (2) (*v*) Registration Act. As was the case in *Kurri Veera Reddi* v. *Kurri Bapireddi* (6) plaintiff here alleges that he was in possession and was ousted by defendants; and no doubt his plaint, which at present asks only for possession, can easily be amended by the addition of a prayer for specific performance by execution of conveyances by the defendants concerned. In these circumstance if the evidence, on which a decree can be passed on the plaint as amended, is before the Court or can easily be obtained and defendants can be compensated by costs for any prejudice they have sustained or may sustain, the proper course is clear. It is,

(5) 22 A. 224; A. W. N. (1900) 52; 9 Ind. Dec. (N. S.) 1180.

(6) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.).

(7) 28 Ind. Cas. 930; 42 C. 801; 28 M. L J. 548; 17 Bom. L. R. 420; 17 M. L. T. 143; (1915) M. W. N. 621; 2 L. W. 258; 19 C. W. N. 250; 21 C. L. J. 231; 13 A. L. J. 229; 42 I. A. 1 (P. C.).

(8) 34 Ind. Cas. 921; 39 M. 509; 20 C. W. N. 1054; 14 A. L J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 24 C. L J. 279 (P. C.).

(9) 43 Ind. Cas. 138; 40 M. 1134; 6 L. W. 300; 22 M. L. T. 173; 33 M. L. J. 252; (1917) M. W. N. 757.

however, denied that these conditions are fulfilled as regards the defence based either on limitation or the merits.

Turning to the merits, the suit was filed against four persons for possession on the award and the proposed amendment will convert it into one against three of them, each of whom is to exchange his land in Pachampet for that, which plaintiff received in other villages in 1911. The first question which 1st, 2nd and the 4th defendants will be able to raise will accordingly be whether Exhibit A with their signature represents a completed agreement at all. For they may urge with reference to the absence of the 3rd defendant's signature and even, though the form of the final clause of the document does not support their contention directly, that "the mere fact of execution by one does not bind him conclusively, when that has been done on the faith that all shall execute, and any one shall refuse." *Latch* v. *Wedlake* (10).

And if it is found that the agreement was formally completed, that will be only the beginning of the inadequacy of plaintiff's averments and of the necessity for fresh enquiry. Exhibit A provides, as already stated, for the exchange of the land of 1st to 4th defendants and also for the payment by the plaintiff of Rs. 4,000 to the four in order to equalize his share with theirs. As regards this payment plaintiff has repeated here his offer made at the trial to pay this sum for the share of 1st, 2nd and 4th defendants only without abatement on account of that of 3rd defendant, which they cannot give him. But as regards their inability to perform the agreement, as it was made, by the conveyance of the 3rd defendant's share with their own, he is constrained to rely on sections 15 and 16, Specific Relief Act. These two sections provide for distinct classes of cases in which part performance can be claimed. But the separate provision made for these classes does not entail that the defence implicitly referred to in section 16, that the two parts of the contract are interdependent and must be performed together, if at all, is not always available; and that is what defendants rely on here contending that they have had no opportunity to put it forward hitherto and should not be called on to make it after the interval which has elapsed.

This defence is relied on in its more peremptory form as resting on what is referred to in *Lumley* v. *Ravenscroft* (11) as the general rule that, when one person is jointly interested in an estate with another and purports to deal with the entirety, performance will not be granted against him as to his share and this is no doubt the basis of the decision in *Price* v. *Griffith* (12). But both these cases related to property enjoyed jointly or in common, the one to part of a London house and the other to a Colliery, whereas here defendant's position is much weaker, since they are to be treated merely as persons who have combined to sell land, parts of which each of them and another person own individually and both decisions must be read in the light of the observations of Farwell, J. in *Hexter* v. *Pearce* (13) with reference to the susceptibility of the different portions of the property of separate enjoyments. If the plaintiff is able to show that the portions of the property, which he now claims, can reasonably be enjoyed independently of the remainder he can succeed.

The decision on this question will involve not only further inquiry, but at least further pleading. Exhibit A contemplates a surrender by plaintiff to all four defendants jointly of his land outside Pachampet since it includes no specification of the particular portion of it, which each is to take. Plaintiff has not offered 1st, 2nd and 4th defendants more than a three-quarter share of that land; and it will first be necessary for him to show that, if there was a contract by the three at all, it was a contract to accept only this three-quarter share. It will next be necessary for him to specify the lands he offers as composing this three-quarter share; and, when it has been ascertained that this

(10) (1840) 11 A. & E. 959; 3 P. & D. 499; 9 L. J. (N. S.) Q. B. 201; 113 E. R. 678; 52 R. R. 552.

(11) (1895) 1 Q. B. 683; 64 L. J. Q. B. 441; 14 R. 347; 72 L. T. 382; 43 W. R. 581; 59 J. P. 277.

(12) (1852) 1 De G. M. & G. 80; 21 L. J. Ch. 78; 15 Jur. 1093; 42 E. R. 482; 18 L. T. (o. s.) 190; 91 R. R. 37.

(13) (1900) 1 Ch. 341; 69 L. J. Ch. 146; 82 L. T. 109; 48 W. R. 330; 16 T. L. R. 94.

share has been fixed fairly with reference to extent and quality it will still be necessary to enquire whether the fact that the plaintiff, and not 3rd defendant, holds the remaining quarter will so affect the enjoyment with reference to access, convenience of management and the like that the contract as to the remaining three quarters can reasonably be separately enforced.

The difficulty of the various enquiries, the necessity for which has been indicated, must necessarily be increased by their postponement; and their postponement is the consequence of plaintiff's unjustified attempt to secure 3rd defendant's share in the Pachampet land by improperly representing Exhibit A as an award. In the circumstances 1st, 2nd and 4th defendants will be prejudiced substantially and in a manner for which costs cannot compensate them, if they are asked to submit to such enquiries at this stage; and the claim to an amendment, which would entail them, or to a decree on the basis now proposed must, therefore, be rejected.

The appeal fails and is dismissed with costs.

ABDUR RAHIM, J.—I agree in the judgment proposed by my learned brother.

M. C. P.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

June 26, 1919.

Present:—Viscount Cave, Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali

A. R. R. M. V. ARUNACHELLAM CHETTY AND OTHERS—DEFENDANTS—APPELLANTS

versus

VENKATACHALAPATHI GURUSWAMIGAL—PLAINTIFF—RESPONDENT.

Hindu Law—Religious endowment—Mutt *or* asthal *—Ownership, nature of—Trustees, position of—Application of surplus income—Suit to obtain or control management of* mutt *properties—Limitation—Adverse possession, what is*—Inam *Register, value of.*

The administration of a *mutt*, *asthal* or similar religious endowment in India must be not for the personal ends of the manager, but entirely for and on behalf of and in the interests of the institution itself. In whomsoever the ownership of the property of such institutions vests, the nature of the ownership is an ownership in trust for the institution itself. [p. 298, col. 2; p. 299, col. 1.]

It is the duty of the manager of such a *mutt* to refrain from the personal enjoyment of surplus income, and to add it to capital, and this is equally the case whether the title is in the *gurukkal* or spiritual head, which is the more common case, or in trustees. [p. 300, col. 2.]

The general case in such *mutts* is that the ownership of the property is vested in the *mohunt* or spiritual head. But this is not an invariable rule, and there are many exceptions depending on the constitution, usage and custom of the particular *mutt*. [p. 299, col. 1.]

It is sufficient to constitute adverse possession that the person now claiming to be owner should have stood by while others continued to possess not by derivative title but in practical contravention of his alleged rights. It is not necessary to prove that such claimant protested against the violation of his rights, and that the possession went on despite such protest. [p 299, col. 2.]

In suits to obtain control or management of a religious institution, when no misapplication is proved, and the defendant admits himself to be a trustee for the institution, the ordinary limitation of 12 years applies. [p. 300, col. 1.]

Balwant Rao v. *Puran Mal*, 10 I. A. 90; 6 A. 1; 13 C. L. R. 39; 4 Sar. P. C. J. 435; 3 Ind. Dec. (N. S.) 352, followed.

The ultimate purpose of the Inam Register, compiled in Madras in or about 1864, was to determine whether or not the lands comprised therein were tax free. But the preparation of that register was a great act of State and the result of elaborate enquiries and though the statements as to tenure set forth in the register cannot displace actual and authentic evidence in individual cases, they are entitled, in the absence of such evidence, to very great weight. [p. 296, col. 1.]

Appeal from a decree of the Madras High Court (Wallis, Offg. Chief Justice, and Kumaraswami Sastri, J.), dated the 10th August 1914, printed as 33 Ind. Cas. 216, varying two decrees of the Subordinate Judge, Madura (East.)

FACTS.—This case related to the management of an ancient Mutt, known as the Patharakudi Mutt, of which the plaintiff became head (Mathadhipati) in 1867. In 1906 he instituted two suits before the Subordinate Judge. In the second suit (No. 51 of 1906) which related to Patharakudi village, one of the villages owned by the Mutt, plaintiff alleged that from the date of his appointment in 1867 he assumed charge of the Mutt and its properties, and managed its affairs: that as he was rather young at the time, and some of the disciples of the Mutt, who were rich and influential Nattukottai Chetties, offered to assist

him, he allowed them to manage such affairs as his agents under his direct control and supervision: that for some years he was satisfied with the management, "but latterly the Chetties began to create documents without the knowledge of the plaintiff in their own names in respect of the Mutt properties with the fraudulent intention of asserting a title as trustees to the Mutt and its properties:" that he, therefore, dismissed them from their position as agents, but that they then, after unsuccessfully charging plaintiff with rioting, took proceedings under Chapter XII of the Code of Criminal Procedure, with the result that the Magistrate ordered that the Mutt should remain in plaintiff's possession but that the village should remain under attachment until the decision of the Civil Court. Plaintiff claimed that he was entitled to a declaration of his right to the said village as head of the said Mutt, and asked for a decree,

"to declare that the defendants have no right to the village of Patharakudi and that the plaintiff as head of the Mutt, is entitled to the possession of the village of Patharakudi, being item No. 1 in the schedule annexed to the plaint, and to receive the income of the same from the hands of the Receiver."

In their written statement of defence the present appellants set out from their point of view the history of the institution and its management, and point out that the term "Mutt" was not accurately descriptive of the institution, and in paragraphs 12, 14, 15 and 16 they pleaded as follows:—

(12) Plaintiff and his predecessors are known as Nagara Gurukkal, and the *matam* erected by Chetties as aforesaid at Patharakudi for their own private accommodation possesses none of the essential characteristics of a Mutt. The expression Patharakudi *matam* is only a loose, convenient and compendious mode of describing the charity founded by the Nagarathars as aforesaid.

(14) These defendants submit that from time immemorial it is the Chetties that have been exclusively managing the said villages and applying the income for feeding Brahmins in the Chattram and other purposes aforesaid.

(15) That owing to the manifest difficulty and inconvenience of the whole body of Chetties, or Nagarathars as they are called, taking part in the executive management of the charity and its endowments, eight families, representing eight out of the nine broad divisions into which the Chetty community (according to the temples to which they belong) is divided, were entrusted with the said management, and by way of avoiding the drawbacks inseparable from such a system of administration, it has been the immemorial custom for the senior members for the time being of the said families to undertake the management of routine matters by rotation, two for each year, except in matters calling for the co-operation and conjoint action of all the term-holders.

(16) These defendants state that on the death of the former Gurukkal in 1863, the then representatives of the eight families aforesaid, in accordance with the usage by which the Nagarathars alone have the right of appointing and removing their Gurukkal, appointed plaintiff as their priest.

They further denied that they were ever the plaintiff's agents, and pleaded that the suit was barred by limitation.

The first suit (No. 50 of 1906) was on similar lines, but related to some other villages, which the Chetties as trustees of the Mutt had leased to a tenant. The Magistrate had decided that these villages should remain in such tenants' possession pending the decision of the Civil Court.

In the first suit plaintiff claimed three years' profits at Rs. 3,000 a year, and in the second suit he claimed the income actually in the Receiver's hands

The Subordinate Judge tried both suits together and disposed of them in one judgment, the material parts of which were as follows:—

"On the whole, I think that the plaint institution is a religious institution of Acharayas or Gurus, whose disciples are the Nattukkottai Chetties, more or less analogous to the Udipi and other institutions which also are institutions and seats of the Acharyas of different sects of Brahmins or Sudras according as the institution is a Brahmin or a Sudra one, and is presided over by a celibate Brahmin instead of by a Sanyasi

or Pandaram as in these classes of Mutts, and has been endowed by Rajahs for supporting the Gurukkal in his dignity as Guru or head of the institution as well as his dependants, for the support of the Poojah of his private idol or Lingam and for feeding Brahmins, as appertaining to his institution. In the absence of any evidence about a special constitution regarding its management, &c., the head of the institution is the beneficiary entitled to the income of the endowment, granted in this manner, subject perhaps to his liability to maintain and perpetuate the institution as a corporation sole according to the ruling in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1). I, therefore, hold hat the Gurrukkal of the plaint institution, *i.e.*, the plaintiff is the person who is ordinarily, according to the nature and character of the institution, entitled to the management and possession of the plaint villages which are its endowments and is both the manager and the absolute beneficiary of the income during his life as regards the entire income, subject only to his liability to maintain the institution.

"Apart from the nature of this institution, which leads to the aforesaid conclusion, I am further of opinion, on the clear evidence in the case, that the Gurukkals of the plaint institution, as the successors of the original grantee of the endowments for this institution, are the persons who are the beneficiaries and trustees and managers of the endowments, and are entitled, therefore, to their possession and enjoyment, as well as to the enjoyment of the income, so long as they are the Gurukkals and the heads of the Mutt. I further held that the defendants, Chetties, had no such right as managers or trustees in their own right either by virtue of the original constitution or of any special custom or valid scheme for management. On the evidence I cannot find this to be in its nature a caste institution of the kind of Dharma Sivacharya's Mutt of the Madras Beri Chetties caste [*Thambu Chetti* v. *A. T. Arundel* (2) and *Krishnasami Chetti* v. *Virasami Chetti* (3)] belonging to the Nattukottai Chetties and the endowments consisting of the plaint villages to have been granted to it as such institution . . . . . Thus, for these reasons, I hold that, according to the nature of this institution and according to the evidence in the cases, the plaintiff's predecessors and the plaintiff have been the holders, superintendents, and managers and the beneficiaries of the endowments of the plaint institution and are, therefore, entitled to its income subject only to its maintenance; and I further find that the hereditary title of eight families of Chetties on behalf of Nagarathars to be its *huqdars* and trustees, either according to the original constitution of the institution or the terms of the original grant of the endowments or according to any custom sprung up subsequently, has not been made out.

"The evidence clearly establishes that the Chetties have assumed possession of the Mutt and its endowments on the death of Senapathy Gurukkal, as the persons interested in the institution and, therefore, entitled to its management, and as its trustees, that they have been claiming to be acting and have acted as such trustees, and that the plaintiff has all along acquiesced in such management by them and abstained from interfering with the same. At the same time I have further found that the defendants have not proved such rights to have sprung from the nature or constitution of the institution as originally founded or from any scheme of management made by them and the Gurukkals, or from any custom attaching to the institution, and that the defendants' case of the hereditary title of eight families to the management has not also been made out. Nor is it clearly made out that though the plaintiff is not shown to have interfered with their management and administration of the endowments from 1863, he was still excluded from participating in such management. The evidence shows only that some Chetties or others, sometimes two, and sometimes only one, and sometimes more than two, managed the endowments, exercised supervision and control, not as agents or in behalf of the plaintiff, but professedly in behalf of the general body of the Nagara Chetties, alleged to be their *huqdars* who apparently acquiesced in such management,

(1) 27 M. 435; 14 M. L. J. 105.
(2) 6 M. 287; 2 Ind. Dec. (N. S.) 479.
(3) 10 M. 133; 3 Ind. Dec. (N. S.) 843.

as the absence of objections on their part may be supposed to imply, just as the plaintiff's acquiescence also is implied in the same-way. In these circumstances I find the first part of issue No. 6 in each suit against the plaintiff. I further find the Chetties to have been holding the management as trustees and not as the plaintiff's agents, during the plaintiff's pleasure ever since 1863, though I have held on issue No. 5 that they have not established the hereditary right as founders and their representatives; the express exclusion also of the plaintiff from such management and administration has not been affirmatively made out."

The result of the said findings was, that the said Subordinate Judge held that because the plaintiff had not interfered with or had acquiesced in the joint management of the Mutt properties by the Chetties, the defendants were entitled to manage the properties along with the plaintiff. The Court, therefore, made decrees declaring that the plaintiff as head of the Mutt was entitled to be a trustee and manager conjointly with the Chetties and to possession and management thereof along with the defendants representing the Chetty community, and that the plaintiff as head of the Mutt was entitled to the entire beneficial enjoyment of the income of the said properties, and dismissing the plaintiff's claim to exclusive possession and trusteeship and mesne profits.

Both parties appealed to the High Court of Judicature at Madras. The four appeals were heard together by a Division Bench composed of Sir John Wallis, Officiating Chief Justice, and Kumaraswami Sastri, J., who delivered separate judgments on the 10th August 1914. The learned Judges of the High Court reversed the finding of the said Subordinate Judge in so far as it was based on the alleged acquiescence of the plaintiff and affirmed all his other findings. They concurrently held that the defendants had failed to establish that the Chetties or any of them had ever held possession of or managed the endowed properties of the Mutt adversely to the plaintiff. The learned Chief Justice observed as follows:—

"As already stated, the Subordinate Judge has found, and the evidence bears him out, that after the plaintiff's appointment the management was left very largely in the hands of individual Chetties, who are not shown to have been appointed in any particular way, but are treated by him as representing the Chetty caste as a whole, and he has come to the conclusion that through them the caste acquired by prescription against the plaintiff the right of managing the endowment, though as the plaintiff was not altogether excluded, he finds that the right of management acquired by the caste was not exclusive of the plaintiff, and that the plaintiff is entitled to manage jointly with the caste. It is not easy to imagine what sort of joint management there could be by the Guru and the whole Chetty caste, but it is not necessary to go into this as, in my opinion, the large part in the management taken by certain influential and energetic Chetties is not shown to have been adverse to the plaintiff. It is not enough to show that the plaintiff knew of the large part in the management taken by individual Chetties, it must be shown clearly that it was adverse to him; and this in my opinion should be very clearly made out where the relation between the parties was that of religious teacher and adherents, and for some time after the plaintiff's succession the facts proved admit of the interpretation that they were acting as *de facto* guardians of the minor. In view of the intimate and confidential relations of the parties, the Courts, I think, should require adverse possession to the knowledge of the plaintiff to be very clearly made out, and I think that in this respect the defendants have failed to discharge the burden which lies on them . . . . . The evidence appears to me to lend itself as readily to the view that the acts done by these individual Chetties were done on behalf of the plaintiff. The Subordinate Judge has not taken the view contended for by either side, but has come to the conclusion that the Chetties acquired a right of managing jointly with the plaintiff. I do not say such a right of joint management could not be acquired but I should certainly expect evidence of incidents of joint management, and it cannot be based upon the ground that, though the Chetties actually managed, there is no evidence that the plaintiff was

excluded from the management. I find no evidence of such joint management or of the manner in which it was to be enjoyed."

Mr. Justice Kumaraswami Sastri came to the same conclusion.

Hence this appeal.

Mr. *Frank Romer, K. C.* (with him Mr. *Kenworthy Brown*), for the Appellants.—In each case of this kind the position and rights of the Mohant and the manner in which the property is held, depend upon the custom of the particular institution.

Ram Parkash v. *Anand Das* (4).

There is no direct evidence as to the original constitution of this religious endowment, but there is a large body of evidence of usage which establishes our contentions, which are that the Chetties have a right to be the trustees of the Mutt, and as such trustees to manage Patharakudi and other villages belonging to the Mutt. This is not a Mutt in its primary sense: it is a religious endowment of the Chetties, and the plaintiff was the Gurukkal or priest of the Chetty community. We do not deny that the plaintiff is the head of the Mutt or that he is entitled to something out of it, but we deny his right to take possession of the endowment villages from us. We do not claim to be entitled for our own benefit or otherwise than as trustees but we claim the right to manage. The evidence establishes that the plaintiff's predecessor Senapati was Mohant for fifty years prior to 1862, and that the Chetties have been in possession and have managed as trustees from before Senapati's time. Under Madras Regulation VII of 1817 the general superintendence of all endowments in the Madras Presidency was vested in the Board of Revenue, and provision was made in sections 10 and 13 for the appointment of managers to exercise superintendence. In accordance with that Regulation petitions were filed and it was recorded that the villages of this Mutt belonged to the Nagara Chetties, who were the trustees. In 1852 there were other proceedings showing that the Chetties were the managers. Apart from anything else, however, the proceedings of the Inam Commission in 1864 were, we submit, conclusive: the Inam Register of that year shows that the Chetties were "*huqdars*" of the villages as trustees of the Mutt. Before making that entry the Commission carefully examined all the title deeds of the Mutt. Tickets were given to the Chetties in respect of Patharakudi village: and following the Inam Commissioner's Report, a formal grant was made to one of the Chetties as Dharmakartha or manager of the Mutt. Under the "rules for the adjudication and settlement of the Inam lands of the Madras Presidency" the Chetties have the right, after these proceedings, to remain in management of the village.

It is not, however, a case of whether we are entitled or not: the onus is on plaintiff who claims possession and has to prove his right to it. The Subordinate Judge rightly disbelieved that we were in possession as plaintiff's agents. The High Court have come to a contrary conclusion, but their finding is not supported by any reliable evidence. Both the lower Courts seem to have been obsessed with the word "Mutt;" the Subordinate Judge has mainly on that ground held that plaintiff is entitled to share in the management, the High Court that he is entitled to the sole management. Cases are not infrequent where the management of a Mutt is vested in a Dharmakartha other than the Mohunt: *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (1).

[VISCOUNT CAVE referred to *Navroji Manekji Wadia* v. *Dastur Kharsedji Mancherji* ( ).].

Further, the suit is long since barred by limitation. The defendants do not claim to be entitled otherwise than as trustees, and the ordinary twelve years' limit applies: *Balwant Rao* v. *Puran Mal* (6).

Here the Chetties have admittedly been in possession, and exercising all acts of ownership, for over 50 years. It is not for me to prove that plaintiff explicitly recognised our ownership: it is for him to show we were his agents, which he has completely failed to do.

The plaintiff here claimed to be entitled as sole beneficiary: to have the income to

(4) 33 Ind. Cas. 583; 43 I. A. 73; 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 406; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 43 C. 707; 20 M. L. T. 267 (P. C).

(5) 28 B. 20; 5 Bom. L. R. 745.

(6) 10 I. A. 90; 6 A. 1; 13 C. L. R. 39; 4 Sar. P. C. 435; 3 Ind. Dec. (N. S.) 352.

do just what he liked with. Strictly his suit should be dismissed: but such a result would be unsatisfactory, and we are willing the case should be referred back for the settlement of a scheme as to the trust property, should the Board think such a course desirable.

Mr. *Kenworthy Brown* followed, and referred to Castes and Tribes of Southern India, by Thurston, Volume V, pages 250—254. Though called a Mutt, this is not a monastic institution: if it were, plaintiff could not be its head: he is not a celibate: he lived in the *agraharam* with his natural family: he is neither a monk nor a prior. The evidence shows that he had resources independent of the Mutt property, *e. g.*, Upadesam fees: that alone distinguishes this from a Mutt properly so called. You can have in India a religious endowment which is a purely caste institution. *Krishnasami Chetti* v. *Virasami Chetti* (3).

Mr. *DeGruyther, K. C.* and Mr *Dube*, for the Respondent.—The only point is whether the grant here was made to the plaintiff's predecessors or to the Chetties. The lower Courts have concurred in finding that this is a Mutt of the usual type such as Udipi and other Dharmapuram Mutts in Southern India. The village being part of the Mutt property, the plaintiff by virtue of his office as head of the Mutt is entitled to hold and manage it and to enjoy the proceeds. The findings of the Inam Commission are not against plaintiff's contention: at the time of the Commission there was no head of the Mutt and so the proceedings in connection with the Mutt properties had to be taken by the worshippers and the well-wishers of the Mutt. It is not shown that the Chetties ever asserted any right adversely to the head of the Mutt, and both Courts find that no such adverse assertion of right has ever been made. According to the evidence, the Chetties helped in the management with the express or implied consent or acquiescence of the plaintiff, and there is no evidence that they ever did anything against his wishes until the events referred to in the plaint. Before plaintiff's appointment the title was throughout recognised to be vested in the Mathadhipati or head of the Mutt. The title deeds which the Chetties put forward in 1832 and in the Inam enquiry were in the name of the head of the Mutt.

Plaintiff is not claiming the income in the Receiver's hands for his own personal enjoyment, but as head of the Mutt and on behalf of the Mutt. Defendants' case is that the institution is not a Mutt and that plaintiff is a paid servant of the Chetty community and liable to dismissal by the Chetties: this case has been negatived by both Courts below. This is not a caste institution but a Mutt: the management of all the Mutt property vests in the head of the Mutt: *Jagadindra Nath Roy* v. *Hemanta Kunari Debi* (7); *Sethuramaswamiar* v. *Meruswamiar* (8). There is nothing to show that the position of this Mutt differs from that of an ordinary Mutt. There is no certain evidence as to the constitution of the Mutt, but throughout its history it has always been assumed that the whole property vested in the head. The Chetties have adduced no reliable evidence that they were appointed trustees of the Mutt in regard to any of its property.

The Courts below were right in holding that plaintiff's suit was not barred by limitation. It is not really a suit in ejectment, but one for declaration of title: it followed on proceedings under Chapter XII of the Code of Criminal Procedure.

The defendants have failed to establish any possession adverse to the head of the Mutt.

The terms of the decree made by the Court below indicate that plaintiff is entitled to draw the surplus income in the Receiver's hands as head of the Mutt; this does not mean he is to spend it on himself.

Mr. *Romer, K. C.*, replied.

JUDGMENT.

LORD SHAW.—This is an appeal from a judgment of the High Court of Judicature at Madras, dated the 10th August 1914,* which varied a decree of the Subordinate Judge of Madura, dated the 19th October 1908. The exact terms of these judgments will be afterwards referred to. It is necessary, however, in order to understand them

(7) 31 I. A. 203; 32 C. 129; 8 C. W. N. 809; 6 Bom. L. R. 765; 1 A. L. J. 585; 8 Sar. P. C. J. 698 (P. C.).

(8) 43 Ind. Cas. 806; 45 I. A. 1; 7 L. W. 22; 4 P. L. W. 91; 34 M. L. J. 130; 16 A. L. J. 113; 27 C. L. J. 231; 22 C. W. N. 457; 41 M. 493; 20 Bom. L. R. 514 (P. C.).

*See 33 Ind. Cas. 216—*Ed.*

to keep clearly in view the form and nature of the suit as brought.

The suit was brought by the present respondent "to declare that the defendants have no right to the village of Patharakudi, and that the plaintiff as head of the Mutt is entitled to the possession of the village . . . and to receive the income of the same from the hands of the Receiver."

The village is part of the property of a Mutt. It has been long administered by the appellants, who are Nagara Chetties. Broadly speaking, the contest in the case—and for the purpose of stating this contest colourless terms are employed—is between the head of the Mutt on the one hand, who claims in virtue of his office to be entitled to the management and possession of the entire property of the Mutt; while, on the other hand, the appellants claim that they are entitled as trustees or managers of the part of the property of the institution which is in suit to be continued in the possession and management thereof. The form of the action brought in these circumstances is a suit for possession instituted by the head of the Mutt, who does not have that possession, against the trustees or managers, who and whose predecessors for very many years have had it.

In such circumstances there naturally arises a subsidiary question of limitation, but their Lordships are unwilling to have the suit disposed of merely on the latter ground, and the case was argued before the Board with much fulness on its merits. In the Courts below this appears also to have been done, and in these Courts judgments of much elaboration were pronounced. Again, however, it must be stated that the suit is one the substantial aim of which is the eviction of the present possessors at the instance of the respondent, with the substitution in lieu thereof of possession and enjoyment by the respondent of the property in question, and of its entire income.

In the village of Patharakudi there are:—

(1) A temple of the god specially revered by the Nagara community, of which the appellants are members and have acted as representatives. This community forms a sub caste of the Chetties;

(2) A residence for the Nagara priest or Gurukkal;

(3) A shelter house or *matam*, for the use of agarathars when they resort to the place for religious exercises;

(4) A *choultry*, where food is distributed to Brahmins; and

(5) A street of houses forming part of a great enlargement made in recent times by the Chetties—that is, by the appellants and their predecessors. This street of houses is an *agraharam*. It is said to be the usual adjunct of a Hindu temple, and to be for the accommodation of Brahmins or Brahminical worshippers; while

(6) There is the village itself and the lands belonging to it, the income of which falls into the general revenue of the Mutt as an institution.

In consequence of a certain assumption throughout the evidence of the knowledge of distinctions between these various parts of the property, there is a lack of clearness on that subject notwithstanding the voluminous evidence; but, speaking generally, their Lordships may assume that the temple or place of worship, together with the residence of the respondent as spiritual head of the institution, the shelter house, and the *choultry*, or place for the feeding of Brahmins, stand on one side, while on the other stands the remainder of the property.

The latter is now in the hands of the Receiver, and has been so for some years. Their Lordships are relieved of difficulty in regard to the distinctions referred to by this fact of a Receivership. The suit has reference, and reference alone, to the property which is in the Receiver's hands. His management has not interfered with the purely spiritual functions of the *gurukkal* and with those parts of the property, like the place of worship and his own residence, which naturally attach to the performance of such functions by him.

In the plaint the respondent treats the other parts of the property under the general term "village", and this is quite a convenient term. His position on the pleading is that he, the Mohunt, was all along in the possession and enjoyment of the village. In the course of the case, however, no substantial denial could be offered to the fact, which was notorious, that the actual possessors were the Chetties. The averment is that "the Chetties were managing the affairs of the Mutt only as agents

under the plaintiff and under his supervision, and were at no time in possession of the village of Patharakudi, the same having all along remained in the possession and enjoyment of the plaintiff." This is the case attempted to be set up by the respondent and by certain witnesses whom he produced, but they were disbelieved.

The respondent was appointed head of the Mutt in the year 1867. There seems little reason to doubt that a decree in the terms sought by him would, to say the least, involve a very considerable subversion of the mode of occupation, possession and management which have obtained during his entire term of office. Under a decree in terms of his plaint he could dismiss the Chetties from office, and assume possession and management himself or by his nominees. Of course, if he had hitherto been, as is alleged in his suit, in possession and management himself, the demand made in the plaint would have been the natural relief sought. It is, therefore, important to see how the facts on this point stand.

Their Lordships have very carefully considered the evidence; and they see no reason to doubt the soundness of the conclusion thereon arrived at by the learned Subordinate Judge in that part of his pronouncement which is now cited. It is as follows:—

"Except the vague and meagre oral evidence, there is not much evidence on the plaintiff's side in this period, while considerable documentary evidence, consisting of accounts, receipts, official correspondence and other papers, has been adduced on the defendants' side to prove their management as trustees and *huqdars*. I may at once state here that the general effect of the entire evidence of this period is to show, beyond all doubt, the full and complete management, control and supervision of the endowments and their income by some Chetties or others to the knowledge of the plaintiff, who appears to have all through acquiesced in the same and not to have interfered with the Chetties in such management. The plaintiff has virtually conceded this state of things, not only in the present case, but has also done so in his previous depositions (Exhibits IV, VI and VIA), in all of which he has unequivocally admitted the management of the Chetties and the fact of the accounts, etc., being kept, checked and controlled by them. His explanation for this state of things, which his witnesses also try to make out, and which, he contends, is corroborated by a few documents on his side, is that the Chetties did all that business only under his orders, and that their management was never independent and exclusive of his rights as the proprietor and head of the Mutt and its sole beneficiary entitled to appropriate the income as he wished. . . . . .

"The Chetties constructed the houses and the new *matam*, etc. (Exhibits VI, XVI, XXI, VII, VIIIE, VIIIF, XXVIIIA and the defendant's 1st, 7th and 10th witnesses), repaired tanks, etc., paid road-cess, etc., and in fact did everything which an owner or manager or trustee must do for the management and administration of the property. It is also shown by the same evidence that money and paddy payable to the plaintiff's house and to the plaintiff for *pooiah* were treated as amounts standing to their credits and were paid accordingly; that moneys for the plaintiff's expenses for his trips to Chidambaram immediately after the installation, for his visit to Sringeri Swamigal at Kunnakudy, and for his Benares trip on pilgrimage, were all paid after correspondence between the servants and the Kariakkar Chetties.

"The Revenue and Zamin Officers also seem to have recognised the Chetties as *huqdars* and issued the road cess *pattas* and notices, etc., sometimes generally, to *huqdars* or managers without names, and sometime to Nachiappa Chetty, one of the eight persons already referred to as *huqdar*."

Other portions of the learned Judge's opinion deal with the case attempted to be made by the plaintiff that all this possession and management by the *huqdars* was as his agents. He brings that matter to a point by saying, "In this case the Chetties were in management in their own right as *huqdars* before the plaintiff's appointment, and continued as such afterwards also. The plaintiff does not prove his case of their management as his agents, or the commencement of their management with his or his predecessors' permission." It might, in the view of the Board, have been open upon the evidence to make upon the allegation of agency a much more emphatic pro-

nouncement in the negative, but it is not necessary for their Lordships to go into that; they are in agreement with the learned Subordinate Judge that the case of agency is not made out, and that accordingly the attempt of the plaintiff either to ground or to fortify his right on possession either by himself or by others has entirely failed. They see no reason to differ from the view of the Judge, who holds that the evidence of the plaintiff and his witnesses upon this topic cannot be believed.

The period of time over which the possession referred to extends covers more than half a century. But the documents in this case are of an important public character and carry the record of this Mutt much further back. As already stated, the plaintiff's appointment to the headship took place in the year 1867. But the Inam Register for the year 1864 has been produced, and to it their Lordships attach importance. It is true that the making of this Register was for the ultimate purpose of determining whether or not the lands were tax free. But it must not be forgotten that the preparation of this Register was a great act of State, and its preparation and contents were the subject of much consideration under elaborately detailed reports and minutes. It is to be remembered that the Inam Commissioners through their officials made enquiry on the spot, heard evidence and examined documents, and with regard to each individual property the Government was put in possession not only of the conclusion come to as to whether the land was tax free, but of a statement of the history and tenure of the property itself. While their Lordships do not doubt that such a report would not displace actual and authentic evidence in individual cases; yet the Board, when such is not available, cannot fail to attach the utmost importance, as part of the history of the property, to the information set forth in the Inam Register.

From that it appears as follows:—

"Villages of Variyanendal, Surakudi, Kanjiram Kurchi Yendal and Hamlet Padattanendal.

"1. These are the four villages in the Zemindari of Sivaganga. These were granted by Savundara Pandiyan King in column 11 for the support of a *matam* in Pathirakudi village. This has no *patta*. This is an ancient grant. It appears by the tradition that the object of the grant is to keep the *matam* which is presided by the priest of Yalayattangudy Nattukottai Chetties efficiently by feeding Brahmins in a *chattram* situated close to the *matam*, by worshipping the Swamy in Palambady Nader Koil situated close to the *matam*, and by maintaining the dignity of the priest or Guru. Now the object of the grant is efficiently kept up by doing all the above things. The Chetties, who are very rich, spend considerable sum annually for feeding Brahmins, etc. The priest of the *matam* died about fifteen months ago. The Chetties are in contemplation in electing a priest for the *matam*. It appears that when the priest was alive, some of the principal Chetties, whose names are given in column 16, were managing the affairs of the *matam* and of the villages attached to it. The managers or trustees are elected by the Chetty community itself. Thus, the grant falls under rule III, clause 1. Tax free.

"This is a hereditary grant. This is in uninterrupted possession of its holders since the date of the grant. The village is entered as Pathirakudi *matam* village in all the accounts in column 12. The persons in column 16 are now trustees of the *matam*. They are managing the affairs thereof."

In further observations made by the Deputy Collector who signs the Register, it is stated that "the trustees in column 16 added 126½ acres of wet and 250 acres of dry to the area entered in the account;" and in another note it is added: "The *matam* is under the management of the trustees with their villages." Further, a matter of not inconsiderable importance is contained in these words:—"The Zamindar has no objection to registering the names of the trustees here." The names of the trustees are duly set forth in the column headed "Particulars regarding present owner;" and these particulars are headed "Pathirakudi *matam* Trustees." Eight trustees who are Chetties, beginning with Natchiappa Chetty, are then mentioned, the name and age of each Chetty being given. As to the title to the property, that is set forth in a further column as "To be con-

firmed under rule III, clause 1. Tax free."

This makes it of importance to consider the rule thus referred to. It is one of the "Rules for the adjudication and settlement of the *inam* lands of the Madras Presidency," being part of Order 116 printed at page 211 of the Standing Orders of the Board of Revenue. It is in these terms:—

"If the *inam* was given for religious or charitable objects, such as for the support of temples, mosques, colleges, *choultries*, and other public buildings or institutions, or for services therein, whether held in the names of the institutions or of the persons rendering the services, it will be continued to the present holders and their successors, and will not be subject to further interference, so long as the buildings or institutions are maintained in an efficient state, and the services continue to be performed according to the conditions of the grant."

It thus appears to their Lordships to be quite clear that the eight Chetties named, who are stated to be trustees, were in 1864 confirmed, after enquiry and in terms of the Rule, as holders of the village. And unless the Rule was to be departed from, the *inam* "will be continued to the present holders and their successors and will not be subject to further interference" so long as two things happen, namely, the buildings are efficiently maintained and the services are continued. Both of these things have happened, and accordingly the adjudication stands: the Chetties were the holders, they were continued as such, and they were not to be interfered with.

Two points may be mentioned in connection with this adjudication. In the first place the most important person, apart from the institution itself, was the Zemindar, from whose predecessors undoubtedly the original title to the lands had flowed; and it will be noted that the Zemindar had no objection to the registration of the trustees as proposed. In the next place, it is a mistake to treat the transactions of 1864 as merely bearing upon that year. They form, in their Lordships' judgment, a record of an anterior state of matters, from which record of possession, etc., a conclusion is formed by the Commissioner as to what was the real state of the title.

Following the report, a title deed was granted by the Inam Commissioner, on the 3rd June 1864, to the Dharmakartha of Patharakudi Mutt, that is to say, to the trustee or manager of the charity, and in this title deed it is stated, first:—

"On behalf of the Governor in-Council of Madras I acknowledge your title to a religious endowment *matam* or *inam*, situated in . . . . held for the support of the Pagoda called . . . in that village . . .

"(2) This *inam* is confirmed to you and your successors, subject to the existing quit rent of Rs. 132-11 1 per annum, to be held without interference so long as the conditions of the grant are duly fulfilled."

But at least one further section of the earlier history of this Mutt can be found. Their Lordships attach weight to the transactions of the year 1832. On the 30th of April of that year a petition was presented by the Zemindar, narrating that the Nagara Chetties originally came from the Tanjore Division and settled long ago in his Zemindari and that their family deities are in that jurisdiction. He stated that "on account of the performance of those charities, the said Chetties have been paying the *poruppu* due to the Sircar in respect of the villages in our Zemindari jurisdiction, managing the said temples, *matam*, etc., and by sperding certain moneys out of their own pocket in addition to the income... are conducting in the said temples, *matams* etc.," the worship, and that "they have constructed tanks and have been performing the feeding charity and other charities." He then sets forth that the Chetties had reported to him that the *Amildar* had contrary to practice appointed *Monegars* and *Samprathis* and called for accounts. Then follows the petition in these terms:—

"We, therefore, beg to submit that orders may be issued to the Head Tahsildar to the effect that *poruppu* amount in respect of the said *devastanams*, *matams*, etc., may be collected as was being done up to last year, that the *Monegars* and *Samprathis* now newly appointed therefor may be recalled, and that no trouble be caused by calling for any account whatsoever, so that the Chetties may, day by day, do on a grand scale the established *poojah*, *annadanam*

(feeding charity), etc., in the said temple, and *matams*."

The Board again notes the significant fact that the Zemindar is himself the petitioner.

On the 25th June of the same year a petition was presented on behalf of the Nagarathars by Venkatachallam Chetty to the Principal Collector of the Madura District, which narrated that "We ourselves have been managing the said temples, *matams*, etc., from the days of our ancestors up to date, spending large sum of money from our private funds," and it prayed that orders might be passed "to the effect that, in accordance with the provisions of Act VII of 1817, we alone should without violating the *mamul* (practice) have claim over the said charities and conduct them, and that the *Monegars* and *Samprathis* now newly appointed by the said *Amildar* be recalled."

It is important to observe what was the Regulation founded upon. It was that of the 30th September 1817, passed by the Governor-in-Council of Fort St. George "for the due appropriation of the rents and produce of lands granted for the support of mosques, Hindu temples and colleges, or other public purposes; for the maintenance and repair of bridges, *choultries* or *chuttrums*, and other public buildings." Under the tenth head of the Regulation it was provided that the local agents should ascertain and report "the names of the present trustees, managers or superintendents of the several institutions, foundations or establishments above described together with other particulars respecting them, and by whom and under what authority they have been appointed or elected." Then follows the thirteenth branch of the Regulation, which is in the following terms:—

"On the receipt of the report and information required by the preceding clause, the Board of Revenue shall either appoint the person or persons nominated for their approval, or shall make such other provision for the trust, management or superintendence, as may to them seem right and fit, with reference to the nature and conditions of the endowment, having previously called for any further information from the local agents that may appear to them to be requisite."

The Regulation of 1817 seems to have been complied with in terms. The language of the petitions by the Zemindar and the Chetties was adopted in the decree issued, namely, that the Chetties should be left in their possession and that they would perform the charities according to *mamul*. The operative words were these: "Let orders be issued to the effect that, in accordance with *mamul*, the temples, *matams*, etc., and their villages mentioned above, belonging to the said Nagara Chetties, be delivered over to them alone, without *Monegars* and others being appointed thereto."

This is the most remote period to which the authentic history of this Mutt can be said to reach. From the fact that it was a Mutt it follows that it must have had a head as such, with all that that implies, as hereinafter to be referred to. But with regard to the village which is now under Receivership, and which is a part of the endowment of the Mutt, the management and possession thereof were in the hands of the Nagara Chetties at least for a period of about eighty years prior to the institution of this suit, and their dispossession and the substitution for such management and possession of that of the plaintiff would, as already said, be a subversion of the history of the property. Such subversion may be a necessity of the case on account of the nature of the institution; and this, which is an important point, will be dealt with. Apart from that point, the right of the plaintiff either to the eviction of the Chetties or to possession for himself is not supported by the history of the lands.

No question arises in this case of misappropriation by the defendants; such a thing is not suggested against them. On the other hand, they admit that their administration must be, not for their personal ends, but entirely for and on behalf of and in the interests of the Mutt itself. This is the settled rule of administration with regard to such institutions under the law of India.

In the circumstances above set forth the demand made in the plaint does not appear to their Lordships to be warranted by law.

It may be difficult to trace the origin of the property under Receivership in the sense of ascribing its acquisition either to gifts from the Chetties out of their own private resources, or to offerings of worshippers, or to accumulations of income: but, however that may be, the case of possession by the Chetties in their own right, and not as agents for the Gurukkal, appears to be made out and is not indeed challenged in the Courts below. The difficulty on this head which the learned Judges in the Courts below have experienced arises from two causes, which will now be dealt with: first, in regard to the rights of the Gurukkal or Mohunt, which are construed as necessarily equivalent by law to the ownership of the village; and second, in regard to the possession itself, which, although protracted and undoubted, is treated, particularly in the judgment of the High Court, as being ineffective because it was not, according to the view that Court takes, adverse possession.

With reference to the first point, the Board has recently had occasion to deal with the position and rights of a Mohunt of an Asthal, or, as in this case, of the Gurukkal of a Mutt, in the two cases of *Ram Parkash* v. *Anand Das* (4) and *Sethuramaswamiar* v. *Meruswamiar* (8). In the former of these cases the body of authority upon this subject was dealt with. Two propositions may be cited as now expressing the general state of the law with regard to these institutions. In the first place, the nature of the ownership is an ownership in trust for the institution itself. Secondly, while it may no doubt be true that the ownership in the general case is with the spiritual head of the institution, still, to use the language of Sir Charles Turner in *Sammantha Pandara* v. *Sellappa Chetti* (9), "We do not, of course, mean to lay it down that . . . the property may not in some cases be held on different conditions and subject to different incidents." As pointed out in *Ram Parkash's case* (4), there are varieties of circumstances and tenure, and in respect to these the usage and custom of the Mutt falls to be determined. Once that usage and custom are clear they form the law of the Mutt.

In the opinion of their Lordships, it would be a contravention of the usage and custom of this Mutt, as disclosed by the evidence during the long course of its history, to affirm that the ownership of the village in suit was in the Gurukkal. It is in the Chetties, whose title has been officially and apparently quite properly recognised as the "holders." But even this latter proposition is not in truth necessary for the determination of the case, for if the plaintiff's own title as owner fails, and the Board is clearly of opinion that it does, the suit as laid by him cannot be maintained.

With regard to the second point mentioned, namely, that the possession by the Chetties has not been adverse to the Gurukkal, their Lordships fail to understand on what the difficulty of the Court below rests. Here was possession, not as in right of the Gurukkal, but as in the Chetties' own right, with all the incidents of possession, namely, the purchase of lands, the borrowing on lands, the erection of buildings, the letting of holdings, the making payments to the priest for his support and spiritual services, the keeping of the village accounts. The Mohunt was presumably aware of these transactions, extending now in his own time for over half a century, yet the first real challenge thereof appears to be the institution of this suit itself. This is a very ordinary case of possession *nec vi, nec clam, nec precario*. The person now claiming to be owner has stood by while others continued to possess not by any derivative title but in practical contravention of his alleged rights. The law does not require that the claimant to ownership must in such circumstances be shown to have protested that his rights were being violated, and that the possession went on adversely to his protests. In short, their Lordships cannot agree with the legal view upon this subject of possession adopted by the Court below.

In these circumstances there seems to the Board no reason why the law of limitation should not apply. In *Balwant Rao* v. *Puran Mal* (6) it was held that limitation applied to cases where the defendant admitted he

(9) 2 M. 175 at p. 179; 8 Ind. Jur. 558; 1 Ind. Dec. (N. S.) 393.

was a trustee, and the plaintiff, without proving misapplication, brought a suit more than twelve years after the cause of action arose, the object of the suit being to obtain control of the management. As Lord (then Sir Arthur) Hobhouse observed, in words which are applicable to the present case:—

"Here there is no question of recovering the property for the trusts of the endowment, because the defendant admits that he is a trustee and says that he is applying the property to the trusts of the endowment. There is no evidence that he is not applying the property to the trusts of the endowment, and there is no reason to conclude that the property would be more applied to those trusts if the plaintiff were to succeed in his suit than it is at this moment. The plaintiff is suing only for his own personal right to manage, or in some way to control the management of the endowment."

The present case is still stronger for the application of the rule of limitation, as the assertion is made not only of the right to management, but of the right of beneficial ownership. But while, in their Lordships' opinion, the suit would be excluded by the twelve years' limitation, they have, on the ground already stated, thought it right to deal with the whole breadth of the argument presented.

Their Lordships desire in conclusion to say that no objection was made out to the *personnel* of the defendants as true successors of the Chetties to whom the rights of ownership for the benefit of the Mutt were confirmed as already narrated; and no challenge is made of the substantial accuracy of the narrative on that subject contained in the evidence of Annamalai Chetty, the son of Natchiappa Chetty, on page 703 of the record.

By the judgment of the Subordinate Judge it was declared that the plaintiff, as the Gurukkal and head of the institution, and "consequently as a trustee and manager of the same conjointly with" the Chetties, was entitled to the possession and management along with them, "without prejudice to the rights of the latter to continue in actual possession and direct management of the same as they have been holding and managing them till now from 1863." Underlying this part of the judgment it is plain that the learned Judge desired to make clear the propriety of continuing the Chetties' possession, but the decree given does not appear to be in workable form. A further objection thereto arises from the latter portion thereof, under which it is declared that the Gurukkal "is further entitled to the entire beneficial enjoyment of the income of the said villages during his life and continuance as the spiritual head of the institution, subject only to the maintenance of the said institution," etc.

A ready test of the application of this is with regard to the accumulated income, amounting to Rs. 20,000 or thereby, now in the hands of the Receiver. Under the decree quoted the Gurukkal would be entitled to instant possession and entire beneficial enjoyment of that sum. If the present purposes of the Mutt did not consume it, he could employ it for his personal use quite apart from the dignity of his office. It is plain to their Lordships that this would be not only a subversion of the usage and custom of the Mutt, but would be a violation of the law applicable to such institutions. A fair test to be applied in such cases is to demand what is the true principle or nature of the administration of surplus income. It is, of course, the duty of a trustee to refrain from the personal enjoyment of such surplus and to add the same to the capital of the estate to be administered; and this law also applies to the property of a Mutt or Asthal, and that whether the title to the same is in the Gurukkal as spiritual head of the institution—which is an ordinary case—or is in trustees like the Chetties according to the usage and custom of the institution as in the present case. This law appears to have been complied with by the defendants and their predecessors during the past history of this institution, and should be continued. This would not be done by an affirmance of the decree of either of the Courts below.

The view of the High Court on this topic was even stronger than that of the Subordinate Judge. The plaintiff was declared to be entitled solely to possession and enjoyment of the village, and as head of the Mutt to be "entitled to draw the surplus income realised by the Receiver and deposited by him to the credit of the suit, and also to receive from

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the Receiver any further surplus income which may have been realised by him subsequently." In their Lordships' opinion this declaration cannot be made.

Their Lordships will accordingly humbly advise His Majesty to recall both of the decrees of the Courts below and to dismiss the suit, the appellants being entitled to a decree for costs of the suit and of this appeal against the respondent, and failing payment thereof, to be entitled to charge the same against the funds and property now in the hands of the Receiver.

Appeal allowed.

Solicitor for the Appellants.—Mr. *Douglas Grant.*

Solicitors for the Respondents.—Messrs. *Barrow, Rogers* and *Nevill.*

PATNA HIGH COURT.
FULL BENCH.

CIVIL MISCELLANEOUS JUDICIAL CASE NO. 74 OF 1919.

August 14, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, Mr. Justice Atkinson and Mr. Justice Adami.

In the matter of THE BHIKANPUR SUGAR CONCERN IN THE DISTRICT OF MUZAFFARPUR.

Income Tax Act (VII of 1918), ss. 2 (1) (b), 4—Profits derived by factory from sale of finished product manufactured from raw material grown by its servants, whether assessable.

The profits derived by a factory from the sale of a finished product, such as sugar, manufactered at the factory from the raw material grown by its servants on its own land is not exempt from the payment of income tax, as the income so derived is not agricultural income within the meaning of section 2 (1) (*b*) of the Income Tax Act. [p. 303, col. 2; p. 305, col. 1; p. 303, col. 1.]

Reference made by the Officiating Member of the Board of Revenue, Behar Province.

FACTS.—The Bhikanpur Sugar Concern was established at a village called Bhikanpur in the district of Muzaffarpur in the year 1906. The factory manufactures sugar partly from cane grown on its own lands by its own servants and partly from cane purchased from Indian cultivators. In 1916—17 the factory had a net profit of Rs. 1,75,000, on which an Income Tax assessment of Rs. 10,937 was made. The factory lodged an objection in respect of Rs. 7,084 of the assessment, which is calculated to be the amount levied on profits derived from the cane grown by it on its own lands. The question referred by the Board of Revenue, Behar and Orissa, to the High Court under section 51 of the Income Tax Act (VII of 1918) was whether the Bhikanpur Sugar Concern was liable to pay income tax on that portion of its profits which was derived from sugar manufactured from cane grown on its own lands by its servants. The factory admitted its liability to pay tax on the profits derived from sugar manufactured from cane purchased from *raiyats* and others.

Messrs. *P. Kennedy* and *S. C. Mitter*, for the Objectors.

The Advocate-General, Bengal, and the Government Advocate, Behar and Orissa, for the Crown.

JUDGMENT.

MILLER, C. J.—This case has been referred to the High Court by the Member of the Board of Revenue of this Province under the provisions of section 51 of the Indian Income Tax Act, 1918. The reference was made in the course of proceedings under the Act relating to the assessment to income tax of the Bhikanpur Sugan Concern. The question upon which the opinion of the High Court is sought is whether the Bhikanpur Sugar Concern is liable to pay income tax in respect to that portion of its profits derived from the sale of the finished article in so far as it is manufactured from sugarcane grown by its own servants on its own land, or whether it is exempted on the ground that such income is 'agricultural income' within the meaning of sections 2 and 4 of the Act. By section 4 income of this nature is not chargeable to income tax. By section 2 agricultural income is defined. By clause (1) (*b*) of that section agricultural income includes any income derived from (*i*) agriculture, or (*ii*) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market.

It is contended on behalf of the factory that the income derived from the sale of

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the finished product manufactured by them at their factory from the raw material grown upon their own land is covered by the words of section 2 (1) (*b*) which I have just quoted. In order to determine this question it is necessary to consider the circumstances under which the factory carries on its business. It is owned by a private company, the business being conducted under the direction of a manager who is also a share-holder in the company. It owns a sugar factory equipped with modern machinery by which the sugarcane is converted into refined sugar ready for domestic purposes. It carries on business on a large scale. During the year of assessment 7,44,398 maunds of sugarcane, of which rather more than half was grown on the factory's own land, passed through the mills, the remainder being purchased from cultivators of sugarcane in the neighbourhood. The gross proceeds of this sugarcane amounted to nearly 6 lakhs of rupees and that of molasses for the same period to about Rs. 44,000. The net profits for the year were stated to be Rs. 1,75,000, on which income tax has been assessed at Rs. 10,937. The factory has lodged an objection in respect to Rs. 7,804 of this assessment as representing a tax on the profits derived from sugarcane grown by themselves. From the accounts it appears that the agricultural branch which deals with the cultivation of the raw material and the factory branch are kept separte. It is not stated what the profits of the agricultural branch are but these would appear to be exempt from taxation. The process of manufacture adopted by the factory is similar to that employed by other sugar refineries in other parts of the world.

The main question for determination is whether the process of manufacture carried on by the company can be said to be the performance by a cultivator of any process ordinarily employed by a cultivator to render the produce raised fit to be taken to market. In order to determine this it is necessary to enquire as to what are the processes ordinarily employed by cultivators of sugarcane. It is common ground that the vast bulk of the sugarcane in this country is cultivated by *raiyats* of agricultural villages. This they either sell in a raw state to middlemen or owners of factories or country mills, or they reduce it by certain simple processes of crushing and boiling to a substance known as *rab*, a kind of molasses in a crude state, and then sell it to the factories where it is subjected to a further process of refinement in order to make it fit for domestic use as sugar. It is also not disputed that a very small fraction of the sugarcane produced in this country is grown by the owners of factories themselves The facts of which I have given a short summary are more fully referred to in the order of reference of Mr. McPherson, the Officiating Member of the Board of Revenue, but I have stated enough to show that the processes employed by the factory are in kind as well as in degree vastly different from those ordinarily employed by a cultivator in order to render the produce fit for the market. Indeed the market to which the cultivator ordinarily takes his wares is not the same market as that in which the refined sugar manufactured by the factory is sold. The market of the vast majority of cultivators of sugarcane is the sugar refinery itself or the country mill. The market of the sugar factory is the retail dealer of the finished product fit for domestic use, and in my opinion it is not possible to hold that the processes employed by a sugar factory in order to render it fit for their customers are those ordinarily employed by a cultivator to render it fit for his. It is true that the cultivator in some cases subjects the raw material to certain manufacturing processes resulting in the production of the juice or *rab* before disposing of it to his customers, but even assuming that the performance of these processes by the cultivator would come within the meaning of section 2 (1) (*b*) (*ii*), the matter so far as he is concerned stops there, and a great deal more has to be done by the factories to refine and crystallise the product before it is fit for the market with which they deal.

It was contended on behalf of the objector that the words "process ordinarily employed" have reference to the processes ordinarily employed by sugar factories or anyone else, if they happen to be cultivators, in rendering the produce fit for the market and that if a person is a cultivator and employs such processes in the ordinary course of his busi-

ness, he comes within the exemption created by the section. I do not think the section can be read in this sense. It refers to the performance by a cultivator of a process ordinarily employed by a cultivator, which I think means in ordinary use amongst cultivators and not to a process ordinarily employed by anybody else, and had the meaning been that contended for, it is difficult to see what operation can be given to the words "by a cultivator or receiver of rent-in kind."

It is next contended that as this is a taxing Statute, it should be strictly construed in favour of the subject and if there is any ambiguity in the meaning he should be allowed the benefit of the doubt. I do not think the construction of the section gives rise to any difficulty. The real question for determination is one of fact, *viz.*, whether the process employed by the factory is that in ordinary use by cultivators, and in my opinion the evidence shows that it is clearly not.

It is further contended that the history of the assessment to taxation of the income of the Bhikanpur Factory throws some light upon the intention of the Legislature. In 1912 the Commissioner of Tirhut on an objection by the factory exempted them from assessment on the profits of their home-grown produce, his decision being based upon an opinion expressed by Sir G. C. Paul, Advocate-General of Bengal, in the year 1896 relating to the assessment of indigo and tea concerns. We have no information as to the processes adopted by indigo or tea planters and are unable to judge how far that opinion may be relevant to the facts of the present case, but it is contended that notwithstanding the decision of the Commissioner of Tirhut the Legislature in passing the Act of 1918 re enacted in section 2 the provisions of the previous Acts in practically identical language and must, therefore, be taken to have concurred in the interpretation placed upon the Act by the Commissioner of Tirhut in 1912. It appears, however, that in 19 4 the Board of Revenue were not satisfied with this decision and placed the matter before the Local Government and finally before the Government of India, with the result that the Bhikanpur Factory was assessed on the whole of its profits for the year 1916-1917. This assessment has been paid under protest and a suit is still pending in connection with it, which it has been agreed shall abide the result of the present reference. I agree where there has been a long course of decisions determining the construction of a Statute, this may be taken into consideration in construing a new enactment passed in the same terms as pre existing Statutes but a single decision such as that referred to cannot, in my opinion, form the basis of any presumption as to the intention of the Legislature in the present case. Moreover, as is pointed out by Mr. McPherson in the order of reference the word "factory," which appears in the proviso to sub-clause (*c*) of section 5 of the old Act, has been omitted from section 2 (1) (*b*) (*iv*) of the present Act "presumably lest its presence might lend colour to any claim of the nature now under consideration."

It is further contended that the factory was never taxed before the year 1916-1917 and for many years they have made an income from sugar. There is, however, no evidence on the record to show how long the manufacture of sugar by this factory has been going on. We are told that it turned its attention to sugar in the year 1906, as did also many indigo planters at a time when the synthetic process of indigo manufacture in Europe materially interfered with the business of indigo planters in this country. What the process of manufacture adopted by the Bhikanpur Factory at that time was we do not know, but in any case I do not think the fact that it has escaped taxation in the past is in itself a good reason why it should still escape, unless it is in fact exempted by the Income Tax Act itself. In my opinion they are not exempted under the clauses of the Act relied on for the reasons above given, and I would answer in the affirmative the question submitted to us whether the Bhikanpur Concern is liable to income tax in respect to that portion of its produce which is derived from sugarcane grown by its servants on its own land and in the negative the question whether it is exempted by reason of the provisions contained in section 2 (1) (*b*) (*ii*) of the Act.

A further point was taken by the learned Advocate-General on behalf of the Board of Revenue, *viz.*, that a company in the position of the Bhikanpur Concern cannot be said to be a cultivator within the meaning

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of section 2 of the Act. He pointed out that the company really consisted of two distinct entities, one interested only in the production of sugarcane and the other in the manufacture of refined sugar, and the accounts shew that the factory branch really bought from the agricultural branch the raw sugarcane at a fixed valuation of 7 annas per maund, which was credited to the agricultural branch in the factory accounts, and that in such circumstances the cultivation of the raw material was only ancillary to the manufacture of the finished product, whereas in the case of a cultivator contemplated by the Act the process of manufacture, such as it is, is merely ancillary to the cultivation of the raw produce in order to make it fit for the market. In support of this contention the case of the *Stamp Reference* (1) was relied upon. That case dealt with the meaning of the term cultivator in the Second Schedule of the Stamp Act of 1879 and held that it did not include farmers, middlemen or lessees even though cultivation was to some extent carried on by them in the area covered by their lease but included only those persons who actually cultivated the soil themselves or by members of their household or by hired labour and with their own or hired stock. The question in that case was whether a *kabuliyat* executed by a lessee of certain land, the greater portion of which was not cultivable or susceptible of being treated as a cultivator's holding, was exempted from stamp duty under the Act of 1879. The Court found that although some small portion of the land might have been brought under cultivation by the lessee, he was not a cultivator within the meaning of the Act, having regard to the purposes for which the land was held. That case does not in my opinion support the contention of the learned Advocate-General in the present case. Having regard to the purposes for which the company's land was used and the fact that they did cultivate it for their own purposes by their own servants, I think they must be held to be cultivators within the ordinary meaning of that term. But in so far as they were carrying on a business of sugar manufacturers, I do not think that the processes used by them for that purpose were those ordinarily employed by cultivators for the purpose of rendering the produce fit to be taken to market. The truth is, in my opinion, that the Bhikanpur Concern was really acting in a dual capacity. In so far as they were cultivators of sugarcane, their operations ceased when they handed over the raw material to their factory branch. In so far as they were manufacturers of refined sugar, they were carrying on a business which required the adoption of manufacturing process not ordinarily used by cultivators before disposing of their produce in the market. In fact there is no evidence to shew that any other sugar factories of this nature convert into refined sugar produce grown on their own farms but even assuming that there may be a few isolated instances in which this is done, it cannot in my opinion be said that this process of manufacture is one ordinarily employed by a cultivator.

ATKINSON, J.—I concur in the judgment just delivered by the learned Chief Justice.

I desire, however, to add a few observations of my own.

The question for decision is, whether the Bhikanpur Sugar Concern is exempt from liability to income tax under the provisions of section 4, read with section 2, clause (*b*) (*ii*), of the Indian Income Tax Act, Act VII of 1918?

Before we consider the construction of section 2 (*b*) (*ii*) with a view of imposing liability on the Bhikanpur Sugar Company for the payment of income tax, it is necessary to ascertain two facts.

First, is the Bhikanpur Sugar Concern a cultivator of land? And secondly, is the process which the sugar company employ in the manufacture of sugar the process ordinarily employed by a cultivator in order to render the produce raised by him fit to be taken to the market?

The Bhikanpur Concern is a private company carrying on two separate and different classes and kinds of business. The company carry on an agricultural business in respect of a large area of land which they hold as Mukarraridars; and secondly, the company also carry on a very large and extensive business in the manufacture and refining of sugar for sale to consumers generally.

The respective branches of the company's business are independent of each other

(1) 5 A. 360; A. W. N. (1883) 113; 2 Ind. Dec. (N. S.) 987.

and are presumably worked and managed by independent staffs.

In the reference the position of the Bhikanpur Company with regard to its different businesses is stated to be as follows:—

"The Concern is divided into two branches; an agricultural branch, which deals with the cultivation and purchase of the cane; and a factory branch, which is concerned solely with the manufacture of sugar"

The sugar business of the company is managed by a European manager; and for the purpose of carrying on the business of the sugar factory, the company buy sugarcane from ordinary *raiyats* and cultivators at the price of four annas per maund; and in addition to the purchases of sugarcane made by the company from *raiyats*, the sugar factory also buys from its agricultural branch such sugarcane as that branch produces from the land under its cultivation.

The Board of Revenue found in the reference that the cane which is purchased by the company from cultivators is purchased at the rate of four annas per maund, and the cane grown by the Bhikanpur Company itself in the course of its agricultural business is transferred from the agricultural branch to the factory branch at a uniform valuation of seven annas per maund; and it is further stated in the reference that the amount of sugarcane purchased by the sugar factory from the Bhikanpur agricultural undertaking is debited in the books of the sugar factory in favour of its agricultural branch.

Thus the position seems to be that the sugar factory purchases from its agricultural branch the sugarcane produced by it at a price higher than the ordinary market price payable for sugarcane to the ordinary cultivating *raiyat*. This being the situation, in my opinion the sugar factory cannot be said to be the cultivators of the sugarcane produced by the agricultural branch of its business. The sugar factory in my view is in the position of an ordinary purchaser from its agricultural branch business, just in the same way as the sugar factory purchases sugarcane from individual cultivators.

They (the sugar factory) convert the product of the agricultural business into stock, suitable and convenient for the carrying on of their manufacture of sugar referable to that portion of their business connected with the sugar factory.

I hold, therefore, that the sugar factory as such is not a cultivator within the meaning of section 2 (*b*) (*ii*) of the Income Tax Act; and consequently that the Bhikanpur Sugar Factory is not within the class of persons contemplated as entitled to exemption from liability to pay income tax under the Income Tax Act of 1918.

Assuming, however, that the Bhikanpur Sugar Factory is a cultivator within the provisions of the Income Tax Act, the next question that requires to be considered is, does the company in respect of the sugarcane which it raises or produces as part of its agricultural business submit the produce so raised by them to a process ordinarily employed by cultivators generally to render such produce fit to be taken to the market? In other words, the question is whether the operations of the sugar factory can reasonably be described as a process ordinarily employed by a cultivator to render his produce fit to be taken to market.

The Bhikanpur Company is an industrial trading concern enjoying a large and extensive business in the manufacture and refining of sugar; and it purports to buy raw material in its raw condition or in a crude state, and convert it into the refined and finished article for human consumption in the market of the consumer; and for the purpose of its business the sugar factory has erected costly machinery of the most improved and scientific character in order to produce the most finished article in the shape of sugar fit in its condition, as it leaves the factory, to be used for all domestic purposes.

Having considered the evidence in the case, I am satisfied that the process employed by the sugar factory in the manufacture of sugar is not that ordinarily employed by a cultivator in rendering the sugarcane produced by him fit to be taken to the market; and in my opinion the argument addressed to us by Mr. Kennedy begs the whole question when he contends that because the sugar factory has to treat the sugarcane

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in a certain way in its initial stages in order to render the raw material fit for more perfect manufacture as a finished article, that such process as is employed in the operations of the factory in the manufacture of sugar runs on parallel lines with the methods ordinarily adopted by a cultivator in rendering the produce of the sugarcane produced by him fit to be taken to the market.

Holding as I do that these two questions which I have mentioned should be answered in the negative *qua* the rights of the Bhikanpur Sugar Company, there is an end of this reference; and there is no necessity to apply one's mind to a more minute consideration of the provisions of section 2 (*b*) (*ii*).

However, I would like to add two observations with regard to the construction of that section.

In my opinion the process ordinarily employed by a cultivator in rendering the produce produced by him, so far as sugarcane is concerned, for the purpose of rendering it fit to be taken to the market is the more crude and primitive method or process referred to in the deposition of Abilak Dhobi, Annexure G, which is the process ordinarily adopted by a cultivator in preparing the raw sugarcane for purchase by the manufacturer or the millowner, as the case may be; and, therefore, I am of opinion that the market contemplated in section 2 (*b*) (*ii*) is the market available to the producer as such, and not the market for which the sugar factory cater, *viz.*, the market of the retailer or consumer.

Section 4 read with section 2 of the Income Tax Act of 1918 is, in my opinion, a section designed to protect the producer, by giving to him exemption from liability from income tax, as a *bona fide* agriculturist carrying on the business of a farmer in the ordinary course of good husbandry.

For these reasons I respectfully concur in the judgment of the Chief Justice, and think that the answer to the reference should be that the decision arrived at by the Board of Revenue is right, and that the Bhikanpur Sugar Company are not entitled to the exemption which they claim under the Income Tax Act of 1918.

ADAMI, J.—The circumstances leading up to this reference have been fully stated by the learned Chief Justice. The question referred to us is whether a company owning a sugar factory equipped with up to date machinery and manufacturing sugar for the consumption of the public, can claim exemption from the payment of tax on so much of its income as is derived from the sale of refined sugar manufactured from sugarcane grown on, lands belonging to the company and cultivated by its own servants, whether in fact such income is "agricultural income" within the meaning of section 2, sub-section (1), clause (*b*) (*ii*) of the Income Tax Act, 1918, and is, therefore, exempted from tax under section 4 of the Act. Under section 2 (1) (*b*) (*ii*) of the Act, "agricultural income" includes income derived from "the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market."

We have, then, to determine what process is ordinarily employed by cultivators or receivers of rent-in-kind to render the sugarcane raised or received by them fit to be taken to market, and whether the Bhikanpur Sugar Factory, assuming it to be a cultivator so far as sugarcane grown by it is concerned, is in fact able by a like process to convert the raw material into a substance fit for the market on which the Concern depends for its profit and to which it ordinarily resorts.

The affidavit, Annexure G, to the reference shows that the ordinary cultivator of sugarcane cuts and strips his cane, crushes it in a *kolhu* with the help of two bullocks and extracts the juice, which is run into an earthen vessel. The juice is strained through a piece of cloth and then removed to an iron pan wherein it is boiled slowly until it becomes *rab*. The *rab* is then sold by the cultivator to sugar refiners for the manufacture of sugar. Instead of converting the juice into *rab*, cultivators will often boil and re-boil the juice until it becomes a thick jelly, which is then converted into *gur* or molasses and is used in the cultivator's own house or is sold for domestic use as *gur* in the local market.

The next class are the Indian manufacturers of sugar on a small scale as described in Appendix F to the reference. They carry on the business of buying cane from cultivators in the locality and of stripping and crushing

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boiling and straining, make *gur* cakes which are soaked in water. This substance is boiled and strained and then stored in tanks covered with *simar* (tank weed) which causes the molasses to drain away and leave coarse white sugar which is then, after being broken up, fit to be taken to the market to be sold.

The next superior class described in Annexure H are the Indian sugar refiners, who buy *rab* from the cultivators and grow no cane themselves. They place the *rab* in pans and boil and strain and re-boil it allowing it to thicken. It is then covered with *simar* which makes the molasses trickle off and sugar remains. These men are not cultivators, but they form the market to which the cultivators take the *rab* they have made from the cane grown by them.

In the processes followed by these three classes no machinery is used other than the *kolhu* (wooden crusher) or the Behea Mill, both of which are worked by bullocks.

Lastly we come to the sugar factory such as the Bhikanpur Concern. There the process up to the stage of the extraction of the juice is similar to that followed by the ordinary cultivator and small Indian manufacturer, only, instead of bullocks, machinery is used for crushing and the arrangements are more elaborate. A much more scientific process, however, is followed in treating the juice, various retorts, defecators, eliminators, settling pans, triple effect boilers, and centrifugals are used for converting the juice into *rab* and the *rab* into sugar. The crushing, heating and evaporating are done by machinery and steam. The process followed by the factory, as far as the stage of conversion into *rab*, is in its essentials the same as that followed by the cultivator though far more elaborate, but for the cultivator the conversion of the juice into *rab* is the end of the process. He has then performed the process which has made the sugarcane fit to be taken to his market, and his market is to be found in the smaller sugar refineries or larger sugar factories, otherwise, if he does not trouble to perform any process at all, he sells the cane he has grown to a factory or to an Indian refiner who extracts sugar from the cane on a small scale as shown in Annexure F. The cultivator, then, renders the produce of his sugarcane crop fit for the market in which he is to sell it either by merely cutting it or by converting it crudely into *rab*, and the market he sells it in is the market in which the manufacturers and refiners of sugar are purchasers.

On the other hand, the object and sole business of the sugar factory is to produce refined sugar. It has no sale for *rab* but instead may purchase it. It finds its market among the general consumers of sugar and the grocers who sell it to the public.

Assuming that the concern, by reason of its growing its own sugarcane on its own lands, is a cultivator for the purposes of section 2 of the Act, it cannot be held that the process performed by it in order to render that sugarcane fit to be taken to the market, which it is the object of its business to command, namely, the sugar-market, is a process ordinarily employed by a cultivator who merely converts sugar-cane into *rab* to be sold to manufacturers or refiners. Were we to decide otherwise, and follow the contention of the Bhikanpur Concern to the logical conclusion, we would have to admit that a firm carrying on the business of the manufacture of confectionery, which, for the purpose of that business, grew its own cane and refined its own sugar, could claim to be exempted from tax on the income it derived from the sale of the confectionery.

It is not necessary to dispute the assertion in the affidavit that the process performed in the Bhikanpur Factory is the same as that performed in all sugar factories in India and the world. The point is that the processes performed by the factory to render the sugarcane fit to be taken to its market are not the same as those ordinarily employed by a cultivator to render the sugarcane he has grown fit to be taken to the market in which he can find a sale. The factory cannot claim that, because up to the preliminary stage of conversion of sugarcane into *rab* the process performed by it is essentially the same as that ordinarily employed by a cultivator who sells his *rab* to the refiners and manufacturers, therefore, the whole process, which produces the refined sugar ready for the consumer by the treatment

of the *rab* by elaborate machinery, is the process ordinarily employed by the cultivator. The produce of the factory's cultivation may be the same and the preliminary stage of manufacture may be the same as in the case of a cultivator, but the final produce of the process is not the same and the market is altogether different.

I agree with the learned Chief Justice that section 2 (1) (*b*) (*ii*), read with section 4, of the Income Tax Act does not apply to the case of a sugar factory of the nature of the Bhikanpur firm, even though a moiety or more of the sugar manufactured is the product of sugarcane grown on its own lands by its own servants.

Answer accordingly.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 370 TO 376 OF 1916.

April 17, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Phillips.

AMBALAVANA PANDARA SANNADHI, TRUSTEE OF PERIYALUDAYAR KOIL DEVASTHANAM IN ARANTANGI TALUQ AND ADINAKARTHAR OF SRI PANCHAKSHARA DESIKAR MUTT OF THIRUVADUTHURAI IN MAYAVARAM TALUQ—PLAINTIFF—APPELLANT IN ALL

versus

PICHAKKUTTI ODAYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 6, 8, 189 (1)—Civil Procedure Code (Act V of 1908), O. VII, r. 10—Suit by temple trustee to eject purakkudi *tenants—Occupancy rights, plea of—Jurisdiction of Civil Court, objection to—Dismissal of suit on ground that holding was part of estate and that defendants should be deemed to be occupancy tenants—Return of plaint to Revenue Court—Jurisdiction, distinct finding as to, whether necessary—Jurisdiction, determination of, by relief claimed and not by averments in plaint—Burden of proof—Landlord and tenant—Presumption as to tenants of temple lands in Tanjore district—Terms negativing occupancy rights in* pattas *and* muchilikas, *construction of—Presumption—*'Purakkudi', *meaning of—Determination of meaning by reference to documents and evidence—Definitions of terms and expressions in glossaries, acceptance of.*

The direction in Order VII, rule 10, Civil Procedure Code, is mandatory. [p. 309, col. 2.]

Nagamma v. *Subba*, 11 M. 197; 4 Ind. Dec. (N. S.) 137, followed.

The plaintiff, as trustee of a temple in the Tanjore district claiming to be entitled to both *varams*, sued to eject the defendants alleging them to be *purakkudis* or tenants liable to be ejected at will. The latter claimed occupancy rights and objected to the jurisdiction of the Civil Court. The Munsif decreed the suit, holding that the Civil Court had jurisdiction. On appeal the Subordinate Judge, without recording a distinct finding on the question of jurisdiction, dismissed the plaintiff's suit on the merits, holding that the land was comprised in an estate and that under section 6 of the Madras Estates Land Act the defendants should be treated as occupancy tenants:

Held, (1) that on the said finding the lower Appellate Court should not have assumed jurisdiction but should have returned the plaint for presentation to the Revenue Court; [p. 309, col. 2.]

(2) that a distinct finding as to jurisdiction should have been recorded [p. 310, col. 1.]

The person seeking to oust the jurisdiction of a Civil Court in which an action has been laid should establish its want of jurisdiction. [p. 310, col. 1.]

The non-maintainability of a suit on the ground of want of jurisdiction depends on the relief claimed and not on the plaint averments. [p. 309, col. 2; p. 310, col. 1.]

The decision of Wallis, C. J., in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar*, 44 Ind. Cas. 894; 34 M. L. J. 234; 23 M. L. T. 161; 7 L. W. 380, does not authorise a general presumption against occupancy rights in the case of lands belonging to temples in the Tanjore district, but only indicates the conclusion justified by authority in any case in which similar facts are found. In each case the Court must decide whether such facts exist. [p. 310, col. 2.]

Courts cannot refuse to consider terms in *pattas* and *muchilikas* negativing occupancy rights on the general ground of the tendency of land-holders since the decision in *Chockalinga Pillay's case*, 6 M. H. C. R. 134 to import such terms, but should consider each contract on its merits and with reference to the burden of proof. [p. 311, col. 1.]

Kandada Narasimhacharyulu v. *Kavicherla Ramabrahmam*, 20 Ind. Cas. 759; 24 M. L. J. 656; (1913) M. W. N. 774 and *Zemindar of Chellapalli* v. *Rajalapati Somayya*, 27 Ind. Cas. 77; 27 M. L. J. 718; 16 M. L. T. 576; (1915) M. W. N. 1; 2 L. W. 17; 39 M. 341, distinguished.

The use of vernacular descriptions of tenures in some places is elastic and the definitions of these terms derived from glossaries and works of reference must be accepted with caution as corresponding at most to their normal meanings and subject, in each particular case, to revision in the light of its circumstances. It is because such terms are often used in different senses that attention to collateral indications of sense, in which they are actually used, is most necessary. [p. 311, cols. 1 & 2.]

The term '*purakkudi*' is ordinarily inaplicable to a permanent tenancy. [p. 311, col. 2.]

It may, however, be shown with reference to the evidence that that interpretation is inapplicable to a particular case. [p. 312, col. 1.]

Second appeals against the decrees of the Court of the Subordinate Judge,

Negapatam, in Appeal Suits Nos. 11, 10 and 12 to 16 of 1915 respectively, preferred against the decrees of the Court of the District Munsif, Patukota, in Original Suits Nos. 21, 9, 23, 24, 22, 7 and 28 of 1913 respectively.

These second appeals coming on for hearing on the 22nd, 23rd and 24th of July 1918, and having stood over for consideration till the 6th of August 1918, the Court delivered the following

JUDGMENT.—These are second appeals by a land-holder, plaintiff, from decisions dismissing his suits for the ejectment of his tenants, defendants, from their holdings.

The plaints set out that the holdings are in villages granted as Sarvamaniam Inam of the temple, of which plaintiff is trustee; that the grants comprised the right to both Varams; that defendants, like other cultivators of the villages, are Purakudis cultivating from year to year with no further interest in the land and liable to be ejected at plaintiff's will, and that they have damaged the holdings, have not rendered the customary services and have not paid rent for three years. Defendants denied these allegations and in particular that they are tenants from year to year. They claimed occupancy right and alleged that they were holding in virtue of such right from before the grant and had been treated as doing so since it. They also denied the jurisdiction of the Civil Court.

Issues Nos. 1 and 2 raised the question of the extent of defendants' interest in their holdings and the former also raised the question of jurisdiction. On both questions the District Munsif found in plaintiff's favour, giving him a decree. On defendants' appeals, however, the lower Appellate Court did not consider the question of jurisdiction separately and there was in fact no ground of appeal, requiring it to do so. It dismissed the suits on their merits, holding, firstly, that the plaintiff did not discharge the burden of proof as to his ownership of both Varams and defendants' ownership of occupancy rights, and secondly, that the holdings being part of an estate and defendants having admittedly been in possession in 1908 when the Estates Land Act came into force, they must in any case be deemed to have acquired occupancy right at that date, whether or not they had it before, with reference to section 6 thereof.

This result is open to the objection that the lower Appellate Court should in consistency with its findings have returned the plaints for presentation to the Revenue Court, which on them alone had jurisdiction, *vide*, Estates Land Act Schedule, Part A, Nos. 17 and 19. For authority is clear that the direction in Order VII, rule 10, Code of Civil Procedure, 1908, corresponding with section 57 of the former Code, is mandatory. *Muttirulandi* v. *Kottayan* (1) and *Nagamma* v. *Subba* (2). It is suggested in justification of the lower Appellate Court's procedure that (1) plaintiff did not ask for a return of the plaints and has not done so here, (2) a return would have been futile, when the averments in the plaints did not comprise any cause of action, such as sections 151 and 153 specify, and the suits, even in the Revenue Court, must have failed. As regards (1) the answer is that plaintiff, who has throughout alleged the jurisdiction of the Civil Court and his right to relief there on the merits, was entitled to restrict himself to pointing out, as he has done, that the assumption of jurisdiction on the footing that the suit holdings are not in an estate is irreconcilable with the finding on the merits that they are, and this is in no degree affected by any change in the incidence of the burden of proof, such as some authorities contemplate in this connection, since the lower Appellate Court imposed it on plaintiff. Nor can his conduct be regarded as, to quote from *Ledgard* v. *Bull* (3), a "consent which would make the Judge an arbiter" and his decision "binding on the merits, when these are submitted to him." For, even if he had waived his objection more explicitly than is the case, the prohibition in section 189 (1), Estates Land Act, would still deprive the Court, even in case of acquiescence by either party, of the right to assume jurisdiction. As regards (2) it is sufficient that it confuses the nature and sustainability of the suits and that the former,

(1) 10 M. 211; 3 Ind. Dec. (N. S.) 900.
(2) 11 M. 197; 4 Ind. Dec. (N. S.) 137.
(3) 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 323.

depending on the relief claimed, not the averments on which plaintiff claims it, is alone material in this connection. For, if (as the latter view involves) the defects in those averments, whether of fact or law, were open to consideration at this stage, the mischief to be prevented, a trial on the merits by an unauthorized Court, would be entailed; and there is further the possibility that in a competent Court, amendments, which would cure such defects, might be allowed. In the circumstances the issue as to jurisdiction should have been decided distinctly. In the present case, in which both parties have adduced full evidence, the incidence of the burden of proof is of little importance. It may, however, be pointed out that it has been imposed on the defendant, who seeks to oust the jurisdiction of the Civil Court, not only in *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (4) to which the lower Appellate Court refers, but also in *Indety China Nagadu* v. *Potu Konchi Venkatasubbaya* (5), *Srimath Kidambi* v. *Pidiriti Kutumbarayadu* (6) and *Ramala Venkataswami* v. *Kanumalla Narasimhayya* (7).

To return to the lower Appellate Court's grounds of decision, as stated above, both involve a finding that the suit holdings are parts of an estate. The first involves further that the grants included or that plaintiff's temple owned at their date both Varams; and the second raises the question whether the Kudivaram interest has been acquired by it within the meaning of the exception to section 8, Estates Land Act. It is on objection to the second ground of decision that the lower Appellate Court has not dealt with this question. But the main contentions here are that (1) the burden of proof as regards these parts of the case should have been imposed on defendants, and (2) that the greater part of plaintiff's evidence has not received proper consideration.

The first of these contentions rests on the judgment of Wallis, C. J., in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (8), in which no doubt it is said that, apart from the general law applicable, there is a long series of decisions as to temple villages in Tanjore district (such as that now in question) which recognize and enforce the presumption against the existence of occupancy right, and no doubt some of those decisions, for instance *Chidambara Pillai* v. *Thiruvengadathiengar* (9) and *Naina Pillai* v. *Ramanathan Chettiar* (10), relate to Inam villages, although the general law was being considered by the learned Judge with reference to a temple holding as a ryot. But it is not clear and it is not likely that he intended to apply any special rule to Tanjore temples on account of either of their location or their management, like all temples in the Presidency, by the Collector up to 1860 or on account of anything except the agreements between him and the ryots about 1830, which were established in the case of each of the temples concerned in the cases in question and would have to be established in the case of any other temple, if a similar inference were proposed. The learned Judge's intention appears to have been, not to authorize general presumption as to Tanjore temples, but only to indicate the conclusion justified by authority in any case, in which similar facts were found. Whether such facts can be found in the present cases will have to be decided.

The second contention is in effect that, although the decisions as to the extent of the temple's rights under Exhibits A, A2, the grants, or independently of them and as to its subsequent acquisition of the Kudivaram must turn wholly or partly on the conclusion reached regarding its subsequent relations with the cultivators and so far as Exhibits A, A 2 are ambiguous or defective, on the manner in which they were understood and acted on later the evidence as to those relations and the later period has been almost entirely neglected.

For this the lower Appellate Court has given two reasons. The first, which it supports by references to *Kandada Narasimha-*

(4) 20 Ind. Cas. 769; 24 M. L. J. 659; (1913) M. W. N. 782.

(5) 8 Ind. Cas. 365; (1910) M. W. N. 639; 8 M. L. T. 376.

(6) 25 Ind. Cas. 891; 27 M. L. J. 233; 39 M. 21.

(7) 26 Ind. Cas. 357; 16 M. L. T. 596.

(8) 44 Ind. Cas. 894; 34 M. L. J. 234; 23 M. L. T. 161; 7 L. W. 380.

(9) 7 M. L. J. 1.

(10) 41 Ind. Cas. 788; 33 M. L. J. 84.

charyulu v. *Kavicherla Ramabrahmam* (11) and *Zemindar of Chellapalli* v. *Rajalapati Somayya* (12), would appear to be that in view of the tendency of land-holders, especially since the decision in *Chockalinga Pillai* v. *Vythealinga Pundara Sannady* (13), to import new terms negativing occupancy rights in the Pattas and Muchilikas no contract of any date containing such terms deserves consideration. But the first of these cases is not in point, since it merely decided that certain newly introduced clauses in Muchilikas by persons, who did not claim occupancy right, did not rebut the presumption in its favour in the case of others, who claimed it and the second expressed at most the attitude, which Courts should take towards admissions in Muchilikas after the decision of *Chockalinga Pillai's case* (13) about 1870, and can have no application to documents such as those before us, of which the majority, including Exhibits B and E series, are earlier. If, moreover, there is reason for suspecting the existence of such a tendency in the particular case under consideration, it can only be taken into account in estimating the value of the evidence, which those who impugn the validity of their predecessors' contracts have to adduce in order to show that they are void for fraud or coercion. It cannot in itself be a ground of decision or justify a refusal to consider each contract on its merits and with reference to the burden of proof.

The lower Appellate Court's other reason for neglecting plaintiff's documentary and other evidence was the loose manner, in which the word Purakudi, of frequent occurrence in the former, is used in Tanjore district and, although it will be necessary to return to this particular instance, it may be conceded at once that there and elsewhere the use of vernacular descriptions of tenures is elastic. In the translation for example made in this Court for the present case the word 'Kudi' is reproduced throughout as ryot, notwithstanding the implication of the latter term in the Estates Land Act and in *Naina Pillai* v. *Ramanathan Chettiar* (10), Sadasiva Aiyar, J., writing with knowledge of Tanjore, referred to alternative meanings of 'Kudivaram' as importing indifferently a permanent tenancy or one at will. The definitions of such terms, derived from Wilson's Glossary or other works of reference, must be accepted with caution, as corresponding at most to their normal meanings and subject in each particular case to revision in the light of its circumstances. It was for instance unsafe for the lower Appellate Court to adopt, as it did in construing the terms of Exhibits A, A 2, the definition of "Shrotriem" from Wilson's Glossary and the judgment in *Papala Narayanasawmi Naidu* v. *Pensalani Kanniappa Naidu* (14) as "a grant, which gives no right over the lands," without considering two of the documents before it, Exhibits E and E 1, in which the Kudis of villages actually referred to therein as Shrotriem are described as liable to be ousted by plaintiff's predecessors and the temple's right is described as Kudikaniachi. It is exactly because terms of this sort are often used in different senses, that attention to collateral indications of sense, in which they are actually used, is most necessary and, whatever the case as regards the term 'Purakudi,' the lower Appellate Court's refusal on this account to consider the documents and other evidence in detail is unsustainable.

In fact, however, its reference to the unsettled meaning of that term is particularly unfortunate. For in *Mayandi Chettiyar* v. *Chokkalingam Pillay* (15), a Tanjore case, the Privy Council held that it had "a well-understood and definite meaning," interpreting it as inapplicable to a permanent tenancy, and we have been shown no authority for its use in any other way. That, as the lower Appellate Court observes, it is sometimes used to denote "a resident cultivator, known as Ulkudi, who is sometimes called also Ulpurakudi" and has occupancy right, rests on *Mahomed Meera* v. *Ramalingam* (16), but the fact must be regarded as doubtful in view of the explanation in

(11) 20 Ind. Cas. 759; 24 M. L. J. 656; (1913) M. W. N. 774.

(12) 27 Ind. Cas. 77; 27 M. L. J. 718; 16 M. L. T. 576; (1915) M. W. N. 1; 2 L. W. 17; 39 M. 341.

(13) 6 M. H. C. R. 164.

(14) 14 Ind Cas. 261; 24 M. L. J. 36; (1912) M. W. N. 496.

(15) 27 M. 291; 8 C. W. N. 545; 31 I. A. 83; 14 M. L. J. 200; 8 Sar. P. C. J. 587 (P. C.).

(16) 8 Ind. Cas. 158; (1911) 1 M. W. N. 84; 8 M. L. T. 430.

the fuller judgment in a later case, *Naina Pillai* v. *Ramanathan Chettiar* (10), of the term Ulupurakudi as applicable to Purakudis with permanent residential rights in the village, but not permanent rights in their holdings. It may, of course, be shown with reference to the evidence that the interpretation adopted by the Privy Council is inapplicable in the present case. But the lower Appellate Court erred in holding that authority was *prima facie* against plaintiff.

The lower Appellate Court's failure to give full consideration to important evidence for plaintiff involves that there must be a re-hearing. It is, therefore, inadvisable to deal at this stage with that evidence in further detail or with plaintiff's case as to receipt of compensation and enjoyment of trees on the holdings. The remainder of the lower Appellate Court's judgment relates first to the evidence that holdings or portions of them have been transferred freely, a uniform rent having been paid throughout, although, the tenure being *varam*, the significance of the last mentioned fact is not clear. There is then a reference to Exhibits E—17 and E—22, as showing that the permission of the previous holder was obtained for two such transfers. But these documents have been misconstrued, since they only show that, when in 1838 and 1840 certain lessees could not comply with the terms of their leases, the land was let to others, in the latter case after an explicit resignation by the defaulter. Lastly, there is a reference to certain judgments, from which no inference is drawn. Nothing, therefore, in this part of the judgment justifies a decision for defendants. The whole being vitiated by failure to come to close quarters with plaintiff's evidence, there must be a remand in order that it may be dealt with properly and findings submitted on the various issues, including that relating to jurisdiction, in the light of the foregoing. It will, as observed above, be necessary for the lower Appellate Court in dealing with the plea based on section 6, Estates Land Act, to decide not only whether the holdings are in an estate, but also whether the Exception to section 8 is applicable to it. Findings will be returned in six weeks. Seven days will be allowed for objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Negapatam submitted the following

FINDINGS.—I am directed by the High Court to submit findings on the various issues in the suits from which these appeals have arisen after dealing with the evidence properly. The only issues in these cases were those framed by the District Munsif, the 1st Appellate Court (my predecessor) not having framed all the points for determination. In addition to those issues the following points are framed by me for determination for the sake of clearness in the light of remand order of the High Court:—

(1) Whether the original grants, Exhibits A and A2, by which the plaintiff's temple acquired title to the suit properties comprised both Varams (Melvaram and Kudivaram) in the lands from which the defendants in the various suits are sought to be ejected?

(2) If it acquired only the Melvaram right, whether the Kudivaram right was acquired by it subsequent to the grants: and if so, how was it acquired?

(3) Whether the tenants acquired occupancy right under 6th section of the Estates Land Act?

2. *1st point*:—Exhibit A evidences a grant of 26 villages and Exhibit A(2) a grant of 10 villages. The villages in which the suit lands are situated are some of them included in Exhibit A, some in Exhibit A2, and the rest in a third grant not produced comprising 12 villages. All these 48 villages are included in the Inam Sanad, issued by the present Government at the Inam Settlement in 1865 (Exhibit C). Exhibits A and A2 did not evidence new grants, but were only confirmatory of grants which had been already made to Sri Athmanathaswami, the presiding deity of the famous temple in the Tanjore district known as Avadayar Kovil or, to pronounce it more correctly, Aludayarkoil. Exhibit A recites (an almost similar recital being found in Exhibit A (2) also) "total villages 26 including Nanja, Punja, Samudayam, fruit-bearing and wood-bearing trees and all, have been in enjoyment and in possession as Sarvamanyamdar Sanad from year to year, from generation to generation

Now the Karkoons are objecting on the ground of Maharaja's signature (document)," and concludes by confirming the grant directing the local officials to continue the Sarvamanyam without obstruction and without raising any objection on the score of the absence of new Sannad every year. Exhibit A (2) also contains similar terms. Two important points to be noted in these documents are (1) that the lands themselves, wet and dry, with trees thereon (as distinguished from the land revenue alone) had been in the actual possession and enjoyment of the temple from the date of the original grants, (2) that they were in such enjoyment as Sarvamanyam.

3. Exhibits A and A (2) did not in any manner derogate from the nature of the grants originally made in favour of the temple, and the British Government also when issuing the Inam Sanad, Exhibit C, did not presumably intend to do so. On the other hand, Exhibit C1, Inam Ticket dated 1863, describes the 48 villages as Poora Shrotriem. Exhibit C, Inam title-deed dated 1865, describes 36 of those villages in which the suit villages are included as whole villages: and, moreover, the lands wet, dry and garden "besides Poramboke" as distinguished from the land revenue due thereon to the Government are mentioned in it as the subject of the grants. The particulars given in the various columns of the Inam Faisal register, Exhibit C3, also show that the actual lands were the subject of grant at the Inam Settlement and not merely the land revenue due to the Government.

4. Exhibits A and A (2) were addressed by the Maharaja Raja Sri Ekoji, Raja of Tanjore, to the local officials and inhabitants of that portion of the kingdom in which the suit villages were situated and which was described as Kallapathu and Vellalapathu country; and the appellant's learned Vakil, Mr. T. R. Venkatarama Sastri, based an argument on this; for he suggested that the description of the country as Vellalapathu and Kallapathu shows that the 48 villages granted to the temple by Ekoji Maharaja were before the grants in the occupation and enjoyment of ryots owning Kudivaram rights therein, the Maharaja being entitled only to collect a share of the income derivable therefrom as his royal share or revenue and that, therefore, it must be taken that he granted to the temple the mere right to collect that share from the said ryots. But the language of Exhibits A and A (2) does not countenance the view that any Kallars or Vellalars were in occupation of the villages granted to the temple. The address to the local officials and the inhabitants of that part of the country, described as Kalla inhabited and Vellala inhabited, simply corresponds to the usual introductory words of a grant now in vogue "know all men by these presents, etc." It may also be noted that the cultivators in the suit villages belong to Odayan caste (Nathaman caste) and are neither Kallars nor Vellalars. His reference to the fact that an undivided $\frac{1}{3}$rd of Avadayarkoil, one of the villages included in the grants, was first granted by Exhibit A and that the rest, $\frac{2}{3}$rds of it, was subsequently gifted by Exhibit A (2) as an indication that the Melvaram alone was the subject of grants, can carry no weight when it is seen that both the grants were made in the same year and at about the same time. Under column 12 of Exhibit C (3), Inam Register, "reference is made to Sikka Sannad Register of 1809 prepared under Regulation XXXI of 1802 and Pymash Chitta of Fasli 1238, Register of 1258." The Pymash Chittas for the villages in question, Exhibit B series, are on record and they all describe Sri Athmanathaswami as the Ekabogam Mirasdar, except with regard to Avadayarkovil in which there are other Mirasdars (Inamdars) and the cultivating tenants as Parakkudis. With regard to the lands in Avadayarkovil belonging to the temple also, Sri Athmanathaswami is entered as the Mirasdars and the cultivating tenants as Porakkudis. (*Vide* Exhibits B and B1.) The same remark is entered against Punja lands; and the trees on the Pymash numbers are also referred to as belonging to the temple. The houses in which the cultivators lived are referred to and their occupants are described as mere Parakkudis. In the light of the above facts disclosed in the documents of an unquestionable nature, I think that the only interpretation that can be given to Exhibits A and A (2) is that the Maharaja Ekoji Raja purported

to grant the proprietary right in the soil of the several villages, and not merely the right to collect the royal revenue thereon, to the grantee, Sri Athmanathaswami.

5. No doubt according to the strict Hindu jurisprudence of old the King was not entitled to the soil in the land if occupied by the cultivators and he was entitled only to collect a portion of their income as revenue, which was $\frac{1}{6}$th in the golden days, as the following extract from Vyavahara Mayukha shows:—

* * * * * * *

"But the property in each village, house, or other portion of a whole country or a district of it belongs solely to the owner of the soil (Bomika) or other proprietor. The revenue only may be taken by the Prince. Therefore, in gifts or other alienations of such lands as are here made mention of, a gift of the land is not brought about; we must only suppose a mere livelihood given by the Prince out of his revenue. But in purchases from the owner of the soil, even ownership accrues in the property transferred, whether houses, land or other. Then indeed the benefits of a gift of land also may be obtained from it by buying land from the owners and then giving it away in charity."

But this theory has not been accepted by the present administrators of Hindu Law; for in the latest Privy Council case, *Adusumilli Suryanarayana* v. *Acchutta Potanna* (17) dated 1st July 1918, their Lordships of the Privy Council have expressly disapproved of this theory on which an argument was based in that case and stated: "That is an assumption which no Court is entitled to make and in support of which there is, so far as their Lordships are aware, no reliable evidence. The fact that Rulers in India generally collected their land revenues by taking a share of the produce of the land is not by itself evidence that the soil of lands in India was not owned by them and could not be granted by them: indeed, that fact would support the contrary assumption, that the soil was vested in the Rulers who drew their land revenue from the soil, generally in the shape of a share in the produce of the soil, which was not a fixed and invariable share, but depended on the will of the Rulers. The assumption contended for on behalf of the respondents was not recognised in Regulation XXXI of 1802. The opening words of that Regulation are instructive, it is there recited:—

"'Whereas the ruling power of the provinces now subject to the Government of Fort St. George has, in conformity to the ancient usages of the country, reserved to itself and has exercised the actual proprietary right of lands of every description; and whereas, consistently with that principle, all alienations of land, except by the...authority of the ruling power, are violations of that right; but whereas considerable portions of land have been alienated by the unauthorised encroachments of the present possessors by the clandestine collusion of local officers, or by other fraudulent means; and whereas the permanent settlement of the land-tax has been made exclusive of alienated lands of every description; it is expedient that rules should be enacted for the better ascertainment of the titles of persons holding, or claiming to hold, lands exempted from the payment of revenue to Government under grants not being Badshahie or royal, and for fixing an assessment on such lands of that description as may become liable to pay revenue to Government; wherefore the following rules are enacted for that purpose'." As it must be taken from this ruling of the Privy Council that the Maharaja Ekoji Raja had full rights in the lands which he granted to Sri Athmanathaswami through Exhibits A and A (2), there can be no presumption that the Melvaram right alone was granted, as my predecessor thought while pronouncing his judgment in these appeals (*vide* paragraph 4 of his judgment). In fact, in the said Privy Council case it has been expressly laid down that there is no presumption in the case of an Inam grant, that the land revenue alone was the subject of the grant. The decisions of the Madras and Bombay High Courts, apparently to a contrary effect, were also noticed by the Privy Council when laying down the said proposition. In the absence of such presumption, therefore, the circumstances already pointed out, which clearly show that the lands themselves were granted as distinguished from the land

(17) 48 Ind. Cas. 689; 41 M. 1012; 36 M. L. J. 585; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 I. A. 209 (P. C.).

revenue due on them, must be given their due weight. In the above mentioned case, the description of the village granted (as Ekabhogam) as distinguished from the land revenue as the subject of the grant in the register of 1809, prepared under Regulation XXXI of 1802, was taken by the Privy Council to be conclusive evidence of the fact that the soil in the lands and not the land revenue alone was the subject of the original grant. In the present case, not only do the Pymash Chittas Exhibit B series make mention of lands (wet, dry and house sites) as being in the ownership of Sri Athmanathaswami, but they also describe Sri Athmanathaswami as the Ekabhogam Mirasdar of all the villages except Avadayarkoil and the cultivating tenants in all the villages as Porakkudis, which terms presumably show that all the rights in all the 48 villages belong to the plaintiff's temple as the subject of the original grants [Exhibits A and A (2)]. The description of the villages in the Sanad, Exhibit C, as whole villages as already noted also supports this view.

6. Though there is no presumption with regard to a grant, that it included both Melvaram and Kudivaram rights, there is no presumption that it included Melvaram right alone, nor is there any presumption that the Kudivaram right was not owned by the grantee at the time of the grant. It has not been shown by the appellants that their ancestors or others were in possession of the suit land at the time of the original grants or the subsequent grants by Ekoji Maharaja: nor have they shown that the temple was not in actual possession of those lands then. On the other hand, the extracts from Exhibits A and A (2) already referred to, to the effect that the temple was in actual possession of those lands from the date of the original grant till the date of Exhibits A and A (2), show that the plaint temple must have been in possession of the soil itself of the suit villages on the date of Exhibits A and A (2), *i. e.*, must have owned the Kudivaram interest in them. It might be that when the grants were originally made the villages were not in the actual possession of anybody, or it might be that the rights of those in occupation were purchased by the King at the grant. This view receives support from the meaning of the word "Sarvamanyam" as given in Ellis's Mirasi Papers. It is stated there "sometime, however, when the Sircar is desirous to give to any one in Sarvamanyam tenure either the whole of a Mirasu village or the waste lands or any extent of ground within the limits of the village, the value of the proprietary right therein is paid to the Mirasdar and the land becomes Sarvamanyam; if the proprietary right be not so purchased then the holder of the Manyam is entitled only to Melvaram; if the Mirasdar should refuse the price offered his consent must be obtained or an exchange made for other ground. This has been practised in the Chola country in the villages of Needamangalam and Kallanni and many others." The foot-note under the word "Sarvamanyam" states "Sarvamanyam signifies land entirely free, of which both the Melvaram, the Government share, and the Kudivaram, the inhabitants' share, is enjoyed by the holder of the Manyam; his tenure can only be lawfully created by the joint act of the Prince and the people. Ardhamanyam is land half free, of which the holder enjoys only the Melvaram; it is created by the Prince only. The confounding of these tenures under the general foreign term 'Inam' has in latter times been the cause of great uncertainty and long continued disputes." The extract from Vyavahara Mayuka above given also shows that if a King wanted to make (*bhu dan*) (gift of land), he might do so if he purchased the occupier's right and gifted it and his right to collect revenue on it, which together would constitute land in the strict sense of the term. The recital in Exhibits A and A (2) already noticed, to the effect that the suit villages were on their dates in the enjoyment of the plaint temple as Sarvamanyam, shows beyond doubt in the light of the above extracts that originally and on the dates of Exhibits A and A (2), the subject of the grants was the proprietary right in the soil itself including both the Melvaram and Kudivaram rights.

7. The learned Vakil for the appellants contended that the question whether both Varams were the subject of grants or not is solely one of interpretation of the grants (Exhibits A and A 2). But the above result that the grants included both Varams has been almost entirely deduced from the language adopted in Exhibits A and A (2), Exhibit C, the Inam Sanad Exhibit C (1),

the Inam Ticket issued prior to the Inam Sanad, and Exhibit C (3), the Inam Register, and Exhibits B series, the Pymash Chittas referred to in Exhibit C (3), which can all be properly referred to for the right interpretation of Exhibits A and A (2). The above argument of the appellant's Vakil overlooks the fact that Exhibits A and A (2) were only confirmatory of still older grants which have not been produced but for the interpretation of which Exhibits A and A (2) and the other documents above mentioned can properly be looked into. I have no hesitation to find the 1st point framed by me in plaintiff's favour.

8. *1st part of the 1st issue and 2nd issue framed by the District Munsif*:—Under these issues it would be appropriate to deal with the large mass of documentary evidence which has been let in to show that subsequent to the grants, the relations between the temple and the defendants or their ancestors have been such as to clearly indicate that the latter were mere Porakkudis or cultivators having no permanent right in the lands which they cultivated. For the sake of convenience the documents may be classified under 3 heads:(1) those relating to the period before the Collector assumed management of the temple properties under Regulation VII of 1817, *i.e.*, from the date of the grants up to 1819, (2) those relating to the period when the temple properties were under the management of the Collector under the above Regulation (1819 to 1850), and (3) those relating to the period subsequent to the handing over of the management to the temple trustee (Thambiran) in 1850.

9. The most notable document during the 1st period is Exhibit N, copy of judgment of the Zillah Court of Kumbaconam in Suit No. 4726 brought by Nagappa Udayam and another against Karuthar Udayan, Santhappa Udayan, Kutti Udayan and others, some of whom appear to be ancestors of the present defendants. It was a suit for the recovery of lands in the villages of Paranthini and Karungodu (two of the plaint villages). The plaintiffs, describing themselves as Porakkudis and alleging that the Miras rights in them belonged to the Avayarkoil temple, sought to eject the defendants who contended that they were Porakkudis under the said temple and had entered into possession of those lands under the authority of the then Thambiran (trustee). The defence allegation being practically admitted by the plaintiffs and also proved by evidence, the Court dismissed the suit. It would appear from the judgment that the plaintiffs were in possession of the said lands for a long time as Porakkudis under the Avadayar Kovil temple and that the defendants had before that suit dispossessed them of those lands on the strength of the Thambiran's authority to cultivate them. This judgment clearly shows that even at the earliest time, the people who cultivated the temple lands in the said villages were acting under the consciousness that the temple was the Mirasdar of its lands and that the only right they possessed was to cultivate them if authorised by the Thambiran to do so, and that this position was recognised by the Civil Court.

10. The 2nd period may be divided to facilitate the appreciation of the evidence relating to it into two periods, (1) from 1819 to 1828, (2) from 1828 to 1850. During the first period the Collector, in whose superintendence the temples of the District had been placed and who was consequently managing the temple lands and its other properties, was realising the income of the temple lands under what is known as the proposal Izara system. Under that system all the temple villages used to be leased by him to one person, called the proposal lessee, from whom what is known as proposal Izara lease was taken. The facts in support of the plaintiff's case which are proved by these Muchilikas are: (1) leases were all for a fixed period. (2) Izaradars or the proposal lessees were placed in actual possession of the lands leased out to them by the Tahsildar. (3) A fixed amount of money is made payable under them to the temple as Swamibhogam, the lessee himself paying the Government revenue due on the villages, and also bearing all the village charges including the payment of Porakkudivaram to cultivating tenants. (4) The temple villages used to be cultivated under Amani, *i.e.*, by the Collector through his subordinates, whenever proposal lessees were not forthcoming to accept leases and when subsequently proposal leases happened to be granted, the lessees used to be put in possession of those lands by the Tahsildar. (5) The Varam paid to the Porakkudis or the cultivating tenants was treated as an item

of expenditure in the temple accounts, as it was paid by the temple as Mirasdar to the Porakkudis instead of the latter taking it themselves directly from the produce which they raised. Exhibit E (6), dated 9th November 1821, a report by the Tahsildar to the Collector, for instance shows that one Peria Thambia Pillai, who had taken a proposal lease of the temple villages for Faslis 1230 to 1232, had failed to pay arrears of rent and that, therefore, a fresh lease was granted to another for 3 years from Fasli 1231 to Fasli 1233, the rent payable being 7,500 pons annually as Swamibhogam. The further Arzi from the Tahsildar in the matter (Exhibit E7, dated 8th December 1821) shows that the possession of the temple lands which had already been under Amani (*i. e.*, temple's own cultivation) was actually handed over to the lessee by the Tahsildar. After the expiry of Fasli 1233, the Collector took steps to have the temple lands cultivated through his subordinates and the report by the Tahsildar to the Collector, Exhibit E (8), dated 4th August 1824, shows that a regular establishment was started for the purpose of carrying on the cultivation operations in the temple villages from Fasli 1234 onwards under the supervision of the Devastanam Amin until a proposal lessee was forthcoming. Exhibits D and D1 are the Izara Muchilikas (*i. e*, proposal leases) executed to the East India Company by Avadai Pillay and Parimanatha Pillay respectively. They show that proposal lessees were as a matter of fact forthcoming for cultivating the temple lands from Fasli 1234 and that accordingly an Izara lease for the 58 villages of the temple (48 villages included in the Sanad Exhibit C and 10 villages in Pudukottah State) including wet, dry and garden lands, etc., was taken from Avadai Pillay for 3 years from Fasli 1234. Parimanatha Pillay, the executant of Exhibit D (1), took a lease of the topes and stray trees in the villages agreeing to pay an annual Swamibhogam of Rs. 530 in addition to the tax payable to the Government. The executant of Exhibit D agreed to pay an annual Swamibhogam of Rs. 12,594 7 2 to the temple in addition to the Government tax Rs. 4,418-13-1 and also agreed to bear the village charges, *viz.*, Porakkadivaram, Kalavadi, Swatantaram, etc. An additional fact is proved by these Muchilikas, *viz.*, that the lessees undertook in their leases to supply labour for the conduct of the various festivals in the temple. Exhibit E (31), an Arzi by the Tahsildar to the Collector, dated 27th August 1827, shows that after the expiry of Fasli 1236, no proposal lessee offered to take up the temple villages on lease, that the cultivating ryots expressed their inability to take them upon lease on the ground that the Mirasu in them belonged to the temple and that they were mere Porakkudis, that consequently the cultivation had to be carried on by the temple employees themselves in Amani (own cultivation) and that, therefore, an increase of establishment had to be sanctioned for cultivation, estimating crops, harvesting, etc. It further appears from this document that the temple lands were Shrotriem Sarvamanyam. Exhibit E (32), dated 1st February 1828, shows that Porakkudi Varam had to be paid by the Devasthanam to the cultivators and that a portion of the payment was withheld in order to induce them to cultivate the lands left uncultivated and to raise the 2nd crops on some lands and to guard paddy stored on the threshing floors. Exhibits E (11) and E (33), dated 20th July 1828 and 3rd September 1829 respectively, show that during Fasli 1237 the Collector himself cultivated the temple villages through hired agencies but that the temple Stanik, Arunachala Thambiran, offered himself as proposal lessee for 2 years from Fasli 1238 to Fasli 1240, agreeing to pay an annual rental of 7,000 pons; while the net income of the temple, which it was able to derive under Amani cultivation in the previous Fasli, was 5,899 pons after deducting Porakkudi Varam and other village charges. Thus much with regard to the proposal Izara lease.

11. The Pymash Chittas ranging from 1828 to 1829 are the earliest documents of public nature under the latter portion of the 2nd period. As already noted, they describe all the temple villages as Yekabhogam except Avadayarkoil, which is admittedly a Palabhogam village as it is owned by the temple and other Inamdars. This word Yekabhogam presumably shows that the cultivating ryots could not then have had any permanent rights in the soil of the temple lands, *vide Nainz Pillai* v. *Ramanathan Chettiar* (10). Exhibit B further shows that the temple was directly cultivating a

portion of its lands as *pannai*, and the evidence of defendants' 1st witness also shows that even now it is carrying on such cultivation in some of its villag s. In Exhibit B series the plaint temple is entered as Mirasdar and the cultivators of lands in it are described as Parakkudis.

12. The Privy Council has held in *Mayandi Chettiyar* v. *Chokkalingam Pillay* (15) that the word "Parakkudi" has a well-understood and definite meaning and has interpreted it as inapplicable to persons claiming a right of occupancy. No authority has been shown to the contrary; nor has it been shown that this interpretation is inapplicable to the present case owing to the existence of any peculiar circumstances in it, (*vide* the High Court's remand order, page 8).

13. In the period from 1828 to 1850 during the Collector's management of the temple lands leases of them began to be granted under what is known as Tharam Faisal system, which was introduced by the then Collector, Mr. Kindersley, and under which lands were leased out for cultivation for an indefinite term at an annual paddy rent fixed on the then cultivable area, with provisions for the commutation of such paddy rent into its money value. It has been held by the Madras High Court and the Privy Council in more than one case [*vide Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (13), *Thiagaraja* v. *Gnanasambantha* (18), *Thiagaraja* v. *Giyana Sambandha Pandara Sannidhi* (19) and *Mayandi Chettiyar* v. *Chokkalingam Pillay* (15)] that tenants holding lands under such Muchilikas can have no permanent right of occupancy in their holdings. As regards the usual term in these Muchilikas that the Tharam Faisal was to hold good permanently, the following extract from the judgment of Scotland, C. J., in *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (13), quoted with approval by the Privy Council in *Mayandi Chettiyar* v. *Chokkalingam Pillay* (15), will show what value that term possesses in favour of the defendants' contention as to their having permanent rights of occupancy: "The language of the agreement had, I think, no greater effect than the ordinary form of Muchilika given by a ryot in exchange for a Patta, except so far as it indicated the intention that its terms should apply to every successive Fasli for which the holding might be continued by neither party exercising the right to terminate it at the end of a Fasli." In fact the term in Exhibit D (2), 'As we have agreed thus, we shall, so long as the said villages remain in our possession, pay according to the instalments of *kist*, etc.,' contemplates that the lessee might not continue necessarily in possession of the lands for ever. The principal features of these Muchilikas, so far as they can be gathered from Exhibit D (2) are, (1): A fixed money rent calculated on the income derivable from Nanja, Punja and garden lands and fishery was made payable annually so long as the lands remained in the possession the lessees and the tenants agreed to this settlement permanently. The permanency referred to here relates, I venture to think, to fixity of rent payable annually under the Muchilika and not to the right of cultivator accepting the Muchilika to hold the lands permanently. (2) If garden crops, such as betel leaves, plantain, sugarcane, tobacco, onion, garlic, etc., were raised on Nanja lands of the temple or if cultivation was carried on waste or Poramboke lands special rents were payable. (3) The tenants should supply labour for conducting Kudi Maramath and for the conduct of the various festivals in the plaint temple, including the carrying of paraphernalia of the temple on those occasions. (4) If the 2nd crop was raised on an area in excess of that mentioned in the Muchilika, special 2nd crop assessment must be paid. Exhibits D (2) and D (7) are Tharam Faisal Muchilikas. Exhibit D (2) refers to Avadayarkoil, one of the suit villages, and Exhibit D (7) relates to Kalagam, one of the 48 villages included in Exhibit C. These terms clearly support the inference that the executants of Tharam Faisal Muchilikas could not have had any occupancy rights in the lands which they agreed to cultivate on the basis of such Muchilikas.

14. The rent payable is described as Swamibhogam and the Melvaram paid on the basis of which the rent is fixed is

(18) 7 M. 374; 2 Ind. Dec. (N. S.) 844.
(19) 11 M. 77; 4 Ind. Dec. (N. S.) 54.

arrived at after deducting from the gross produce, Purakkudivaram, Swathantram and other village charges. The word "Purakkudi," by which the cultivators are described and which has been construed by the highest tribunal to connote the absence of a permanent right of occupancy, and the word "Swamibhogam," which has been understood to mean the share of the produce or rent which is paid to the Mirasdar or hereditary proprietor by the tenant cultivator holding the land in farm for a fixed period *vide Naina Pillai* v. *Ramanathan Chettiar* (10) are almost conclusive as to the full proprietorship of both the Melvaram and Kudivaram rights being with the temple.

15. When occupancy right was claimed on basis of similar Muchilikas, it was negatived by the Madras High Court in *Naina Pillai* v. *Ramanathan Chettiar* (10) on a consideration of terms therein almost similar to those above pointed out. Exhibit E (14), which is an Arzi by the Tahsildar to the Collector, shows clearly what rights were possessed by the lessees under Tharam Faisal system in the lands leased to them. It appears from it that the Tharam Faisal lessees of Punyavayal and other villages, who were called upon to pay the arrears of rent due by them, found themselves unable to do so on account of there being no yield owing to drought and as the crops which were standing on the lands had been grazed by cattle owing to the ryots who raised them having quitted their homes for other places. The chief objection raised by the tenants for refusing to pay the rent was that they had no right in leased lands, which they cultivated merely as Purakkudis and that the temple itself was their Mirasdar. The Tahsildar concludes the Arzi by stating that as the tenants in arrears owned no properties except thatched houses and as the lands which they cultivated belonged to the temple and they owned no right in them, it was difficult to collect the arrears. The contents of this Arzi, which is dated so late as 1837, make it fully clear that the tenants under Tharam Faisal Muchilikas could not have had any permanent rights in the lands which they cultivated.

16. During this period also leases for small periods used to be granted; for it is seen from Exhibits D(3) and N(32) that Ramasami Servai and others agreed to cultivate the lands in Pranthani including Nanja, Punja, and garden lands and pay paddy rent for Nanja and cash rent for Punja and garden lands for Fasli 1249. As they found it impossible to give immoveable property security as they evidently possessed no lands or houses, they agreed to stand surety for each other as * * * (*sangili punasal jameen*) *i. e.*, (the joining together of the tenants as sureties for each other as the links of a chain). It further appears from Exhibit N(32) that after the execution of the Muchilika Exhibit D(4) and security bond Exhibit D(4) they were placed by the Tahsildar in actual possession of the lands to be cultivated.

17. Exhibit E(19), dated 9th December 1839 shows also that some of the lands belonging to the temple were directly cultivated by the temple servants without being leased under the Inam Faisal system or any other system.

18. Exhibit E (20), E(21), E(22), D(5) and D(6) show that whenever the lessees under the Tharam Faisal Muchilikas found themselves unable to continue the cultivation and wanted to abandon their leases, the temple trustee inducted other villagers who were Purakkudis as tenants in their place. Exhibit E(20), for instance, shows that one Sandappa Udayan, who had taken a lease for Manayal village (one of the plaint villages) but who after cultivating it during Fasli 1248 found himself unable to continue the cultivation in Fasli 1249, gave up the lease in that Fasli and that Uchani Ramu Udayan (the grandfather of 1st defendant in Original Suit No. 21 of 1913) and 13 others who were already cultivating lands in that village as Purakkudis were granted a lease of those lands under the Faisal system in his place and were put in possession of the lands. Exhibit E(21) shows that Vaithilingam Pillay and Chockalingam Pillay, two of the persons who had taken a Faisal lease of Karagudi (one of the plaint villages), finding themselves unable to continue cultivation in Fasli 1249, gave up their lands in favour of Arumugathudayan (ancestor of 1st defendant in Original Suit No. 7 of 1913), who agreed to take them on lease from the temple. Exhibit E(22) refers to the said Uchani Ramu Udayan (grandfather

of 1st defendant in Original Suit No. 21 of 1913) as Purakkudi.

19. In this period also there was a judicial pronouncement with regard to some lands in Karagudi (one of the plaint villages) to the effect that the Kudimiras, *i. e*, proprietary right in the soil, belonged to the plaint temple and not to anybody else. This pronouncement was made in Suit No. 726 of 1841 on the file of the Pattukota District Munsif's Court, which was brought by one Thangathammal who claimed Kudimiras right in the said lands as heiress of her husband; the 1st defendant in it was the paternal grand-uncle of 1st defendant in Original Suit 9 of 1913; the 5th defendant was the father of the 1st defendant in Original Suit No. 7 of 1913; and the 6th defendant was the grandfather of 1st defendant in Original Suit No. 21 of 1913. The suit was dismissed, it being held that the Kudimiras right belonged to the temple [*vide* Exhibit N(11)]. This, it may be noted, was the first time when a ryot set up Kudimiras right in himself but did not succeed in establishing it. Exhibit E(25) shows that shop rent and ground rent on house sites were collected by the Collector on behalf of the temple in Avadayarkoil, and Exhibit E(26) shows that Pranthani village, after being under Amani cultivation for a long time was let out to the ryots of that village for a rent exceeding the average collection of the previous ten years. This clearly shows that both the Melvaram and Kudivaram rights in it were at the entire disposal of the temple itself. Exhibit E(27), dated 1845, shows that Karungadu village (both Nanja and Punja) was also under Amani cultivation.

20. On 12th July 1850 the temple villages appear to have been handed over to the temple trustee (Thambiran) by the Government, *vide* Exhibit G (20), and now commences the 3rd period of the temple management already referred to, during which the temple trustee (Thambiran) and not the Collector was in possession of the temple villages and properties. Exhibits G(20), G (21), G (22) and G (56) are all leases executed to the Thambiran (trustee) in 1850 for the temple lands in which the father of the 1st defendant in Original Suit No. 7 of 1913 and an ancestor of the 1st defendant in Original Suits Nos. 9 and 22 of 1913 have taken part as executants. There is a tendency visible in these Muchilikas for the tenants to go back to the old Amani system under which the temple itself retained the cultivation in its own hands and carried it on directly and by letting out the lands to the tenants for fixed periods; for the executants of these Muchilikas stated in them that they found themselves unable to continue as tenants under the terms of Tharam Faisal Muchilikas and that, therefore, they preferred to go back to the Amani system under which they stated that, they would pay Melvaram, etc., as of old and take Kudivaram *from the temple*. For dry crops raised on Nanja and Punja lands they agree to pay the customary Varam. There is also a provision for rendering services to the temple in its festivals and to conduct Kudimaramath in the temple villages. The terms in these Muchilikas clearly show that their executants were acting under the full consciousness that they had no rights of permanent occupancy at any time and that they had not acquired any such rights under Tharam Faisal Muchilikas, which were in force when the temple lands were being managed by the Collector.

21. Exhibit N12, dated 30th June 1851, is again another judicial pronouncement in a claim order passed by the District Munsif of Pattukotta, to the effect that the tenants cultivating lands in Seruguvayal village owned by the plaint temple had no permanent right of occupancy in them. Though it was merely an order in a claim petition, the matter was fully inquired into by the District Munsif who passed an elaborate order giving full reasons for raising the attachment which had been made on the temple lands by a creditor in execution of a decree which he had obtained against the tenants

22. In 1852 Exhibit G (57) was taken for two pieces of waste land in Karuppur village (one of the 48 villages), which its executants agreed to improve and cultivate on condition that if they did not do so the lease might be cancelled and the lands assigned to others. There is also found in it the usual term for the performance of services. This clearly shows that all the waste lands in the temple villages belonged to the temple and that the temple trustee was exerting himself in

seeing that they were gradually improved and brought under the yoke.

23. Exhibit E, an order, dated 16th November 1852, of the Head Assistant Collector to whom some ryots of Kalagam village had complained about the increase of the tax payable for trees, etc., by the Thambiran after he assumed management of the temple properties, supplies a correct test as to what was the real position of the Tharam Faisal lessees and other tenants who were cultivating the temple lands, while they were under the management of the Collector. The following extract from his order describes the position of the tenants in a clear manner: "The said Kalagam village belongs to temple as its own and God owns it including the Kudikaniachi right. Even the ryots who came to Court in person admitted that both the Melvaram and Kudikani rights belonged to temple and that they came only as tenants under Sircar for Faisal rates. The lands in the village were given to the ryots for Faisal rates while under the management of Government. Now the village was handed back to the Thambiran and is under his management. Therefore, these ryots must act according to the will of Thambiran. The Faisal rates will apply only so long as the village was under Sircar management and will not bind the temple after the village was handed over to the Thambiran. The Thambiran alone has the power and not the Government to accept any tenant that acts according to his (Thambiran's) will and to eject those that do not. Inform the Thambiran that he may so act and the ryots that they should act according to the will of the Thambiran, and in default they are liable to be ejected and their lands assigned to others. Inform similarly that the Thambiran may so act with regard to other villages whose Kudikani right also belongs to the temple and the respective Faisal ryots of these villages that they should also act similarly."

23. In the next year 1853—54, there was again a judicial pronouncement in a suit brought by the temple itself to eject some tenants of Sirugavayal village (one of the 43 villages) from their holdings on the chief ground that they were not entitled to Kudimiras right and that they were liable to be ejected. Those tenants set up permanent right of occupancy chiefly on the basis of the Tharam Faisal Muchilika under which the lands had been held, and the District Munsif also found in their favour and dismissed the suit [*vide* Exhibit N (13)]. But in appeal the District Judge of Tanjore refused to confirm the lower Court's decision on the strength of the Pymash accounts, which clearly showed that the temple had the Miras right in its lands, and on the strength of the description of the defendants as Porakkudis in the documents filed by themselves. The District Judge Mr. Bird reversed the District Munsif's decree and granted a decree in favour of the temple [(*vide*, Exhibit N (14)].

24. Exhibit G (33), a Muchilika, dated 10th April 1885, executed by Mukkanda Veerappa Pillai and 25 others of Avadayarkovil, describes its executants as Porakkudis and further shows that they were cultivating the temple lands but were sought to be ejected through Court, that as soon as proceedings were instituted against them they surrendered possession of the lands, that a portion of them was kept thereafter under the Pannai cultivation by the temple and that the rest was leased out to them on Varam tenure and on condition that they should perform the customary services. There is an important term in the Muchilika to the effect "if we default in cultivating the lands duly or if we delay or default in performing services, you are at liberty to evict such tenants and keep in Pannai, or allot it to suitable Porakkudis and we will perform the customary services." This term renders it impossible to hold that the temple does not own all rights in the Avadayar Kovil and other villages. Exhibit S, dated 1862 (Puli accounts), shows that even for Punja lands Varam was collected.

25. Exhibit G (23), dated 17th July 1866, is a very important document. It is attested by the defendants' ancestors, and it shows that the lands in the cultivation of some Porakkudis were taken from them and handed over to others for cultivation as tenants under the temple. It shows that there was a change of tenants in this manner in 3 villages, *viz.*, Karungudu,

Manayal and Praudani all suit villages). The executants of Exhibit G (23) further undertook that they would not sell or mortgage their rights under it on pain of losing their leasehold right if they did so. The terms are surely inconsistent with the existence of any permanent right of occupancy in the tenants.

26. As in the previous period when the temple lands were under the Collector's management (Exhibits E8, E9, E11, E12, E14, D, D1, D3, E31 and E26) leases were taken by the Thambiran (trustee) after the management was handed over to him for fixed periods (*vide* Exhibits G57, G58, G59, J8 and J6). Exhibits D3, E26, G58, G59, J8 and J6 relate to some of the suit villages.

27. Exhibit G16 belongs to the class of leases called Arrakkat cash leases, under which the executant agreed to pay cash rent for the lands taken by him for cultivation for 15 Faslis from 1305 to 1319 and also undertook to render temple services, tank services, etc., as per *mamool*. After the expiry of the term possession of the leased lands was to be delivered by him to the temple. In this document there is further an admission by the executant that the temple possessed both Melvaram and Kudivaram rights. They relate to villages included in the 48 villages covered by Exhibit C.

28. Exhibits G to G15, G24, G26, G29 to G32, G34, G39 to G43, G46, G49 to G53 are also similar leases. They range from 1886 (Exhibit G) to 1905 (G14). The common features of these lease are (1) provisions for handling of crops after paying rent, (2) service to tank and temple, (3) surrender after the expiry of the lease, (4) interest payable on arrears in addition to the recital that both Varams belonged to the temple and the executants were mere Purakkudis. G 65, dated 19th December 1881, is a Muchilika executed by one Karuppudayan for the house, and Punja lands previously in the occupation of Porakkudi Samiaatha Odayar but subsequently let out to him by the temple. He undertook to live in that house and cultivate the said land and pay the rent reserved in addition to performing the usual services and on default he was liable to be ejected from both the house and the land. This lease shows that the sites and lands in the possession of one tenant were taken from him and let out to another.

29. In execution of a Civil Court decree passed against one of the cultivating tenants of the temple 146 palmyra trees were sold in Court auction; but in a suit brought by the Thambiran trustee to set aside the sale on the ground that the said trees belonged to the temple and that the tenants were merely Porakkudis, a decree was passed in favour of the temple (*vide* Exhibits N 16 and N 17). This adjudication is important, as showing that the trees standing on the temple lands belong to the temple, which fact goes some way towards establishing the plaintiff's case that the temple is entitled to the proprietary right in the soil of its lands.

30. Exhibit G15, dated 14th June 1874, is a lease for a house site executed by the father of 1st defendant in Original Suits Nos. 9 and 22 of 1913 and his brother for the purpose of building a house thereon, for which he agreed to pay a fixed ground rent. On default to pay the rent in any Fasli he undertook to remove the materials of the house built by him and leave the site. The site in question is situated in Pandipathuram (one of the suit villages). This lease shows clearly that the Punja sites in the temple villages belong exclusively to the temple.

31. J (8) series is a Muchilika book, and page 23 of it contains a Muchilika executed by the father of 1st defendant in Original Suits Nos. 9 and 22 of 1913, in which he agreed to carry on wet cultivation on dry lands already in his occupation and to pay cash rent annually; and on default he agreed that the lease might be cancelled and that the land might be taken under Amani cultivation. He further undertook to pay the arrears of rent with interest from his own properties and to perform the usual tank and temple services. Exhibit J8, page 111, contains a Muchilika executed by the father of the 1st defendant in Original Suit No. 7 of 1913, father of 1st defendant in Original Suits Nos. 9 and 22 of 1913, father of 1st defendant in Original Suit 21 of 1913 and the father of 1st defendant in Original Suit No. 28 of 1913, all describing themselves as Porakkudis of Karakudi village (one of the suit villages).

by which they agreed to deliver to the temple a fixed quantity of straw for the consumption of the temple cows each year. J8, page 219, shows that a ryot who was cultivating the lands in Karagudi and Manayal villages gave up his right, as a penalty for his disobedience of the orders of the temple trustee that none should cultivate those lands without the special orders as there was a dispute with regard to their possession. This Muchilika is attested by the father of the 1st defendant in Original Suit No. 21 of 1918. Exhibits N1, N2 and N3 are petitions presented to the Criminal Court by both parties to some criminal dispute about the possession of some lands, to the effect that as both the Melvaram and Kudivaram in them belonged to the temple, they agreed that those of them only who were permitted by the temple trustee to cultivate those lands should cultivate them and that they would abide by the decision of the temple trustee in this matter. The lands referred to are those of Prandani (one of the suit villages).

32. Exhibits H series are debt bonds executed by the temple tenants mainly for arrears of rent in which they invariably described themselves as Porakkudis and agreed to pay the amount due from their own properties. Exhibit H44 was executed by the father of 1st defendant in Original Suit No. 7 of 1913 and referred to the arrears due in Prandani, Karungadu, Pandipathram and Karagudi, which are all suit villages. It was attested by Rangappudayan, son of Karuppadayan, the senior paternal uncle of the 1st defendant in Original Suit No. 21 of 1913; Exhibit H45, dated 3rd October 1881, executed by a Porakkudi of Pandipathram village (one of the suit villages) was attested by Karuppannan, paternal uncle of the 1st defendant in Original Suits Nos. 9 and 22 of 1913. Exhibit H40 related to arrears in Pandipathram, Manayal and Piranthani villages and Exhibit H41 to Pandipathran and Avadayarkoil villages. Exhibit H43, dated 1st May 1883, was attested by the father of the 1st defendant in Original Suit No. 7 of 1913. Exhibit H5, dated 2nd July 1885, was executed by the 1st defendant in Original Suit No. 23 of 1913, Exhibit H60, dated 9th November 1885, was executed by the father of the 1st defendant in Original Suit No. 21 of 1913, who described himself therein as Porakkudi. Exhibit H61 was executed by the son of the senior paternal uncle of the 1st defendant in Original Suit No. 21 of 1913 describing himself as Porakuddi. In Exhibits H7 to H10 and H23 the executants described themselves as Porakkudis and admitted the Kudivaram (both Varams) rights of the temple.

33. Exhibits F9 to F13 show that compensation for the lands in the temple villages acquired by the Government under the Land Acquisition Act was invariably paid to the plaint temple; and Exhibits F2, F, F5, F11 and F16 show that the trees on roads running through the temple villages were recognised to be the temple's, and Exhibits F1, F2, F6, show that the sites in the temple villages were in its exclusive enjoyment. Exhibits K series are petitions by the cultivators of the temple lands made from time to time praying that fuel for occasional domestic purposes and trees for building and repairing houses might be sanctioned to be given to them by the temple trustee from out of the trees standing in the temple villages. In these documents the petitioners have described themselves invariably as Porakkudis. Their dates range from 1893 to 1910. The petitioner in Exhibit K51, dated 4th June 1893, was the father of 1st defendant in Original Suit No. 21 of 1913. The petitioner in Exhibit K55, dated 8th July 1893, was the 1st defendant in Original Suit No. 28 of 1913. Exhibit K60, dated 2nd May 1902, was by 1st defendant in Original Suit No. 7 of 1913, 1st defendant in Original Suit No. 28 of 1913 and 1st defendant in Original Suit 21 of 1913, etc.

34. Exhibits M series and R series ranging from 1896 to 1910 are receipts granted to the cultivators who have described themselves therein as Porakkudis.

35. The data supplied by the documents considered above under 3 periods are far more numerous and definite than those on the basis of which the occupancy right claimed by the tenants was negatived by the Madras High Court in the cases reported as *Naina Pillai* v. *Ramanathan Chattiar* (10) and *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (8). The facts proved and the data may be summarised under the following heads with reference to the documents which prove

them. (1) Sri Athmanathaswami is the Mirasdar of the lands included in the Inam Sanad, Exhibit C, and the tenants cultivating them are mere Porakkudis having no permanent occupancy right therein (*vide* Exhibits N11, E, E1, N15, N1 to N3, N24, J6, pages 156, 243, 250, 374 and 386 and 470, G, G1, G2, G46, G24, H6, H11, H7, H8 and H23, all relating to the suit villages, in addition to documents of similar nature relating to the other villages). (2) The temple lands are owned by Sri Athmanathaswami and are in his possession, the ryots having no permanent rights whatsoever in them (*vide* Exhibits E24 and E). (3) House sites and trees also in the temple villages belong to the god (*vide* Exhibits N16, N17, G45, J6, page 47[illegible], G27, G25, F5, J4, page 427, J3 page 343, N26 and N27). (4) The temple has been cultivating some lands (both dry and wet) in its villages directly under the Amani system (*vide* Exhibits E7 to E11, E31, E33, E21, E27, G20 to G22 and G5[illegible], G33, all relating to the suit villages besides others of similar nature relating to other villages). (5) The temple has been exercising the power to cancel the leases entered into by its tenants and let out the lands included in them to others (*vide* Exhibits G57, E, E1, G33, G23, G59 to G61, J8, J6, J4 and G25, J59, J60, J5, page 406, G4, G14, G1[illegible] and G19, all relating to villages other than the suit ones). (6) The temple has been exclusively paid compensation for acquisition of lands in the temple villages by the Government under the Land Acquisition Act (*vide* Exhibits F5, F9, F10, F12, F15, F13, F14 and F17). (7) Agreements by tenants not to sell or mortgage their holdings (*vide* Exhibits G23, J3, page 321, and G4). (8) Undertaking by the tenants not to remove crops before paying the rent due to the temple (*vide* Exhibits G, G2, G46, G24, J4 pages 164 and 186, G40, G41, G3, G5, G12 G13, G26, G29, G42 and G50). (9) Agreement to give straw to the temple (*vide* Exhibits J5 page 111). (10) Undertaking by the tenants to surrender their holdings after the expiry of the periods fixed in their leases (*vide* Exhibits G33, J3, pages 374 and 386, G to G2, G46, G24 and G series from 1889 to 1912, J, page 457 and J5, J3, pages 143, 350 and 311). (11) Special taxes payable for cultivation of Poramboke, Punja, garden crops, 2nd cultivation, etc. (*vide* Exhibits D2, D7, G20 to G22, G56, G57, G58, IV, IV*g*, G3, G30, G31, G43, G16, G34, G32, G42, G43, G53 and G6). (12) Undertaking to supply labour for the conduct of the temple festivals and for Kudimaramath etc. (*vide* Exhibits E30, D, G20 to G22, G56, G57, G59 to G61, J8, page 23, G65, J6, pages 156 and 152, 334 and 386, rest of G series from 1886 to 1912 and J5, pages 112 and 117 (13) Change of holdings (*vide* Exhibits N, E6, E34, E13 to E18, E20 to E22, D5, D6, G33, G23, XXIIa, G30, G61, G65, J4 series, J6, page 386, H20 and J1, page 279. (14) Rents varying from time to time (*vide* Exhibits E11, E12, E18, E26, G20, G21, G22, G56 and E). (15) Tenants' own property liable for rent, which shows that they had no property in their holdings under the temple (*vide* Exhibits N33, D3, D4, G65, H15, H44, H33, H39, J6, pages 149, 152, 243 and 250, G to G2, G46, G24, J4, pages 164 and 186, H23 and J5, page? (16) Leases for fixed periods showing that the tenures were only temporary (*vide* Exhibits D, E31, D3, E26, G58, G59, J8, pages 23 and 111, J6, page 149, G2, G45, G24, G39, G42, G49, G41, G26. G5, G3, G29, G31, G43, G16, G34, G32, G42, G49, G50 to G53, J pages 361 and 414, G55, G54, J5 pages 7, 112, 117, 403 and 406 and G18, all relating to the suit villages, in addition to others of a similar nature relating to other villages).

35. In addition to these data there is the fact that the suit and other villages of the plaint temple were cultivated for sometime under the proposal Izara leases and for sometime subsequently under Tharam Faisal Muchilikas and that the rent payable under both these systems by the cultivators was described as Swamibogam, a circumstance the existence of which alone in the cases dealt with in *Naina Pillai* v. *Ramanathan Chettiar* (10) and *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (8) was considered by the Madras High Court as almost conclusively showing that the landlord had complete rights in the lands in dispute in them. The other circumstances in favour of the theory of the tenants having no occupancy right in the suit lands which appear in those leases have been already detailed (*vide* paragraphs 10 and 13). Furthermore, the judgments of Courts ranging from so early date as 1810 have been pointed out above as showing beyond doubt that whenever the

uestion of occupancy right was raised by the tenants in Courts, that question was invariably decided against them. This is a very strong additional circumstance which did not exist in the cases dealt with in the above two Madras decisions.

37. The appellant's Pleader suggested in his argument that the Amani system referred to in the plaintiff's document simply meant that the temple manager was looking after the cultivation operations carried on by the tenants on their own right as such, for the purpose of facilitating the prompt collection of rents, and that the reference to handing over possession of the temple lands to the persons who executed Muchilikas to the temple, shows that right of collecting the Melvaram from the tenants was transferred to the lessees both under the proposal Izara system and Tharam Faisal system. But, in my opinion, these suggestions are not in the least convincing. The reference to the Amani cultivation as well as the handing over of the possession of the temple lands to the lessees occurs in plaintiff's documents in such definite language that no doubt can reasonably be entertained as to their meaning. He also suggested that the lands for which compensation was granted to the temple might not have been in the cultivation of the tenants. But the evidence of plaintiff's witness No. 24, who speaks to the compensation being given to the temple on two occasions [as shown by Exhibits F (9) and F (10)], is that compensation was granted to the temple and that no part of it was paid to the tenants. This impliedly shows that the lands acquired must have been in the cultivation of some tenants. Neither in the cross-examination of this witness nor in the evidence let in by the defendants was it sought to be established that those lands were waste lands not in the cultivation of any tenant. By his explanation as regards Arakkat leases that they relate to the lands silted up or washed away by floods, it is not clear what exactly the learned Vakil for the appellants wanted to suggest in favour of the theory of permanent occupancy. If he meant to state that such leases were granted only in respect of lands in the absolute disposal of the temple, this itself is an admission that the temple had at best some lands in its absolute control, a circumstance clearly against the claim of a permanent right of occupancy in the tenants and in support of the theory that the temple was from the beginning owner of both Varams in the suit and its other villages. But the evidence of defendants' witness No. 1, who has deposed that he executed an Arrakkat lease for 3½ Mahs of land which had become silted up 4 years before and was lying waste but which was in his cultivation before that period, shows that such leases were granted in regard to lands in the occupancy of tenants also. Almost to the same effect is the evidence of defendants' witness No 3. The evidence of defendants' witness No. 14 definitely shows that Arrakkat leases used to be executed even as regards lands already in the enjoyment of tenants. It appears from the contents of such leases that they were generally granted with regard to lands which required to be improved for Nanja cultivation owing to being damaged by floods. What is really important and relevant in these documents is that the lands included in them and which were already in the cultivation of tenants, though requiring to be improved owing to ravages due to floods, were leased out under conditions perfectly inconsistent with the existence of any permanent right therein in favour of the tenants at any time.

38. The appellants' Vakil drew a distinction between the recitals in documents of 1875 and those after that year. But it is not clear on what essential differences between these two sets of documents he wanted to rely and what point he wanted to make out from those differences. No doubt in Exhibits H and J series the recital that both Varams belonged to temple occurred only in the later documents and not in the earlier ones; but the latter distinctly contained a recital that their executants were Porakkudis, which meant virtually that both Varams belonged to the temple. It might be that the temple manager wanted to make his position clear and definite by insisting on the inclusion in documents taken by him from tenants of words showing that the temple owned both Melvaram and Kudivaram in its villages. It should also be pointed out that documents prior to 1875 of an un-

questionable nature contain clear indication to show that the temple is entitled to both Varams in its villages, as already pointed out. For instance, Exhibits B series (Pymash Chittas), Exhibits N, N(1), N(2), and N(3), N(11), N(12), N(13), N(14) and N(15) (all judgments) and Exhibits E and E1 show clearly that the temple villages owned both Varams and they are all of ancient dates, though they are not Muchilikas executed by tenants.

39. Muchilikas Exhibits G (20) to G (22) and G (56), which were executed to the Thambiran trustee after the management was handed over to him in 1850 and which have been already dealt with in detail, make it quite clear that the temple owned both Varam rights in its lands, though neither the word "Kudivaram" nor the clause "both Varams belonged to the temple" were used in them.

40. The appellants' Vakil also relied on the following facts to show that the defendants were treated by the temple authorities as tenants possessing permanent rights: (1) In the absence of any grounds to eject the tenants they were not ejected. (2) If a tenant died his heirs were registered in the temple accounts in his place (*vide* the evidence of plaintiff's witness No. 23 on this point). (3) Alienations by way of mortgage, sale, etc., were made by the tenants and acquiesced in by the temple authorities.

41. The first two points deserve, in my opinion, no serious consideration; for the numbering of tenants and the registering of their heirs in their place after their deaths might be due to a desire to create facilities for proper collection of rent. As regards the 3rd point, *viz*, alienations of holdings, it no doubt appears from the oral evidence let in and some of the documents exhibited in the case (*vide* Exhibits II (*b*), IX, X, XIV, XX and XXI specially referred to at the argument) that alienations of their holdings were occasionally made by the tenants; but it does not appear that they were made with the knowledge of the temple manager or that he recognised them. The earliest of these documents, Exhibits XIX and XX, appear to have been marked on account of their age, though they are cadjan documents and Mr. T. Rangachariar pointed out at the argument that they had not been regularly proved to be genuine. With regard to the argument based on the alienations, the answer is supplied by the following observations of the Madras High Court in *Naina Pillai* v. *Ramanathan Chettiar* (10): "No doubt, where a landlord is legally entitled to grant rights as against him to a tenant he can, by acquiescence or by conduct amounting to estoppel, be treated as having made such grant. But the trustees of a temple have no legal right or power to confer higher rights on a temple tenant in the temple lands in his holding than he originally possessed, except for the necessities or the clear benefit of the temple. The acquiescence and conduct of the trustees cannot, therefore, affect detrimentally the rights of the temple." The following observation of the Chief Justice in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (8) is in point: "If the defendants' predecessors have not occupancy rights in 1831, I do not think they can have acquired them since by reason of the fact that the trustees have raised no objection of late years to the transfer of the holdings by sale and mortgage. In *Mayandi Chettiyar* v. *Chokkalingam Pillay* (15) the Judicial Committee question the right of temple trustees to confer permanent rights of occupancy by express grant, and I think they can still less be held to have done so by implication."

42. With regard to the Tharam Faisal Muchilikas, the appellants' Pleader argued that though no occupancy right can be claimed on their basis, they cannot be treated as having put an end to such rights in the tenants if they already existed. But this argument can be effectively answered by the reply that the terms and conditions in the Tharam Faisal Muchilikas in question make it impossible to accept the position that their executants could have ever had occupancy rights in the lands included in them. If they had such rights, they would not have in all probability executed such Muchilikas. Such an argument has been completely refuted by Sadasiva Aiyar, J., in his judgment in *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (8).

43. As regards house sites the learned Vakil for the appellants specially laid stress on two documents (Exhibits V and VI), dated 1875 and 1905 respectively to

show that the temple did not own any house site in its villages. Exhibit V evidences a sale of a house with its site in Avadayarkoil, which is more or less a town and in which the temple of Sri Athmanathaswami is situated. It does not appear that the temple manager claims title to all the house and house sites in that village, which is not an Yekabhogam village (like the rest of the villages included in the Sanad, Exhibit C) but which is only a Palabhogam village, owned in shares by the temple and other Mirasdars. As there is no evidence that the temple claimed any ownership in the house site included in Exhibit V, the argument based on it loses all force. In fact the sale was in favour of the temple itself and it is improbable that the manager would have purchased it recognising a title in the seller, if the temple had any title to it, considering the claims of complete ownership in the Devasthanam villages including house sites which were being put forward until then from the earliest times.

44. As for Exhibit VI, a document dated 1905 and evidencing a sale of a house site in Kurichikulam by one Velandam Pillai to one Muthusami Chettiar of Siddakoor, it does appear that the vendor was Porakkudi under the temple. It might be that he had ancestral title to the site sold as recited in the document and that that title was in no way derogatory of the claim of both Varams made by the temple. On the other hand, G 45, G 24, G 47 and J6, page 470, place the matter beyond doubt, making out clearly as they do that the temple has the complete control over the house sites in its villages. J6 relates to Manayal and Pandipathram, G45 to Karagudi Lakshmiyendal and another village, G47 to Kuragudi and G25 to Pandipathram village. All these are suit villages. These are Muchilikas executed by the ryots taking up house sites from the temple manager on leases for the purpose of building houses thereon for residence. There is a clause in them that the tenants must quit the premises on default to observe the conditions recited therein To the same effect is Exhibit J6 page 470. In the Pymash Chittas also the houses and house sites occupied by the temple tenants are referred to and described in detail, but invariably their occupants are termed therein as Porakkudis, a term which is inconsistent with their having any proprietary right therein. It thus follows that even as regards house sites the plaint temple is owner of both Melvaram and Kudivaram rights. In the Sikkil Case [*i. e. Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* (8)] where the tenants were held to be entitled to the house sites on which they resided, the Pymash disclosed that some tenants in occupation of the house sites were described therein as Olavadai Kudikani Mirasdar: whereas in this case the tenants were all of them invariably described as Porakkudis. Moreover, it was found by the High Court that the plaintiff in that case had made out no case to eject the tenants from their house sites; but here on the evidence let in and discussed by me, plaintiff has made out his full title to both lands and house site equally.

45. On the above considerations I find the 1st part of the 1st issue and the 2nd issue framed by the District Munsif in plaintiff's favour.

46. *2nd point framed by me* :—In the face of my finding on the 1st point this point does not really arise for consideration. But if a finding on it is necessary, I must give it in plaintiff's favour on the same considerations on which issues No. 1 (1st part) and No. 2 of the District Munsif were found in plaintiff's favour. The uniform course of dealings between the temple manager and the tenants of the temple villages, which are only in keeping with the theory of the temple possessing both Varams, the inference which invariably follows on a perusal of public documents of ancient dates consisting of correspondence between public officers, and the judgments of Civil and Criminal Courts, establish beyond any shadow of doubt that Sri Athmanathaswami must have acquired the Kudivaram right in the lands granted to him under Exhibits A and A2 at least after the grants, assuming that he did not do so by virtue of the grants themselves But the question at what time or times and by what means the Kudivaram right was acquired, and whether it was acquired with regard to all the lands at the same time or whether it was acquired gradually cannot be answered,

as there are no sufficient materials for such an answer on the evidence.

47. *3rd point framed by me* :—If my finding on the 1st point, *viz.*, that Sri Athmanathaswami acquired complete ownership consisting of both Varams in the suit villages by virtue of the grants, Exhibits A and A (2), is correct, the defendants cannot rely on section 6 of the Estates Land Act as creating in them a permanent right of occupancy in the suit lands by virtue of the provisions contained in it. As it has been shown that subsequently to the grants also, the plaint temple has been exercising its rights as the owner of both Varams, the defendants were neither ryots nor were the lands in their possession as tenants' ryoti lands within the meaning of those expressions, as used in section 6 and defined in section 3 of the Estates Land Act when it came into force. Ryoti land means cultivable land in an estate other than private land. But as it has been found that both Varams belonged to the plaint temple from the commencement of the grants and when the Estates Land Act came into force in its villages, the suit lands could not be termed ryoti lands ; nor can they possibly be termed lands in an estate within the meaning of those words as used in section 3, sub-section 2, clause (*d*). The clause runs as follows:—"Estate means any village of which the land revenue alone has been granted in Inam to a person not owning the Kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village." As it has been found that not merely the land revenue but also the proprietary right in the soil of the temple villages was granted in favour of Sri Athmanathaswami by Maharaja Ekoji Raja, the suit villages cannot come under the above clause, and, therefore, cannot be termed "estates" so as to attract the provisions of the Estates Land Act.

48. Supposing for a moment that the temple did not acquire both Varams by virtue of the original grants but somehow acquired title to the Kudivaram right in the suit villages subsequently, the question arises whether under those circumstances section 6, as controlled by the provisions of section 8, conferred permanent right of occupancy on the defendants. It was argued for the appellants that if the acquisition by the temple of the Kudivaram right subsequent to the grants was by virtue of a surrender by the defendants and other tenants, their holdings would be considered to be ryoti lands in an estate when the Estates Land Act came into force and that, therefore, they must be considered to have acquired permanent right of occupancy by virtue of the provisions in section 6, in spite of the Exception to section 8 relating specially to Inam villages which runs as follows:—"Notwithstanding anything contained in this section where before or after the commencement of this Act, the Kudivaram interest in any land comprised in an estate falling within clause (*d*) of sub-section 2 of section 3 has been or is required by the Inamdar, such land shall cease to be part of the estate," the argument being that acquisition by surrender is not one of the modes contemplated by section 8 or its Exception. The judgment of Seshagiri Aiyar, J., and Sadasiva Aiyar, J., in *Upadrasta Venkatu* v. *Devi Sitaramudu* (20) supports this view. In *Adusumalli Suryanarayana* v. *Acchutta Potanna* (17), a decision passed by the High Court about five months earlier, Sadasiva Aiyar, J., had expressed the same view, the other Judge, however, who took part in that decision (Spencer, J.) having held a contrary view stating that "a narrow interpretation should not be placed on the word 'acquired' in the Exception to section 8 so as to exclude acquisition by an Inamdar by surrender or abandonment of the Kudivaram rights by a tenant." The above view of Spencer, J., was subsequently accepted to be correct by Miller, J., in *Ponnuswamy Padayachi* v. *Karupudayan* (21), decided two months earlier than the case reported as *Upadrasta Venkata* v. *Devi Sitaramudu* (20). In this conflict of authorities the doubt on this point can only be set at rest finally by the High Court. If the view of Justices Miller and Spencer be correct and if the plaint temple is held to have acquired the Kudivaram right in the suit villages subsequent to the grants, supposing it did not do so at

(20) 24 Ind. Cas. 224; 26 M. L. J. 585; 38 M. 891.
(21) 24 Ind. Cas. 217; 38 M. 843; 26 M. L. J. 295; 1 L. W. 218; 15 M. L. T. 299.

their dates, then it must be held to have acquired that right within the meaning of the word 'acquired' as used in the Exception to section 8 and, therefore, to have become full owner of those lands. In that case the suit lands must have ceased to be lands in an estate as defined by the Estates Land Act.

49. If on the other hand the view of Justices Sadasiva Aiyar and Seshagiri Aiyar be correct, the Exception to section 8 would not be applicable to this case and, therefore, section 6 will have to be interpreted independently of section 8. In that view, the question whether the tenants acquired permanent right of occupancy by virtue of the provisions of that section would depend upon the questions

(1) Whether the lands in their occupation when the Estates Land Act came into force could be termed ryoti lands.

(2) Whether they would come under the description "ryots" within the meaning of that word as used in that Act. All these questions have been already considered by me and answered against the defendants in paragraph 47 above.

50. I think also that the defendants must make out that the temple acquired the Kudivaram rights in the suit lands subsequent to the grants, by surrender and not by any other mode, before arguing that the suit lands did not cease to be part of an estate under the Exception to section 8 of the Estates Land Act. No doubt if it is to be eventually held by the High Court that according to the correct interpretation of the original grants the temple did not acquire both Varams under them but if it finds on the evidence as above discussed by me that it subsequently acquired the Kudivaram rights therein, it would then only be necessary to consider under sections 5 and 8 whether the tenants had acquired occupancy right when the Estates Land Act came into force. But even under those circumstances the burden of proving that the temple acquired the Kudivaram right subsequent to the grants by virtue of surrender would, in my opinion, be on the defendants as there is no reason why in the absence of all evidence it should be taken that the acquisition was by surrender rather than by any other mode. The defendants, who request the Court to shut out the plaintiff from the benefit of the Exception to section 8 by stating that the acquisition must be taken to be by surrender, must prove that, as any other fact.

51. *The 2nd part of the 1st Issue*:—This part of the 1st issue relates to the question of jurisdiction. As I have found that the plaint temple acquired both Varams under the original grants, the definition of an estate as given by section 3, sub-section 2, clause (*d*), which is the only clause that can be thought of in the consideration of the question whether an Inam village is an estate or not under the Estates Land Act, cannot be applicable to it; for that clause only contemplates Inam grants by which the land revenue alone was granted to the Inamdar. If the view that the plaint temple acquired the Kudivaram rights only subsequent to the original grants is to prevail and if it is to be held that section 6 of the Estates Land Act is not applicable to this case and that Exception to section 8 is applicable to it, even then the suit lands cannot be held to be part of an estate so as to attract the provisions of the Estates Land Act as regards the question of jurisdiction; for in that view the suit lands cannot be termed to be lands in an estate. In any of the views the Civil Court has clearly jurisdiction to entertain these suits. As pointed out in the remand order, the decisions reported in *Tadikonda Buchi Virabhadrayya* v. *Sonti Venkanna* (4), *Indety China Nagadu* v. *Potu Konchi Venkatasubbaya* (5), *Srimath Kidambi* v. *Pidipiti Kutumbarayadu* (6) and *Ramala Venkataswami* v. *Kanumalla Narasimhayya* (7) show that there is further a burden on the defendants who want to oust the jurisdiction of the Civil Court to show that it has no jurisdiction to entertain these suits. On the findings recorded by me already on the merits, it is clear that they have not discharged that burden. I find this part of the 1st issue against the defendants.

52. No arguments were advanced before me by either the appellants' Vakil or the respondent's Vakil regarding the other issues framed by the District Munsif.

53. *3rd Issue*:—This issue raises the question whether the defendants are entitled to any

compensation from the plaint temple in case they are ejected from their holdings by the plaintiff. The District Munsif has found this issue against the defendants on the ground that the evidence relating to it is vague and indefinite. The appellants' Vakil did not in his argument make out any case for compensation with reference to the evidence let in and it was not pointed out how the District Munsif's finding is incorrect. I also find this issue against the defendants.

54. *4th Issue*:—This issue evidently raises the questions whether the alienations of holdings by way of mortgages and sales effected by some tenants in the suit villages which, as the defendants stated, were acquiesced in by the temple manager, created an estoppel against the plaintiff so as to deprive him of the opportunity to prove that he is entitled to both Varams in the suit villages. But it has been already shown that in the case of temple properties, such an argument has really no force, nor is there any clear evidence that the temple manager consented to the alienations or acquiesced in them. I find this issue against the defendants.

55. *5th Issue*:—This relates to the question of the propriety of the notices to quit before suit. This point is not raised in the memorandum of appeal grounds presented in the District Court and, therefore, it may be taken to be given up by the defendants. There is also sufficient proof that notices to quit were given and the District Munsif has found that they were proper. I also find this issue in plaintiff's favour.

56. *6th Issue*:—This issue raises the question of limitation. It is not seen how any question of limitation can arise in these suits. The defendants were admittedly tenants at their institution and if it is to be held that the defendants had no permanent rights of occupancy in their holding, their possession must be taken to be the possession of the temple itself. No reference was made to limitation at the argument, though appeal ground No. 16 had raised it. I find that the suits are in time.

57. *7th Issue*:—The plaintiff claimed certain consolidated amount in each of those suits as past profits for Faslis 1319 to 1321, the details of the amount also being given in the various plaints. But there is no proof worth the name, as the District Munsif has rightly remarked, that the plaintiff is entitled to recover these amounts from the respective tenants. There is an occasional reference to Pulli accounts, Exhibits L series in the evidence let in by the plaintiff; but their contents have not been properly proved. There is no proof, for instance, as to what was the actual yield in the said Faslis in the various holdings in dispute or as to what crops were raised or as to their prices and the amounts due as rents. The defendants contended that the customary rent due for Fasli 1319 had been paid up and that there was no proper yield in Faslis 1320 and 1321. The evidence was not directed to these points specifically. In the absence of definite evidence with due particulars to show what exact amount is due to the plaintiff as damages for the three Faslis it is not possible to give a decree for mesne profits nor would it be safe to make a calculation solely on the basis of the entires in the Pulli accounts Exhibits L series, which were prepared by the temple servants recently. I, therefore, agree with the District Munsif in finding this issue against the plaintiff.

These second appeals coming on for final hearing after the return of the findings of the lower Appellate Court on the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the lower Appellate Court's findings and allow the second appeals, setting aside the lower Appellate Court's decrees and restoring those of the District Munsif with costs throughout.

Appeals allowed.

M. C. P.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 329 OF 1 17.

July 2, 1919.

Present :—Sir Henry Rattigan, KT., Chief Justice.

FIRM OF ASA RAM-KALU RAM THROUGH PURAN CHAND AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

FIRM OF BAKHSHI RAM-KANAHYIA RAM THROUGH SHIV NATH, RAM NATH—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20, O. VII, r. 10—Contract entered into by telegram—Cause of action, where arises—Jurisdiction—Court, whether can consider question suo motu—*Order directing return of plaint to proper Court, when can be made.*

Plaintiffs, carrying on business at Khanna in the Ludhiana District, sent an order by telegram to defendants, residing and carrying on business at Khamgaun in the United Provinces, to purchase cotton seeds on their behalf. Defendants wired back informing the plaintiffs that the cotton seeds would be purchased and sent, but they sent only a part, withholding the remainder as the price had gone up. Thereupon the plaintiffs filed a suit at Ludhiana for the recovery of the balance of the amount paid by them as well as damages for non-delivery:

Held, (1) that the Court was competent to consider the question of jurisdiction *suo motu* and to return the plaint at any stage of the suit for presentation to a Court in which the suit should have been instituted; [p. 331, col. 2]

(2) that the contract must be taken to have been made at Khamgaun where the defendants carried on their business and where they received the plaintiffs' telegram and that the Ludhiana Court did not have jurisdiction to entertain the suit [p. 332, col. 1.]

Muhammad Shaffi v. *Karamat Ali*, 76 P. R. 1896, followed.

Boseck & Co. v. *Mandlestan*, 70 P. R. 1906, *Fremji Khetsey* v. *Ghulam Sarwar Khan*, 36 P. R. 1908; 85 P. W. R. 1908, distinguished.

Petition, under section 44 of Act III of 1914, for revision of the order of the District Judge, Ludhiana, dated the 3rd January 1917, affirming that of the Senior Subordinate Judge, 1st Class, Ludhiana, dated the 23rd December 1915, returning the plaint to the plaintiffs for presentation to the proper Court.

Lala *Hargopal* for Mr. *Jai Gopal Sethi*, for the Petitioners.

Mr. *Amar Nath Chona*, for the Respondents.

JUDGMENT.—The allegations in the plaint are as follows :—That two firms Asa Ram-Kalu Ram and Nand Ram-Salig Ram carry on business at Khanna, that they jointly sent an order by telegram from that place to defendants to purchase cotton seeds on their behalf, that defendants replied by telegram to plaintiffs at Khanna to the effect that the cotton seeds would be purchased and sent to plaintiffs at Khanna; that in compliance with the terms of the agreement defendants purchased some 8,000 bags of cotton seeds for the plaintiffs but sent only 2,681 bags and failed to send the remainder of the bags because the rate of cotton seeds had gone up. The plaintiffs accordingly sued the defendants for a sum of Rs. 1,106-10-9, being the balance of the amount sent by plaintiffs to defendants, and the sum of Rs. 1,095-6-0 as damages for loss by reason of the failure to supply the remaining bags of cotton seeds. The plaintiffs alleged that the suit was cognisable by the Court in which it was instituted, namely, the Court of the Senior Subordinate Judge, Ludhiana. The defendants did not appear in the case, but the Senior Subordinate Judge *suo motu* took up as a preliminary issue the question whether the Court at Ludhiana had jurisdiction to try the suit. He held that the Court had no such jurisdiction and that the cause of action arose either at Sirhind in the Patiala State or at Khamgaun in the United Provinces, where the defendants reside and carry on business He accordingly returned the plaint to the plaintiffs for presentation to the proper Court. This order was upheld by the District Judge on appeal and the plaintiffs have applied to this Court for revision.

Mr. Hargopal on behalf of the plaintiffs urged that the Court ought not to have taken up the question of jurisdiction *suo motu*, but upon this point I have no hesitation in holding that the Court acted in accordance with law. The plaintiffs alleged that the cause of action arose within the jurisdiction of the Court, and before the Court could adjudicate on the suit it had obviously to consider whether upon the allegations made in the plaint it had jurisdiction to entertain the suit. Order VII, rule 10, of the Civil Procedure Code is clear upon the point and gives the Court power to return the plaint at any stage of the suit for presentation to a Court in which the suit should have been instituted.

MANNA SULTAN *v.* SECRETARY OF STATE.

As to the question whether the Court at Ludhiana had jurisdiction or not, it appears to me that the decision of Chatterji, J., in *Muhammad Shaffi* v. *Karamat Ali* (1), which I have no hesitation in following, is conclusive upon the point. The contract according to that decision must be taken to have been made at Khamgaun where the defendants carried on their business and where they received the telegram from the plaintiffs, and it is quite clear that the delivery of the bags of cotton seeds was to be made to the railway at that place for conveyance to plaintiffs at Khanna. The rulings cited by Mr. Hargopal, *Premji Khetsey* v. *Ghulam Sarwar Khan* (2) and *Boseck & Co.* v. *Mandlestan* (3), are clearly distinguishable inasmuch as the question of jurisdiction was in those cases decided by a reference to either the previous practice obtaining among the parties or an express agreement between them as to the place where the money under the contract was to be paid. In the present case the money for the cotton seeds would be paid in the ordinary course of things to defendants at their place of business and the mere fact that the money was remitted from Khanna would not affect the question of jurisdiction.

I hold accordingly that the Courts below were right in returning the plaint to the plaintiff for presentation to the Court either at Khamgaun or at Sirhind, and I reject this petition with costs.

Petition rejected.

(1) 76 P. R. 1896.
(2) 36 P. R. 1908; 85 P. W. R. 1908.
(3) 70 P. R. 1906.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2260 AND 2279 OF 1917.

July 29, 1919.

Present:—Mr Justice Seshagiri Aiyar and Mr. Justice Burn.

Sree Raja VASIREDDI SREE CHANDRA MOULESWARA PRASADA BAHADUR MANNA SULTAN—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE, REPRESENTED BY THE COLLECTOR OF KISTNA AT MASULIPATAM, AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 14—Inams, *post-Settlement, granted by zemindar, enfranchisement of, by Government, legality of—Enfranchisement proceedings, whether should be set aside—Madras Proprietary Estates Village Service Act (II Mad of 1894), s. 27—Madras Inams Act (VIII Mad. of 1869).*

Where facts are undisputed and do not give an officer jurisdiction, but he nevertheless holds that he has jurisdiction to deal with the subject-matter, his decision must be regarded as *ultra vires*. Where, therefore, the Inam Commissioner, with knowledge that lands with which he was dealing were post-Settlement *inams*, makes an order in respect thereof in enfranchisement proceedings, his order would not affect the actual rights of the parties entitled to the property and his proceedings need not be set aside under Article 14 of Schedule I to the Limitation Act [p. 333, col. 1.]

Second appeals against the decrees of the District Court, Kistna at Masulipatam, in Appeal Suits Nos. 55 to 74 of 1916, preferred respectively against the decrees of the Subordinate Judge, Bezwada, in Original Suits Nos. 33 to 35 of 1914 and 4 to 19 and 23 of 1915.

FACTS appear from the judgment.

Mr. *K. Srinivasa Aiyangar* (with him Mr. *P. Nagabhushanam*), for the Appellant.—The *inams* are post Settlement *inams* which it is within the competence of the Zemindar to resume. So an Inam Officer has no power to enfranchise such an *inam*. See section 17 (Madras) Act II of 1894. Therefore, where he passes an order of enfranchisement, the order is a mere nullity and does not require to be set aside. The question is also concluded by (unreported) decisions of this Court in Second Appeals Nos. 1364 to 1366 of 1915 and Second Appeals Nos. 782 to 787 of 1916. See also *Surannanna* v. *Secretary of State* (1), followed in *Balvant Ramchandra* v. *Secretary of State* (2). I

(1) 24 B. 435; 2 Bom. L. R. 261.
(2) 29 B. 480; 7 Bom. L. R. 497.

submit that Article 14 has no application and the suit is not barred.

Mr. *Ramesam* (the Government Pleader), for the Respondents.—The decisions lay down that where the *inam* is subject to a condition, it is liable to resumption. So it was held in *Subbanna* v. *Secretary of State* (3) in the case of Dasabandam Inam.

Where an Executive Officer acts *bona fide* and holds a regular inquiry at which the Zamindar appears and defends, it is not open to the latter to sue in respect of the lands without first getting the order set aside.

JUDGMENT.—The Courts below should not have disposed of these cases on the question of limitation. There can be no doubt that if the lands in suit were included in the assets of the Zamindari at the time of the Permanent Settlement, the Government would have no right to resume them. See section 27 of Act II of 1894. Act VIII of 1869 makes it clear that any decision by the Inam Commissioner would not affect the actual rights of the parties entitled to the property. Therefore, if the Inam Commissioner, with knowledge that the lands were post-Settlement *inams*, passed enfranchisement proceedings, he would have acted *ultra vires*. Such proceedings need not be set aside under Article 14 of the Limitation Act. The learned District Judge has relied on the dissenting judgment of Candy, J., in *Surannanna* v. *Secretary of State* (1). The judgment of Jenkins, C. J., who differs from Candy, J., was upheld on a reference by Parsons, J., and has been followed in *Balvant Ramchandra* v. *Secretary of State* (2) and other cases. In our opinion these decisions lay down the law correctly. No doubt, as the learned Government Pleader suggested, if on investigation of the circumstances which would give jurisdiction, an officer decides facts in a particular manner and proceeds to deal with it further in the exercise of the powers vested in him, it may be contended that the order was not passed *ultra vires* and that the mistake as to facts of the deciding officer would not oust his jurisdiction. But where the facts are undisputed and do not give the officer jurisdiction, but he still erroneously holds that he has jurisdiction to deal with the subject-matter, his decision must be regarded as *ultra vires*.

The learned Judge in the Court below has not kept these considerations before him in dealing with the appeal. We find that the very question which would show whether the Inam Commissioner had or had not jurisdiction is raised in the first issue; and in our opinion without deciding it the question of limitation should not have been considered. We must reverse the decrees of the Courts below and remand the suits for trial on the merits. Costs to abide and will be provided for in the decree of the first Court.

Refund of stamp duty will be granted on application.

Appeal allowed; *Case remanded*.

M. C. P.

(3) 31 Ind. Cas 237; (1915) M. W. N. 915.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No 171 OF 1919.

July 18, 1919.

Present:—Mr. Justice Shadi Lal.

MAHMUD HUSSAIN AND ANOTHER—DEFENDANTS—PETITIONERS

versus

MUHAMMAD USMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 19, 21—Appeal dismissed in default—Application for review of order dismissing appeal and for re-hearing cross-objections decided ex parte, nature of—Order dismissing application, whether appealable—Revision, whether lies.

A decree for redemption of a garden having been passed against two minors, they appealed to the District Judge praying for enhancement of the amount awarded to them, while the plaintiffs preferred cross-objections contending that they were entitled to the possession of the property without any payment at all. The minors' appeal was dismissed for default and the cross-objections were accepted *ex parte*. The defendants then made two applications, one for a review of the order dismissing the appeal in default and the other for setting aside the *ex parte* order deciding the cross-objections. Both these applications having been rejected, the defendants preferred an application for revision in the High Court:

Held, (1) that neither of the orders dismissing the two applications was appealable and that the defendants were competent to make an application for revision; [p. 334, col. 1.]

(2) that inasmuch as the next friend of the minor defendants had not been served with a notice of the date fixed, the order of dismissal of appeal for default was prejudicial to the minors and could not be sustained. [p. 334, col. 2.]

BHUBAN MOHAN GUHA *v* SHEIKH BADAN.

Petition, under section 44 of Act VI of 1918, for revision of the order of the District Judge, Delhi, dated the 11th November 9.8, rejecting the application.

Lala *Moti Sagar*, R. S., for the Petitioners.

Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—On the 26th of June 1916 the Subordinate Judge of Delhi passed against two minors, Muhammad Husain and Basir Hussain, a decree for the redemption of a garden on payment of Rs. 3,796. The minors preferred an appeal to the District Judge praying for enhancement of the amount to be awarded to them, and the plaintiffs preferred cross-objections contending that they were entitled to the possession of the property without payment of any money to the defendants. On the 1st June 1918 the District Judge dismissed the minors' appeal for default of prosecution; and on the 17th September 1918 he accepted the cross-objections *ex parte*, and reduced the amount to be paid to the defendants to Rs. 84-12-0.

On the 11th October 1918 the defendants made two applications, one for a review of the order dismissing the appeal in default and the other for setting aside the *ex parte* order deciding cross-objections in their absence. Both these applications were rejected on the 11th November, and against the orders thus passed the defendants have preferred to this Court an application for revision.

Mr. Balwant Rai for the respondents raises a preliminary objection that the application for revision does not lie, because the orders complained of were appealable to this Court. This objection appears to me to be wholly untenable. As stated above, the defendants applied for a *review* of the order of dismissal for default, and I cannot treat their application as an application under Order XLI, rule 19, for the re admission of the appeal. In the same way an application for re hearing the cross-objections decided *ex parte* cannot be viewed as an application under Order XLI, rule 21, for the re-hearing of an appeal which has been heard in the absence of the respondents. I must hold that neither of the orders passed on the 11th November was appealable and that the defendants are competent to make an application for revision.

On the merits I have, after perusing the various orders passed by the District Judge prior to the 1st of June 1918, reached the conclusion that the minors' appeal should not have been dismissed for default. There can be little doubt that their next friend, who was their father, had not been served with a notice of the date fixed for the hearing of the appeal after the remand by the Chief Court, and considering that the appellants were minors, the District Judge should have appointed another person to prosecute the appeal, if he was of opinion that their father was intentionally avoiding the service of the notice. It is the duty of the Court to protect the interests of the minors, and I do not think that I can endorse the order of dismissal for default which is obviously prejudicial to the minors. I must, therefore, set it aside, and direct the District Judge to hear the appeal on the merits. It appears that one of the appellants has now become *sui juris* and can prosecute the appeal on his behalf and can also act on behalf of his minor brother.

As regards the *ex parte* hearing of the cross-objections, it is sufficient to say that the point involved in both the appeal and the cross-objections is the same, *viz.*, the amount to be paid by the mortgagors to the mortgagees. In these circumstances I consider it unnecessary to refer to the irregularity in the procedure of the lower Appellate Court to which the learned Vakil for the petitioners has invited my attention, because it is obvious that the appeal preferred by the minors cannot be adjudicated upon, as long as the decision accepting cross-objections remains undisturbed. There can be no doubt that both the appeal and the cross objections should be decided together, and I direct the District Judge accordingly. I leave the parties to bear their own costs in this Court.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1952 OF 1916.

January 7, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Newbould.

BHUBAN MOHAN GUHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SEIKHI BADAN—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 49, 85 (1), 167—Landlord and tenant—Sub-lease by raiyat, validity of—Sale for arrears of rent—Sub-tenancy, whether incumbrance—Annulment of sub-tenancy,

BHUBAN MOHAN GUHA *v.* SHEIKH BADAN.

whether necessary—Notice to quit, sub-tenant, whether entitled to.

A sub-lease granted by a *raiyat* without a registered instrument and without the consent of the landlord is void as against the landlord under section 85, clause (1), of the Bengal Tenancy Act.

The provisions of section 167 of the Bengal Tenancy Act for annulment of sub-tenancies and the provisions of section 49 of the Act, which require notice to quit to be served on the under-*raiyat*, have reference to cases where there is a subsisting tenancy, which stands good against the landlord unless it is put an end to in the manner provided in those two sections. Where the sub-lease is invalid from the beginning as against the landlord, it is not necessary for him to annul that which has never been operative against him.

Appeal against the decree of the District Judge, Faridpur, dated the 16th May 1916, reversing that of the Munsif, Bhanga, dated the 29th June 1914.

Babu *Jogesh Chandra Roy* (with him Babu *Asitaranjan Ghose*), for the Appellants.

JUDGMENT.—This appeal arises out of a suit for *khas* possession of the lands in dispute brought by the plaintiff, who purchased the lands at a sale held in execution of a decree for arrears of rent.

There was a dispute as to the nature of the interest purchased by the plaintiff, but it is found by the lower Appellate Court that the interest of the tenant which was purchased by the plaintiff was an occupancy holding and that the defendant No. 1 was an under-*raiyat* under that tenant. The Court of first instance decreed the suit. On appeal the lower Appellate Court held that the plaintiff was bound to annul the incumbrance of the defendant under section 167 of the Bengal Tenancy Act and also to serve a notice to quit under section 49 of that Act.

We are of opinion that the learned District Judge was wrong in the view he has taken in the case. Section 85, clause (1), provides that if a *raiyat* sub lets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord unless made with the landlord's consent. There was no lease in writing in the present case, and there was no consent of the landlord to the creation of a sub-lease. It was, therefore, void as against the landlord.

The provisions of section 167 of the Bengal Tenancy Act for annulment of sub-tenancies, and the provisions of section 49 of the Act which require notice to quit to be served on the under-*raiyat*, have reference to cases where there is a subsisting tenancy, which stands good against the landlord unless it is put an end to in the manner provided in these two sections. The sub-lease in the present case was invalid from the beginning as against the landlord. It was, therefore, not necessary for the landlord to annul that which had never been operative against him. This view is supported by the decisions of this Court in the cases of *Peary Mohun Mookerjee* v. *Badul Chandra Bagdi* (1) and *Gangadhar Mandal* v. *Rajendra Nath Ghosh* (2).

The learned District Judge has relied upon the cases of *Amirullah Mahomed* v. *Nazir Mahomed* (3) and *Lal Mahomed Sarkar* v. *Jagir Sheikh Mallik* (4). But in those cases the landlord acquired the interest of the occupancy *raiyat* under a conveyance. Such a voluntary alienation by the occupancy *raiyat* could not enlarge the rights of the vendee (although he might be the landlord), so as to enable him to get *khas* possession of the land without putting an end to the sub-tenancy, which his vendor would be bound to determine if there had been no conveyance. The distinction between a purchase at a sale for arrears of rent and a purchase under a conveyance is pointed out by Sir Lawrence Jenkins in the case of *Lal Mahomed Sarkar* v. *Jagir Sheikh Mallik* (4). In that case it was held that a landlord purchasing the interest of an occupancy-*raiyat* under him is not entitled to treat as a trespasser an under *raiyat* holding the land under an oral lease from the *raiyat*. The learned Chief Justice distinguished the case of *Peary Mohun Mookerjee* v. *Badul Chandra Bagdi* (1) on the ground that there the tenant's interest did not pass by the voluntary act of the tenant. The case of *Peary Mohun Mookerjee* v. *Badul Chandra Bagdi* (1) was followed by Jenkins, C. J., in *Gangadhar Mandal* v. *Rajendra Nath Ghosh* (2) cited above.

The decree of the lower Appellate Court must accordingly be set aside and that of the Munsif restored. The appellant will be entitled to his costs in this Court and the lower Appellate Court.

Appeal allowed.

(1) 28 C. 205; 5 C. W. N. 310.
(2) 19 Ind. Cas. 652; 17 C. W. N. 860.
(3) 31 C. 932.
(4) 2 Ind. Cas. 654; 13 C. W. N. 913.

JANGANTHAR SUBBIAH *v.* KAMISETTI CHINNA VENKATASUBBIAH.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1089 OF 1918.

April 30, 1919.

Present :—Mr. Justice Oldfield and Mr. Justice Bakewell.

JANGANTHAR SUBBIAH AND ANOTHER—PLAINTIFF AND HIS LEGAL REPRESENTATIVE—APPELLANTS

versus

KAMISETTI CHINNA VENKATASUBBIAH AND OTHERS—DEFENDANTS AND LEGAL REPRESENTATIVE OF DEFENDANT No. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 54—Attachment of immoveable property belonging to Hindu co-parcener—Attachment of share in each item, validity of.

An attachment of the share of an undivided Hindu co-parcener in joint family property must take the form of an attachment of his undivided share in the family property as a whole, and not of his undivided share in each item of it.

Second appeal against the decree of the District Court, Cuddapah, in Appeal Suit No. 2 of 1917, preferred against the decree of the Court of the Temporary Subordinate Judge, Cuddapah, in Original Suit No. 57 of 1916 (Original Suit No. 8 of 1914 on the file of the District Court.)

FACTS appear from the judgment.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswamy Aiyar*, for the Appellants.—The attachment was effected before the compromise decree between 1st and 2nd defendants. The attachment was of the 2nd defendant's share in the family properties. The brothers cannot get rid of the attachment by allocation of distinct items to each. Such a distribution is, under section 64, Civil Procedure Code, void as against the claim of the attaching creditor.

Messrs. *R. Srinivasa Aiyangar* and *C. V. Subramanya Aiyar*, for the Respondents.—Section 64, Civil Procedure Code, does not apply at all. The attachment itself is invalid. It is not an attachment of the 2nd defendant's undivided share in the entire family but of his share in each item of it. The judgment-debtor's share was not ascertained at the date of the attachment and it has not fallen to his share since. The right of the alienee of a particular item to sue for partition of that item has no analogy to the facts of the present case.

JUDGMENT.—When the facts are understood, this case can be decided on a very short ground.

First and second defendants are brothers. Plaintiff before judgment attached, not 2nd defendant's undivided share in the family property as a whole, but his undivided share in each item of it. A suit for partition as between 1st and 2nd defendants had been filed before this attachment and it ended before the connected Court sale in a compromise decree assigning to 2nd defendant his share of the whole property, not as half of each item of it, but by an irregular distribution of items between the two sharers. First defendant claimed so much of the attached items as fell to his share, and this suit is brought to get rid of the order allowing his claim.

The lower Courts have considered and the argument here has turned almost entirely on the application of section 64, Civil Procedure Code, to the compromise decree in which the partition suit ended. But, in fact, there is no question of the effect of section 64, because there was never a valid attachment of the suit items at all. It is the co-parcener's undivided share in the whole family property, not his share in each item comprising it, which can be attached. No doubt, if he does alienate his share in a particular item, the alienee can sue for possession of that share by partition of that item alone. But that right is based on equitable considerations arising from the co-parcener-vendor's own act, which are not in question here, when the attachment is not made on his responsibility but on that of the decree-holder alone. Shortly, the attachment, so far as its validity is disputed, was not of anything which was ascertained as the judgment-debtor's property at its date or has since been assigned to him, and on that ground the claim petition was allowed rightly. The second appeal is dismissed with costs of the 1st defendant's legal representative. No order as to 2nd defendant's costs.

Appeal dismissed.

M. C. P.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 330 OF 1913.

July 11, 1916.

Present:—Mr. Fawcett, A. J. C.

RAMCHAND GURDASMAL AND ANOTHER —PLAINTIFFS

versus

GOBINDRAM GURDASMAL AND OTHERS— DEFENDANTS.

Arbitration and award—Reference, effect of—Award, whether extinguishes original cause of action—Agreement authorising arbitrators to arrive at decision in whatever way they like, effect of—Objection to award—Burden of proof—Award not set aside - Decree on ground inconsistent with plaint, whether can be given—Award not stamped, validity of.

The fact that an award duly signed by the arbitrators is not stamped, does not affect its original validity. [p. 337, col 2.]

A valid award ordinarily operates to merge and extinguish all claims raised in the submission, and after the award has been made, the submission and the award are the only basis by which the rights of the parties are governed and constitute a bar to any action on the original cause of action. [p. 337, col. 2.]

Where a party contests the validity of an award, the onus is on him to prove that the award is bad. [p. 337, col. 2.]

An agreement to recognise any award the arbitrators might make, even though it is beyond the scope of the disputes mentioned in the reference, is binding on the parties to the reference. [p. 339, col. 1.]

The ordinary rule that, as the submission only refers to the arbitrator the question between the parties, the moment he touches the interests of a stranger his authority and his award are void, can have no application to cases of partition of joint family property. [p. 340, col. 2.]

Where the parties by their conduct and by the terms of the reference show that the arbitrators are at liberty to get information from one or all of them without there being necessarily a formal meeting with all the three parties present, it is not open to a party to object to the award that it was passed *ex parte* and without just cause. [p. 341, col 1.]

Where arbitrators are expressly authorised to proceed with or without making inquiries, and to arrive at a decision in whatever way they like, it is open to them to take into consideration a document purporting to be the draft of a Will unsigned by the testator and to regard it as a genuine and valid document. [p. 343, col. 2.]

A party who seeks to upset an award, and who fails to do so, cannot claim a decree on a ground which is quite inconsistent with his plaint. [p. 344, cols. 1 & 2.]

Mr. *Tolasing Khushalsing*, for the Plaintiffs.

Mr. *Isardas Oodharam*, for Defendants Nos. 1 and 2.

Mr. *Tahilram Maniram*, for Defendant No. 3.

JUDGMENT.—The plaintiff Ramchand Gurdasmal sues his two brothers Gobindram and Goverdhandas for partition of joint family property left by their deceased father and separate possession of a one-third share. The suit was instituted on the 2nd September 1913. The defendants plead that the suit is barred by an award, dated the 4th September 1913, which was passed by the three arbitrators to whom the parties had made a written reference, dated 24th April 1913. In paragraph 3 (*b*) of the amended plaint, plaintiff contends that this award is void or voidable on certain grounds there stated. On these pleadings the following issues have been raised ?

(1) Is the suit barred by reference or award, if any, between the parties ?

1 (*a*) Is the award void or voidable, as alleged in paragraph 3B of the plaint ?

1 (*b*) Is the suit maintainable in the present form in view of the alleged agreement set up in paragraph 3 (*b*) of the plaint ?

The award in question (Exhibit 37) has been duly proved and the defect of want of stamp is now cured. The document was signed by three arbitrators, and even if it was intended to be fair copied on to a stamped paper, it does not affect its original validity, *cf. Nagabushanam* v. *Seshachalam* (1).

Unless this award is bad for misconduct on the part of the arbitrators or other sufficient cause, it bars the suit. For as held in the case of *Khanchand* v. *Kodumal* (2), a valid award ordinarily operates to merge and extinguish all claims raised in the submission, and after the award has been made, the submission and the award are the only basis by which the rights of the parties are governed and constitute a bar to any action on the original cause of action. The onus is, therefore, on the plaintiff to show the award is bad on account of any of the objections that have been raised in paragraph 3 (*b*) of the amended plaint.

The 1st objection taken is that the award was passed more than three months after the reference was entered upon. This objection avails only if the Arbitration Act of 1899 applies. The reference was signed by the plaintiff and defendant No. 1 at Shikarpur

(1) 1 M. H. C. R. 178.
(2) 15 Ind. Cas. 819; 5 S. L. R. 240.

and by defendant No. 2 at Sukkur, at which places the arbitrators reside or work; and there is nothing to show that the parties contemplated the Act being applicable. At the same time I can see no answer to the contention that the case does fall under section 2 of the Arbitration Act, for one of the properties in suit is situated in Karachi, and a suit in regard to the subject-matter submitted to arbitration could be, and actually has been, filed at Karachi. I think, therefore, that the provisions of the Indian Arbitration Act must be held applicable to the reference in question.

But it is proved that the reference was not signed by defendant No. 2 till after April 24th. Virumal in his 1st deposition says that it was a month or two later, and in answer to interrogatory No. 2 says it was about two months after. This latter statement is confirmed by the plaintiff's letter (Exhibit 29) where plaintiff, writing on 26th July1913, says it is "from the last five weeks that you have collected signatures from Goverdhan." It seems to me, therefore, probable that defendant No. 4 did not sign this reference till some time towards the middle or end of June. There is no precise evidence as to the date when the arbitrators entered on the reference, but it would in the ordinary circumstances certainly be after defendant No. 2's signing the reference. Again the only meeting referred to in the award is one of 27th August and the correspondence, Exhibits 28, 30 and 41, points to nothing much having been done till August. Even assuming that the arbitrators entered on the reference immediately after defendant No. 2 signed, it is not proved that three months had elapsed from then to 4th September 1913. And in any case under the provisions of the Arbitration Act this Court can extend the time so as to prevent this objection being fatal, see the case of *Haridas* v. *Ootoomal* (3). If, on the other hand, the reference falls under the ordinary Common Law, then all that is required is that the award should be within a reasonable time, and this requirement was, in my opinion, satisfied in this case. I, therefore, hold that this objection has failed.

The 2nd objection is that the award was passed after the power of the arbitrators had been validly revoked. If the Arbitration Act applies to the reference, then section 5 of the Act bars this plea. Otherwise admittedly the plaintiff could not revoke the reference unless for "just cause." In this case the only cause alleged is the plaintiff's complaint of the arbitrators' delay in making an award, as appears from his letter, Exhibit 29. But there can be no doubt that there was no unreasonable delay in this particular case. As already pointed out, even the three months allowed by the Arbitration Act had not expired before the award was signed and there was certainly no such delay as would justify the revocation of the plaintiff's authorisation to the arbitrators given in the reference of 24th April 1913.

Defendants contend that in any case there was a waiver of this revocation by the plaintiff's conduct in attending the meeting of the arbitrators on the 27th August. According to all the three arbitrators, he attended the meeting, answered questions put to him, and showed no unwillingness for the arbitration to proceed. The plaintiff in his evidence, on the other hand, first of all said that he only went to Shikarpur on the 27th August in order personally to tell the arbitrators that they could not act, in addition to his having informed them of his revocation by notice. In his examination a week or so later he makes a material change and says that the reason he went was to ask the arbitrators Shivaldas and Dwarkadas to show him the document which is referred to in these proceedings as the 'Will'. Now in his previous cross-examination he had said that he did not then know of the existence of this Will and his explanation of this glaring discrepancy is, I think, a lame one. Plaintiff further admits that he went to Shikarpur on the 27th August in response to a telegram sent by the arbitrators asking him to attend on that date. He also admits that on the 27th August he went with the arbitrator Virumal to the Pleader Mr. Sakhawatrai, as stated in Virumal's deposition. In these circumstances, I think, there can be no reasonable doubt that he went to Shikarpur not with any such particular purpose as he alleges, but in response to the telegram already mentioned in order to attend the meeting of the arbitrators. The plaintiff's deposition and his demeanour in

(3) 16 Ind. Cas. 861; 6 S. L. R. 89.

Court convince me that he does not hesitate to lie when he thinks it suits his purpose, and that his testimony cannot be relied on. I have no hesitation in preferring the evidence of the arbitrators as to his actually attending such a meeting, though there are no doubt some discrepancies in their evidence as to the duration and time of that meeting, and the arbitrator Virumal probably exaggerates the time it lasted. The evidence of the arbitrators that enquiries were made of the plaintiff at this meeting is corroborated by various recitals in the award as to the admission by the plaintiff regarding various amounts, etc. I hold, therefore, that the plaintiff did attend such a meeting and (if it were necessary) I think the defendants could rely on his conduct in doing so as amounting to waiver of his revocation of the authority given by him to the arbitrators in the reference. This objection, therefore, in my opinion also fails.

I now come to the 3rd objection, namely, that the award is in excess of the reference. On this point defendants rely on the conditions in the reference that "whatever decisions regarding the above mentioned contentions or the disputes raised personally by the parties the arbitrators arrive at with or without taking any evidence shall be binding upon us. We will not raise obstacles of any kind, whether written or verbal, in the way of decision by the arbitrators. But any obstacle thus raised by any party concerned should be considered as null and void."

This is no doubt an agreement to recognise any award the arbitrators might make, even though it might be beyond the scope of the disputes mentioned in the reference, and there is authority for holding that such an agreement is binding on the parties to a reference. Thus according to English Law, as summarized in Halsbury's Laws of England, Volume 1, Article 996, "it would seem that parties may by their submission agree that neither of them will set aside the award on grounds of misconduct by the arbitrators," and in the case of *Oursetji* v. *Crowder* (4) Farran, J., recognised that the parties might agree that a reference may be conducted in any particular way, and to waive their objection to an irregular course of conduct on the part of the arbitrator. On the other hand in the case of *Hurdwary Mull* v. *Ahmed Musaji* (5) Fletcher, J., held that it was not competent for the parties by an agreement to oust the jurisdiction of the Court, vested in it by section 14 of the Indian Arbitration Act of 1899, to set aside an award, if misconduct on the part of the abitrators were shown or if it were shown that the award was improperly procured, when the parties desire that the award should be enforced under the provisions of the Act. No full grounds are given for this decision, and it could not of course apply in cases where the agreement not to dispute an award operates as an estoppel. This case is also distinguishable, because here it is not a question of any of the parties desiring to enforce the award under the provisions of the Arbitration Act and the Court is not considering the award under the special provisions of section 14 of the Act. In *Basrio Faddoo* v. *Mahomed Ladha* (6), which was a case under the Arbitration Act, an agreement that the arbitrators might decide the disputes without hearing the parties or their witnesses, was held to be valid. I think, therefore, that the defendants are entitled to rely on this agreement as barring this objection. But as this view may be not taken in appeal, I think it best to consider the objections raised under this particular head on their merits.

The 1st contention is that the arbitrators had no jurisdiction to award the plaintiff $\frac{1}{4}$th share in certain joint family properties instead of $\frac{1}{3}$rd share. This assumes that in the reference the defendants admitted plaintiff's right to $\frac{1}{3}$rd in all the joint property. But, in my opinion, this is a presumption that is not justifiable. Defendant No. 1 merely denies that plaintiff is entitled to $\frac{1}{4}$th share without saying how exactly the property should be divided between the parties. Defendant No. 2 no doubt says that after getting an allowance for certain things the remaining property should be divided in three equal shares. But this does not, in my opinion, tie the arbitrators down to give the plaintiff at least $\frac{1}{3}$rd. Both the defendants refer to further rights which were to be explained personally to the arbitrators, and by the terms of the reference the latter are appoint-

(4) 18 B. 299 at p. 312; 9 Ind. Dec. (N. S.) 707.

(5) 1 Ind. Cas. 371; 13 C. W. N. 63.

(6) 24 Ind. Cas. 264; 7 S. L. R. 113.

ed "for the final settlement of the disputes existing between (the parties)." The plaintiff himself claimed more than $\frac{1}{3}$rd share and this claim was disputed by the defendants. The amount of his share was, therefore, referred to arbitrators without any limitation as to the amount of his minimum share. In support of this construction, reference may be made to the plaintiff's own letter, Exhibit 41, in which he says "I have all the time left the matter entirely in the hands of arbitrators at their discretion whether to allow me an inch or no from the property." In his deposition he attempts to explain this way by saying this was ironical. It is no doubt very likely that the passage preceding this particular sentence, in which he says "he was very pleased to see the arbitrators acting to the satisfaction of his brothers," was meant to be ironical ; but this particular sentence is a separate one put by plaintiff under a separate heading marked III, and to my mind it does not read as if it was intended to be otherwise than a serious statement. The reference also gives authority to the arbitrators to decide not only about the contentions expressly stated therein, but also the disputes that might be placed before them by the parties orally. Such disputes would undoubtedly cover for instance defendants' contention in paragraph 4 of their written statement that "plaintiff is in possession of a hardware shop and cash to the extent of Rs. 30,000, which is a part of the property liable to be partitioned and which should be brought into hotchpot." This contention would appear also to have been raised before the arbitrators, for Virumul in his evidence mentions that he tried to persuade the plaintiff to give an account of his earnings but the plaintiff refused. And this also is stated in the arbitrators' award. The award shows that it was largely in consequence of this refusal of plaintiff that his share has been reduced, and, I think, the defendant No. 2's admission that the plaintiff was entitled to $\frac{1}{3}$rd share was clearly based on the understanding that all the joint property should be brought into hotchpot, and that any other construction of it would be unreasonable. If it was intended by the parties that this question of the plaintiff's separate earnings was to be excluded from the scope of the reference, it should have been clearly expressed in it. As it is, I hold that the arbitrators had authority to decide, as they did, that plaintiff's separate earnings constituted joint property as they might be under Hindu Law, if they were obtained with the aid of the joint family property ; and even if the arbitrators erred in this finding, it does not vitiate their award. This disposes of the objection that the arbitrators were not justified in awarding plaintiff less than a $\frac{1}{3}$rd share and the further objection that they went beyond the scope of the reference in treating plaintiff's separate earnings as joint family property.

Under this head it is also urged that the arbitrators had no jurisdiction to hold that the Karachi immoveable property was not joint family property and that the plaintiff was not entitled to a share in it. But the arbitrators in their award did not say that it was not joint family property, but that it was acquired by Gurbomal from his self-acquired earnings and exclusively belonged to him. In the hands of the sons it might (in the absence of a devise of the property by Will, as to which see *Jugmohandas* v. *Mangaldas* (7) and *Parsotam Rao* v. *Janki Bai* (8)] constitute joint family property though not ancestral. See Mulla's Hindu Law, 2nd Edition, pages 176 and 177. In any case there is nothing in the reference which barred them in holding that it was not joint family property. And Mr. Isardas in this connection points out that even in the plaintiff's contentions as set forth in the reference the word "ancestral" is qualified by "etc." This objection, in my opinion, therefore, also fails.

The last contention under this heading is that the arbitrators went beyond their jurisdiction by deciding points relating to strangers to the reference. No doubt the ordinary rule is that, as the submission only refers to the arbitrator the question between the parties, the moment he touches the interests of strangers, he exceeds his authority and his award is void. But this strict rule of English Law obviously cannot be applied in partition cases like this, and the reference clearly referred the question of maintenance allowances and of marriage and *shradh* ceremony expenses to the arbitrators. The plaintiff himself in his conten-

(7) 10 B. 528; 5 Ind. Dec. (N. S.) 742.
(8) 29 A. 354; 4 A. L. J. 257; A. W. N. (1907) 77.

tions refers to the question of presents given to sisters, etc., and marriage and *shradh* expenses as among those to be settled, and he is almost necessarily estopped from raising the plea like the present one. Unless such questions were settled, there would be no final settlement of the disputes and the defendants presumably would not have agreed to the arbitration. I hold, therefore, that the objection that the award is bad for exceeding the scope of the reference is not substantiated.

The next objection raised is that the award has been passed after the institution of the suit. On this point it is sufficient to refer to the case of *Sawyer* v. *Louis Dreyfus & Co.* (9), where it was held that section 14 of the Arbitration Act does not apply to a case like the present.

Then it is said that the award has been passed *ex parte* without "just cause." As already remarked, the reference is very wide and it includes terms approving the decision of the arbitrators even if it be made without enquiries and in any way they liked. This is very natural as the arbitrators were old friends of the family of 20 or 30 years standing, as plaintiff himself admits in his letter, Exhibit 41. They already knew the main facts giving rise to the controversy, and I think it is quite clear that the parties never intended them to act with the formality and strictness applicable in cases where the arbitrator is a stranger who knows nothing about the dispute. Plaintiff himself privately corresponded with the arbitrators regarding the dispute, and the parties by their conduct and by the terms of the reference show that the arbitrators were at liberty to get information from one or all of them without there being necessarily a formal meeting with all the three parties present. This is confirmed by Exhibits 28 and 41. In Exhibit 28 Virumal mentions that "it was only the other day that Goverdhan's representatives came to tell us all about Goverdhan's claim". In his reply in Exhibit 41 plaintiff writes, "for my part everybody has clear monopoly to act *ex parte*." In his deposition plaintiff admits that this paragraph 11 in Exhibit 41 does express his view of the matter, at any rate, prior to his revocation of the reference. In this case the only formal meeting appears to have been that of the 27th August, when the plaintiff, as I have already held, was present, and in my opinion the plea that the arbitrators improperly acted *ex parte* is not established.

I now take up the objection that the award has been based on the alleged Will of Gurdasmal which was neither produced nor proved before the arbitrators, and when the parties had agreed to divide the property *dehors* the said alleged Will. This seems to me to be the plaintiff's main grievance and is a more substantial objection than the others. The document referred to is a draft Will, which the deceased father of the plaintiff got drawn up for him about a year before his death, but which he never signed. It was found after his death, in a box containing this and other documents which the deceased used to keep at the *otak* of the arbitrator Seth Shivaldas. The latter, in explanation of the document not being signed, says that the deceased told him that he intended to consult a Pleader by name Shivaldas and one or two other friends about it, and the arbitrator Dwarkadas confirms this statement. Shivaldas' evidence regarding this Will is corroborated by his letter, Exhibit 39, and is, in my opinion, reliable. The plaintiff's Pleader admits for the purpose of arguments that, as the case stands, the document should be held to be a genuine draft Will prepared by the deceased in the manner stated by Shivaldas. And even if any dispute can be raised regarding the genuineness of the document in question, it is clear that the surrounding circumstances at any rate justify the arbitrators in treating it as a genuine document, and that they had substantial grounds for believing what Shivaldas has stated in the matter. The objection urges that this Will was neither produced nor proved before the arbitrators. It was, however, certainly produced before them. Virumal says that it was shown to him at Seth Shivaldas' *otak* and he is corroborated in this by his letter, Exhibit 28, in which he mentions having read the document in question. Shivaldas, as already mentioned, knew of its existence before. The 3rd arbitrator Dwarkadas

(9) 20 Ind. Cas. 504; 7 S. L. R. 1.

no doubt says that he saw it for the first time when the award was written. But at the same time he says that he knew of its existence and that Shivaldas might have told him its contents before that. Its existence is also proved to have been known to the parties to the reference. Plaintiff at first denied having had any knowledge of it, but when his attention was drawn to Exhibits 38—40, he had to admit that he had heard about it. As regards the question of its being placed before the arbitrators, it is to be noted that section 6 of the Evidence Act does not apply to the case, for under section 1 of the Evidence Act the provisions of that Act do not apply to proceedings before an arbitrator, in this respect differing from the English Law which holds that arbitrators are bound by the same rules of evidence as Courts of Law, see *Enoch & Zaretzky, In re* (10). The arbitrators were, therefore, clearly justified in treating the Will as a genuine document. The objection further says that the parties had agreed to divide the property *dehors* the said alleged Will, but no evidence has been adduced as to any such agreement, nor has it been relied on in argument. All that was contended was that the Will was not mentioned in the reference and, therefore, it must be deemed to be excluded. As to this it is sufficient to say that no particular documents nor any restrictions in the matter of evidence are mentioned in the reference. On the contrary the reference contains an expressed authorization to the arbitrators to proceed with or without making enquiries and to arrive at a decision in whatever way they liked; and in view of this, this contention clearly fails. It is not a case where there was any clear necessity to refer to the Will at all, and the omission to do so does not, in my opinion, justify the inference that the parties intended it to be excluded from consideration.

The objection is, therefore, reduced to the question whether the arbitrators were justified in taking this document in consideration. Now no doubt it is the law that, though the Evidence Act does not apply to proceedings before an arbitrator, yet the latter must not receive and act upon evidence or decide upon grounds which would render his award utterly unfair or worthless. Also as stated in the case of *Cursetji v. Crowder* (4) it is a well-established principle of law that an arbitrator ought not to hear or receive evidence from one side in the absence of the other side, without, if he does, giving the side affected by such evidence the opportunity of meeting and answering it. A good illustration of this is contained in that case. There the arbitrator had received certain papers and documents from the defendants in a suit referred to his arbitration, together with a letter from the defendants containing some comments on the documents sent to him, and made his award without giving the plaintiffs any opportunity of seeing the said papers and documents and of meeting the inferences deducible from them. The papers in question were documents which referred to particulars of ruling rates of coal (page 312*) that were in dispute and affected the arbitrator's decision. It was consequently held that there was such a breach of duty on the part of the arbitrator as entitled the plaintiffs to have the award set aside. A recent instance of another kind is contained in the case of *Walford Baker & Co. v. Macfie* (11). In that case a contract for the sale of sugar contained no provision for the suspension of deliveries, "if the production by the sellers was prevented or lessened by causes beyond their control", nor any similiar clause. Owing to a cause beyond their control, the production by the sellers was "prevented or lessened," and they suspended delivery. Dispute having arisen, recourse was had to arbitration. A former contract between the parties containing such a suspension clause as the above was produced to the arbitrator by the sellers. The arbitrator made an award simply that "the sellers are entitled to suspend delivery under this contract." The Court was satisfied that, in making this award, the arbitrator was influenced by the terms of the earlier contract. On this it was held that the award must be set aside, the arbitrator

(10) (1910) 1 K. B. 327; 79 L. J. K. B. 363; 101 L. T. 801.

(11) (1915) 84 L. J. K. B. 2221; 113 L. T. 180.

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having been guilty of legal misconduct, inasmuch as he had, in making the award, looked to a document other than the contract, which was the only matter before him, or, in other words, had allowed to be given, and had acted upon, evidence which was wholly inadmissible, and which went to the root of the question submitted to him for decision. But the present case is quite a different one. Even if plaintiff did not know the arbitrators contemplated taking this Will into consideration and was given no opportunity of being heard against it, this would not necessarily prejudice him. The document was not one which he could seriously contest, in the sense of showing it was not genuine or its contests untrue. All that he could urge would be that it was unjust or had no legal validity. But he clearly had an opportunity to raise these pleas, and in fact appears to have done so. Even before the reference he was in communication with Shivaldas as to the document prejudicing, or (as he puts it) "deviating" his rights (Exhibit 38); and in his final story of what happened on the 27th he says the arbitrators themselves told him that there was no Will, but only a rough unsigned document which was not genuine and that could not be relied on. This of course is an obvious lie, but it corroborates the evidence of Shivaldas that the Will was referred to at the meeting of 27th August, though he is not supported by the other arbitrators in his statement, that it was actually produced and inspected during that meeting. It was not necessary to produce it as the general tenor of its contents was, I think, undoubtedly known to the arbitrators and parties. In his letter, Exhibit 39, Shivaldas offered to show the document to the plaintiff, and it is very unlikely that the plaintiff did not go and see it when he was at Shikarpur later on during that month about the time he signed the reference. Shivaldas no doubt in his evidence says that he cannot say whether the plaintiff knew of this Will before the 27th August, but his memory is obviously faulty as shown by Exhibits 38–40. I hold on the evidence that the plaintiff knew of the Will and its contents, and had had an adequate opportunity of meeting and answering it, and in my opinion there was nothing improper in the arbitrators taking it into consideration. It was a document which was clearly reliable as evidencing what the deceased father, at any rate shortly before his death, thought should be arranged about the division of the family property between his sons, and presumably he would be in the best position to judge fairly in the matter.

According to Hindu Law, in cases like this not governed by the Hindu Wills Act or Succession Act, it is not necessary that a written Will should be signed or attested, and *prima facie* it had, therefore, greater validly than a similar document would in English Law. At the same time I do not mean by this to prejudice the decision of the 7th issue, for as stated in the case of *Vinayak* v. *Govindrav* (12), in order to make it a valid Will it is necessary to be shown that the document is a complete instrument and expressed the deliberate intention of the testator. All I decide at present is that the arbitrators could take it into consideration and they did not act improperly or unjustly in doing so. I hold, therefore, that this objection is also invalid.

The further objections taken in paragraph 3 (*b*) of the amended plaint that the award is written on an unstamped paper, and that the award was not made on the date on which it is alleged to have been made, are not now pressed.

The only other objection taken in the arguments is that the award is invalid as being incomplete, in that it does not make any actual partition between the parties. This objection is not included amongst those mentioned in paragraph 3 (*b*) of the plaint, but it can be taken as covered by the words "*inter alia*" in that paragraph. As ruled by the Privy Council in the case of *Makund Ram Sukul* v. *Saliq Ram* (13), the ground for holding an award to be invalid on account of its not disposing of all the matters referred appears to be that there is an implied condition in the submission of the parties to the arbitration that the award shall

(12) 6 B. H. C. R. 224 at p. 228.

(13) 21 C. 590; 21 I. A. 47; 6 Sar. P. C. J. 423; 10 Ind. Dec. (N. S.) 1023.

dispose of them all But here there is no such condition implied or expressed in the reference, for as there stated, the main object of the reference was to finally settle the disputes between the parties. No doubt it is the case that the plaintiff asks that he should get his share separately, but there is no express or implied indication that the arbitrators were expected actually to partition the whole property by metes and bounds. This would in fact appear impossible for them to have done in the case of the immoveable property at Shikarpur, in which the parties' cousins had shares, so the presumption is against any such intention. The case is also quite different from that of *Ghulam Hussein* v. *Sakinabai* (14), where the subject-matter referred was a suit that had been filed for partition and possession. In that case it was of course a necessary consequence that there should be an actual partition by metes and bounds. But here a division by a declaration of shares was quite sufficient for a settlement of the disputes between the parties, and no actual division by metes and bounds was necessary. As ruled in the case of *Bhaurao* v. *Radhabai* (15), in cases where an award directs partition to be effected, it dissolves the joint family and from the moment of its date it severs their interests.

This completes the consideration of the objections raised to the award, and for the reasons given above I answer issue 1A in the negative. It follows that under issue 1 the suit must be held barred by the award. It is not necessary to decide issue 1B.

After the above judgment had been delivered, Mr. Rupchand for the plaintiff claimed that the suit should not be dismissed, but that the plaintiff was entitled to a preliminary decree for partition, on the basis of the award. He argues that as the suit was filed before the award was made, the case should be treated as if the suit had been compromised, where a decree issues in terms of the compromise.

The matter must, however, be considered with reference to the amended plaint, which affords the only basis on which plaintiff's suit was allowed to proceed. In this amended plaint, he seeks to upset the award, and now that he has failed in that he cannot claim a decree on a ground which is quite inconsistent with his plaint, in which he contends the award is invalid *cf. Vinayak* v. *Govindrav* (12).

This view has the authority of the Privy Council to support it. The case of *Kshenchunder Singh* v. *Shamachurn Bhutto* (16) decides that "the determinations in a cause should be founded upon a case either to be found in the pleadings, or involved in, or consistent with, the case thereby made," and that "the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, are not to be departed from."

In accordance with this principle, there are numerous rulings to the effect that a plaintiff cannot be allowed to abandon his own case, adopt that of the defendant, and claim relief on that footing, *cf. Shibkrishk Sircar* v. *Abdool Hakeem* (17), *Mylapore Iyasawmy* v. *Yeo Kay* (18), *Balmukund Kesurdas* v. *Bhagwandas Kesurdas* (19) and *Nogendra Mohan Ray* v. *Pyari Mohan Saha* (20). No doubt it can be said that the original plaint contains nothing inconsistent with the relief now claimed, but as already remarked, it is the amended plaint which the Court has now to consider; and in any case the original plaint was clearly an attack on the arbitration proceedings, which included the award as its natural *sequæla*.

I, therefore, refuse this request, and hold that plaintiff's suit must be dismissed. If the award is not acted on by defendants, he has his remedy. I can hardly conceive that the present suit would bar a separate suit on plaintiff's title under the award, since defendants themselves admit plaintiff's title thereunder, and this title surely cannot, therefore, be held to be a "matter which might and ought to have been made a ground for defence or attack" in this suit within the meaning of Explanation IV to

(14) 19 Ind. Cas. 374; 6 S. L. R. 146.
(15) 2 Ind. Cas. 431; 33 B. 401; 11 Bom. L. R. 406.
(16) 11 M. I. A. 7; 6 W. R. 57 (P. C.); 2 Ind. Jur. (N. S.) 87; 2 Sar. P. C. J. 209; 1 Suth. P. C. J. 649; 20 E. R. 3.
(17) 5 C. 602; 5 C. L. R. 455; 2 Ind. Dec. (N. S.) 991.
(18) 14 C. 801; 14 I. A. 168; 11 Ind. Jur. 397; 5 Sar. P. C. J. 50; 7 Ind. Dec. (N. S.) 531.
(19) 9 Ind. Cas. 401; 15 Bom. L. R. 209.
(20) 30 Ind. Cas. 420; 21 C. L. J. 625; 20 C. W. N. 319; 43 C. 103.

section 11 of the Civil Procedure Code. But Mr. Rupchand's application will in any case suffice to dispose of any such bar.

As to costs, I see no sufficient reason for departing from the ordinary rule that these should follow the event, and plaintiff must bear defendants' costs including those of defendant No. 3, for whom a separate Pleader's fee is allowed. But in drawing up the bill of costs, allowance should be made for those already paid by plaintiff under this Court's order of 27th September 1915, and defendants are not entitled to include in their costs the amount of stamp and penalty paid by them in respect of the award. As the award was mainly in their favour there is no reason why they should not have arranged for the stamp at or about the time it was drawn, especially in view of the plaintiff's suit against them. If they had done so, they would have been entitled to recover the proportionate share of the stamp payable by the plaintiff under section 29 (*g*) of the Indian Stamp Act 1899.

Suit dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1954 OF 1918.

July 22, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

HALLINGAL MOOSA KUTTI—DEFENDANT No. 1—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 90, sub-s. 1 (d)—Lease by Government—Grants or assignments of interest, whether include lease by Government—Stipulation against erection of buildings on land demised in Malabar, legality of—Malabar Compensation for Tenants' Improvements Act (I Mad of 1900, s. 19—Crown Grants Act (XV of 1895), ss. 2, 3—"Grant", meaning of—Interpretation of Statutes—Ejusdem generis, *rule of, applicability of.*

The words "grants or assignments of interest" in section 90 (1) (*d* of the Registration Act are comprehensive enough to include a lease by Government. [p. 347, col. 1.]

Munshi Lal v. *Gopi Ballabh*, 22 Ind. Cas. 933; 12 A. L. J. 219; 36 A. 176, dissented from.

A stipulation, in a lease granted by Government of land situate in Malabar, that the lessee should not erect buildings thereon does not fall within the mischief of section 19 of the Malabar Compensation for Tenants' Improvements Act and is saved by section 3 of the Crown Grants Act. [p. 346, col. 2.]

The expression "grant" in section 2 of the Crown Grants Act is not restricted to the transfer of prerogative rights possessed by the Crown but denotes transfers of land of every description. [p. 346, col. 1.]

Dost Muhammad Khan v. *Bank of Upper India*, 3 A. L. J. 628; A. W. N. (1906), 255, considered.

In construing expressions used in a section of a Statute, it must first be ascertained from the language of the section the class of cases which were intended to be affected. If the intention is clear, the occasion for the introduction of the *ejusdem generis* rule of interpretation would not arise. [p. 346, col. 2.]

Second appeal against the decree of the District Court, South Malabar, in Appeal Suit No. 324 of 1918, preferred against the decree of the Court of the Principal District Munsif, Calicut, in original Suit No. 118 of 1916.

FACTS.—Certain land containing cocoanut trees was relinquished by the S. I. Railway Company, and taken possession of by the 1st defendant. The Government thereupon granted the land to the 1st defendant on lease for 3 years at a rent of Rs. 150 per year. The defendant contracted not to erect or alter buildings, not to cut trees, etc. He, however, erected buildings. In a suit in ejectment by the Government the defendant contended: (1) the lease was inadmissible in evidence, as it was not registered, (2) the contract not to erect, etc., was bad as penal and obnoxious to section 19 of Madras Act I of 1900, and the defendant claimed the value of a building he had erected. The lower Courts decreed the suit and ordered the defendant to remove fixtures.

Mr. *K. P. M. Menon*, for the Defendant-Appellant.—The lower Court is wrong in holding that section 90, clause (*d*), of the Registration Act applies. It applies only to grants of sovereign rights such as rights to minerals, etc.

Section 90, clause (*d*), refers only to *sanads* and *inam* title-deeds "and other documents" obviously *ejusdem generis* with "*sanads*" which convey the sovereign right of the Government only. See *Munshi Lal* v. *Gopi Ballabh* (1), following *Dost Mohammad Khan* v. *Bank of Upper India* (2) and *Dost Mohammad Khan* v. *Bank of Upper India* (3).

(1) 22 Ind. Cas. 933; 36 A. 176; 12 A. L. J. 219.
(2) 3 A. L. J. 129; A. W. N. (1906) 44.
(3) 3 A. L. J. 628; A. W. N. (1906) 255.

Government has no sovereign rights in Malabar. So any lease of land by Government cannot stand on a better footing than one by a private party.

Taking it that section 90 cannot apply, either section 17 of the Registration Act or section 107 of the Transfer of Property Act must apply. In either case the document is not admissible without registration.

Secondly, I must get the value of the *chamagams* made by me.

The contract not to erect buildings, etc., upon the lands is obnoxious to section 19 of the Malabar Compensation for Tenant's Improvments Act (Madras Act I of 1900). It is void. This law is not affected by the Crown Grants Act (XV of 1895), which was passed to affect the Transfer of Property Act alone. The Malabar Act is subsequent and it can hardly be said that a prior general Act will override the provisions of a subsequent special Act.

The Government Pleader (Mr. *Ramesam*), for the Respondent: – Section 90, clause (*d*), applies. If it can apply to a case of a gift or grant of full proprietary rights, it applies nonetheless to a grant of a limited leasehold interest. The words in the clause end with "any interest in land" including limited interests like the present.

Section 90 is inoperative in excluding the application of the Act to grants by Government. It was never in the contemplation of the Legislature that there should be a distinction between grants of full interests and grants of limited interests. See also sections 17, 48, and 49.

The Crown Grants Act is the sole authority in cases of grants by the Crown of whatsoever nature. See the word "transfer" in the preamble. So Madras Act I of 1900 cannot apply.

There is no difference in the operation of section 17 of the Registration Act and section 107 of the Transfer of Property Act. For the sections of the latter Act referring to registration are to be regarded as part of the Registration Act (section 4, Transfer of Property Act).

JUDGMENT.--Two questions of some importance have been argued before us in this case. By Exhibit A the 1st defendant took a lease of certain lands near a Railway station from the Government. The lease was for three years and provided for a rent of Rs. 150 per annum. It contained a clause that the defendant should not erect buildings on the land. Notwithstanding this undertaking he put up buildings on it. The suit is by the Secretary of State for ejectment. The defendant pleaded that as Exhibit A was not registered it was not admissible in evidence; and secondly, that the provision restraining the defendant from erecting buildings is obnoxious to section 19 of Act I of 1900, of the Malabar Compensation for Tenants' Improvements Act. Both these contentions were overruled by the Courts below. We think they are right.

It was argued for the appellant that the first question relating to registration is covered by *Munshi Lal* v. *Gopi Ballabh* (1). With all respect to the learned Judges we are unable to follow it. The learned Judges say that the words "other documents purporting to be or to evidence grants or assignments by Government of land or of any interest in land" in section 90, clause (1) (*d*), of the Indian Registration Act should be read *ejusdem generis* with the preceding words "*sanads* and *inam* title-deeds." We see no ground for applying this principle of construction to the section. As was pointed in *Angus* v. *Dalton* (4), we have first to ascertain from the language of the section the class of cases which were intended to be affected. If the intention is clear, the occasion for the introduction of the *ejusdem generis* rule of interpretation would not arise. (See also the other cases collected at page 546 of Maxwell on the Interpretation of Statutes.) In the present case the object of the Legislature in enacting section 90 of the Registration Act seems to be to enumerate the class of documents executed by or on behalf of the Government which should not be affected by the previous sections relating to registration. In this view there is no ground for imputing to the Legislature a restrictive scope of the operation of clause (1) (*d*) of section 90. Further even applying the principle we are not satisfied that a lease of land is not of the same character as a *sanad*. As the learned Government Pleader pointed out, there are *sanads* by Government and *zemindars* which grant property on favourable terms. Therefore, the idea implied in a *sanad* is not that of a

(4) (1878) 4 Q. B. 162 at p. 166.

gift without reservation. For these reasons we are unable to agree with the Allahabad High Court that a lease is not within the sub clause. A further argument of the learned Counsel for the appellant requires a little more consideration. He contended, and in this also he is supported by *Munshi Lal* v. *Gopi Ballabh* (1), that the words "grants or assignments by Government of lands or of any interest in land" would exclude a lease. We are unable to accept this contention either. Turning to section 17 of the Registration Act we find in sub-clause 2 (*vii*) the use of the word grant, and that word is used with reference to transfers and receipts enumerated in clause 1 (*b*) and 1 (*c*) of section 17. In that connection the word has the meaning of transfer and does not denote a gift. We are, therefore, of opinion that the words "grants or assignments of interest" in section 90 (1) (*d*) are comprehensive enough to include a lease. The document, therefore, is admissible in evidence.

The learned Judges of the Allahabad High Court got over the difficulty connected with the Crown Grants Act (XV of 1895) in a manner which we are unable to accept as sound. Section 2 of the Act refers to "grant or other transfer of land or of any interest therein." This language shows that the word "grant" can be employed to denote a transfer of land. In the second place, it is clear that all transfers of land of every description are within the operation of the section. Mr. Menon's suggestion, that the Act is confined to the transfer of prerogative rights possessed by the Crown and not to ordinary incidents of a mercantile transaction in which the Crown may be engaged is opposed to the plain language of the Statute. We find nothing in *Dost Muhammad Khan* v. *Bank of Upper India* (2) and *Dost Muhammad Khan* v. *Bank of India* (3) to support this view.

On the second point, we feel no doubt that the wide language of section 3 of the Crown Grants Act is conclusive. The Government have specially armed themselves with powers which they have withheld from private parties presumably on the ground that they are not likely to misuse them. It is clear to us that these contracts are not within the mischief of section 19 of the Malabar Compensation for Tenants' Improvements Act.

We must, for the above reasons, confirm the decrees of the Courts below and dismiss the second appeal with costs. The appellant will have two months to remove the buildings erected by him.

Appeal dismissed.

M. C. P.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 30, 1919.

Present:—Viscount Cave, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

Musammat BHAGWAT KOER AND OTHERS—APPELLANTS

versus

DHANUKDARI PRASHAD SINGH AND ANOTHER—RESPONDENTS.

Hindu Law—Widow, estate of—Renunciation by widow, how effected—Surrender, validity of.

A Hindu widow can renounce her estate in favour of the nearest reversioner of her husband, and can by a voluntary act efface herself from the succession as effectively as if she had then died. [p. 353, col. 2.]

Such voluntary self-effacement can be effected by any process whereby there is a *bona fide* and total renunciation of the widow's right to hold the property. [p. 353, col. 2.]

Where, therefore, a widow compromised with the reversioner her claims to her husband's estate, and the documents of compromise were drawn up on the footing, not that the widow surrendered her right, but that she admitted that it did not exist:

Held, that the widow was precluded from asserting any further claim against the estate, and that such estate vested absolutely in the reversioner. [p. 353, col. 2.]

This case (Privy Council Appeal No. 117 of 1917) was one of three consolidated appeals from the Calcutta High Court, which in this case affirmed a decree of the Subordinate Judge, Saran.

FACTS leading up to the litigation are set out in their Lordships' judgment. The two connected appeals involve only questions of fact and the application of well-known principles. The present suit referred to the estate of Jugal Kishore Singh, and the question arose in it as to the effect of a compromise made in 1874 between Anandi Koer, his widow, and Mahabir, the son of his surviving brother, Bachhu Singh.

After Jugal Kishore's death in 1872 Bachhu applied for a certificate to collect debt due to the estate, alleging that he was joint with Jugal Kishore. Anandi Koer opposed, alleging that they were separate and that she was entitled to succeed for a widow's estate. The District Judge decided against her, and gave the certificate to Bacchu's son Mahabir, Bacchu himself having died *pendente lite*. Anandi Koer could have contested this decision in a regular suit, but acting through her brother and attorney Dukharan she accepted it, and in consideration of certain property being given her for life for her maintenance, agreed not further to contest the matter. The agreement was duly carried out.

In 1894 Mahabir died, leaving a widow *Musammat* Bhagwat Koer (the first defendant-appellant). Anandi Koer died in 1904. In 1906 *Musammat* Bhagwat Koer adopted Ragheshvar Indar Sahi (the second defendant appellant) as son to Mahabir.

The respondent Dhanukhdhari Singh in this suit claimed Jugal Kishore's estate from Bhagwat Koer and her adopted son. He alleged that Jugal Kishore separated from his brothers in 1864 and that the title to his estate, after Anandi Koer's death in 1904, vested in himself as reversioner. It was admitted that he was reversioner both to Jugal Kishore and to Mahabir. The defendants contested his suit on the plea, *inter alia*, that Anandi had completely surrendered her estate in 1874 to Mahabir, and that the latter thereupon became absolute owner.

The Subordinate Judge found that Jugal Kishore was separate at his death: and that the compromise of 1874 was brought about by corruption and was not binding on Anandi.

He decreed the suit, and an appeal to the Calcutta High Court (Chitty and Teunon, JJ.) was dismissed. With reference to defendants' contention that Anandi Koer had surrendered her estate to Mahabir, the learned Judges observed as follows:

"There is no proof on the record that Anandi Koer was ever a party to the document which was executed in her name by Dukharan. Apart from that, the document in itself does not, in our opinion, amount to such a surrender or relinquishment as the defendants contend. It amounts simply to an admission that the three brothers were joint, an admission which clearly would not, in any way, bind the plaintiff even if it had been made. No doubt, Anandi Koer, who lived for some thirty years after these events, was content to receive the maintenance which was accorded to her by Mahabir Prashad, but there is nothing to show that she ever had any independent advice or was ever really informed of her true rights in the matter. This circumstance, therefore, is not of very much importance. We agree, therefore, with the Subordinate Judge that there was no surrender or relinquishment on the part of Anandi Koer, which would have the effect of accelerating the inheritance and of completing the title of Mahabir to the whole estate. Nor, for the reasons above stated, can it be regarded as a family arrangement which would have had the same effect."

On the present appeal,

Messrs. *De Gruyther*, *K. C.*, and *Dube*, for the Appellants, submitted that the Courts below had concurrently found that Jugal Kishore Singh separated from his brothers about 1864, and died separate. That being so, Anandi Koer succeeded him for her life. Mahabir Singh was the next reversioner. Anandi Koer surrendered the whole of her estate to Mahabir, and thereby accelerated the reversion and made him absolute owner. She and the nearest reversioner together represented the whole interest in the estate. A Hindu widow can surrender her whole interest to the nearest reversioner: *Rangasami Gounden* v. *Nachiappa Gounden* (1).

In this case Anandi Koer did so surrender her whole interest. This clearly appears from the terms of the document executed on

(1) 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105 (P. C.).

her behalf: there was no reservation of any kind.

A surrender by a Hindu widow is effective, although she is granted maintenance out of the estate: *Noferdoss Roy* v. *Modhu Scondari Burmonia* (2).

The doctrine of surrender under the Hindu Law requires that the right of the widow should cease; it is just as if she died, the reversioner takes the estate not merely when she dies, but when her title is extinguished by renunciation, remarriage, or any other way; *Debi Prosad Chowdhry* v. *Golap Bhagat* (3).

There is no evidence that the Rs. 3,000 mentioned by the Subordinate Judge was paid as a bribe to Dukharan, the only evidence is that it was paid for Anandi Koer's credit. We do not contend that the mere execution of the deed by Dukharan is conclusive: but we say that Anandi Koer being entitled and having in compromise of proceedings taken maintenance, there was a relinquishment in Hindu Law which vested the whole estate in Mahabir.

Messrs. *Upjohn, K. C.*, Sir *W. Garth, K. C.*, and *Parikh*, for the Respondents.—What Anandi Koer is said to have done in 1874 could not possibly amount to surrender of her right and title to the estate. In the first place she did not herself execute the document, and there is nothing to show it was her act. She being a *pardah-nashin*, it was necessary to prove that she fully understood the meaning and effect of the deed. So far from this being the case, it has been found that her brother was bribed to execute the document.

But even if the document be good, it is nothing but an admission by Anandi of Mahabir's title on the ground that Jugal Kishore was joint with Bachhu. Such an admission by the widow cannot possibly bind the reversioner. The decision of the District Judge was under Act XXVII of 1860 and is not *res judicata*. Only a decision obtained in a fair trial against a Hindu widow will bind the reversioner: *Risal Singh* v. *Balwant Singh* (4).

A mere admission will not bind, especially when, as here, such admission is found to be contrary to fact.

There is nothing to show that Anandi knew or believed that she was the owner, and that as such owner she was relinquishing in favour of the reversioner; on the contrary she was acting, if at all, under the belief that she had no title, and it is impossible to say what she would have done had she known her real position.

Mr. *Dube*, in reply.—The document of 1874, coupled with the conduct of Anandi Koer for more than 30 years, established that she knowingly surrendered her entire estate in favour of the nearest reversioner. Disclaimer or renunciation in favour of the nearest reversioner by a Hindu widow has the same effect as her death or as her adopting: *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (5), *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (6).

By relinquishing her estate in favour of the reversioners, the widow creates in them a present indefeasible right: *Debi Prosad Chowdhry* v. *Golap Bhagat* (3).

JUDGMENT.

VISCOUNT CAVE.—These are consolidated appeals against three decrees of the High Court of Calcutta, dated the 22nd May 1913, two of which affirmed decrees of the First Subordinate Judge of Saran, dated respectively the 17th March and the 12th May 1910, while the third modified a decree of the same Court dated the 18th July 1910.

The facts leading up to the litigation may be shortly stated as follows: Srikishun Singh, Bachchu Singh and Jugal Kishore Singh were three Hindu brothers governed by Mitakshara Law and possessed of considerable properties in the districts of Saran and Gya and in Oudh. Jugal Kishore died on the 5th July 1872 without issue, leaving a widow, *Musammat* Anandi Koer; Srikishun died on the 18th July 1872 without male issue, leaving a widow and

(2) 5 C. 732; 5 C. L. R. 551; 2 Ind. Dec. (N. S.) 1078.

(3) 19 Ind. Cas 278; 40 C. 721 at pp. 728, 752, 771, 781; 17 C. W. N. 701; 17 C. L. J. 499. (F. B.)

(4) 48 Ind. Cas. 553; 45 I. A. 168; 24 M. L. T. 361; 28 C. L. J. 519; 40 A. 593; 9 L. W. 52; 28 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511.

(5) 10 C. 1102; 5 Ind. Dec. (N. S.) 787.

(6) 31 M. 446.

two daughters; and Bachchu died on the 9th February 1874 leaving a son, Mahabir Singh.

After Jugal Kishore's death Bachchu applied to the District Judge of Saran, under Act XXVII of 1850, for a certificate to collect debts due to the estate of Jugal Kishore, alleging that the three brothers had been joint in estate and that he was entitled as survivor to Jugal Kishore's estate. This application was opposed by Jugal Kishore's widow, Anandi Koer, who claimed that a partition between the three brothers had been effected in the year 1864 and accordingly that at the date of her husband's death the brothers were separate and she was entitled to succeed to her husband's estate. Bachchu died while the dispute was pending, but in the result the District Judge decided that the alleged partition had not taken place and accordingly that the three brothers were joint, and granted the certificate to Mahabir. This decision, being given only upon a question of representation, did not preclude Anandi Koer from raising the question of title again in a suit properly instituted for that purpose; but in fact Anandi, acting through her brother and attorney, accepted the decision and executed an agreement, dated the 17th May 1874, agreeing, in consideration of certain property being allotted to her for maintenance during her life, not further to contest the matter; and thereupon Mahabir took possession of the estate. This transaction, the effect of which is in dispute, will be referred to at greater length hereafter.

Mahabir died on the 21st June 1894 leaving no issue but leaving two widows, the defendant *Musammat* Bhagwat Koer and *Musammat* Rupkali Koer, the latter of whom was then enceinte and gave birth, on the 11th October 1894, to a daughter, named Ramdulari Koer. Mahabir before his death executed a Will (to be referred to later), probate of which was, on the 5th January 1895, granted to his two widows. The posthumous daughter, Ramdulari, died on the 4th June 1895, her mother, Rupkali, on the 8th February 1899 and Anandi, the widow of Jugal Kishore, on the 4th August 1904. On the 13th February 1906 Bhagwat Koer, the surviving widow of Mahabir, purporting to act under a power conferred upon her by her husband's Will, adopted the defendant Ragheshwar Indar Sahi as his son and executed in his favour a deed of adoption dated the 17th February, 1906.

The plaintiff Dhanukhdhari Prashad Singh is the nearest reversionary heir to Jugal Kishore and Mahabir, and claims to be entitled to their estates; and on the 20th August 1907 he instituted the three suits out of which these appeals arise against the surviving widow and the alleged adopted son of Mahabir in the Court of the First Subordinate Judge at Saran. One Ambika Prashad Singh, the purchaser of a part of the property, joined as co plaintiff in two of the suits, but need not be further referred to. The causes of action in the three suits are different, and it will be convenient to deal with them separately.

In Suit No. 200 of 1907 (out of which Appeal No. 100 of 1916 arises) the plaintiff Dhanukhdhari sued to set aside the adoption of the defendant Ragheshwar as invalid and contended that the power of adoption conferred by the Will of Mahabir had, in the events which had happened, no operation. The terms of that Will must now be referred to in detail.

The Will of Mahabir, which was dated the 20th December 1894, was divided into paragraphs. By paragraph 1 the testator, after reciting that he had then no male issue but had two wives living, directed that if any child should be born of either wife, or if children should be born of both wives, they should after his death become possessors of all his moveable and immoveable properties, whether ancestral or self-acquired, whereby the name and reputation of his ancestors might be perpetuated and the religious merit of his family might be preserved. By paragraph 2 he directed that if at the time of his death his children should be minors, his wives successively should act as their guardians and manage the estate. It was contended that, although the word "children" (*aulad*) is used in the above two paragraphs, they were in fact intended to operate in favour of male children only; but it is unnecessary to determine this question, as in any event the first two paragraphs are controlled, so far as female issue are concerned, by the third paragraph of the Will. The third and

fourth paragraphs of the Will are in the following terms :—

"3. If there be no son born of either of my wives and only (a) daughter be born, in such a case also the management of the *reasat* shall be conducted by either the senior or the junior wife, whoever may be existing, and her (the daughter's) guardianship and training and education shall be conducted as provided in paragraph 2. She will have the daughter married in a gocd family as is the custom in my family. My wives up to the terms of their respective lives shall remain proprietresses and possessors as provided in paragraph 2. After the death of both of them my daughter shall become the proprietress, and she shall perpetuate the name and reputation of my family by residing in my house and maintaining the same as the absolute proprietress.

"4. If by the will of Providence no male or female child be born to me, in that case both my wives, one after another as provided in paragraph 2, shall remain, in concord, proprietors and managers and perpetuate the name and reputation of the family up to the terms of their lives. I also authorize my wives that, if both of them exist, they in concurrence, or if either of them die, the surviving wife alone shall select according to her choice some worthy boy from my family or the families of my relatives and adopt him, who shall remain obedient and dutiful as a son up to the terms of the lives of my wives ; and the said adopted son after the death of my two wives shall remain absolute proprietor in my place as my son, and he shall have all authority such as is possessed by me."

In the suit now under consideration it was contended by the plaintiff that under the express terms of the Will the power of adoption conferred by paragraph 4 was contingent on no male or female child being born to the testator, and that as a daughter was born to him (although after his death) the power of adoption never arose. He also contended that Rageshwar was not a member of the class, consisting of the testator's family (*khandan*) or the families of his relatives, from which alone any adoption could be made. Both these contentions were upheld by the Subordinate Judge, who accordingly set the adoption aside; and on appeal the High Court, while holding that Ragheshwar was within the class described in the Will, agreed with the Subordinate Judge in holding that in the events which had happened the power of adoption did not arise, and accordingly dismissed the appeal.

On appeal by the defendants to this Board the appellants relied on the strong presumption that the testator, a Hindu, would have desired that, in the event (which happened) of his having no child who survived him and attained maturity, a son should be adopted to him by his widow, and contended that the Will must be construed as having that effect. The presumption is no doubt strong, and in a case of this kind the Courts would not be astute to defeat an adoption not clearly in excess of the power ; but in the present case it appears to their Lordships to be impossible, without unduly straining the words of the Will, to put upon it the construction contended for on behalf of the defendants. The words "if no male or female child be born to me" clearly govern the whole of paragraph 4 of the Will, including the power of adoption ; and it is impossible, without going outside the terms of the Will and in fact making a Will for the testator, to hold that in the events which happened the power took effect.

The result is that the decision of the High Court in this suit is right and that this appeal must fail.

In the Suit No. 198 of 1907 (out of which Appeal No. 131 of 1916 arises) the plaintiff Dhanukdhari sued for a declaration that under the terms of the Will of Mahabir and in the events which had happened the plaintiff was entitled to immediate possession of Mahabir's estate. He based his claim on the contention that on the true construction of paragraph 3 of the Will the widows were only entitled to be guardians of the testator's daughter and to manage the estate during her lifetime, and that upon her death the estate passed to her mother Rupkali and on the death of the latter to the plaintiff. The Subordinate Judge held that, on the true construction of paragraph 3, the widows took life estates in succession and that on the death of the surviving widow the property passed to

Ramdulari or her representatives under section 106 of the Succession Act. He, therefore, dismissed the claim for possession, but added to his judgment a declaration, under section 42 of the Specific Relief Act, of the right of the plaintiff as heir of Ramdulari to succeed to the estate of the testator after the death of the surviving widow Bhagwat Koer. Both sides having appealed to the High Court, that Court affirmed the decree of the Subordinate Judge dismissing the suit for possession, but struck out the declaration as to the plaintiff's reversionary right, holding that his plaint contained no claim for such a declaration and that the plaintiff had not made out his title to succeed to the estate of Ramdulari. The plaintiff thereupon appealed to this Board. Their Lordships agree with the decision of the High Court in this case They are satisfied that on the true construction of the Will and in the events which happened the estate was given to the testator's widows successively for life, and after the death of the survivor to Ramdulari, so that Ramdulari became entitled at birth to a reversionary estate under section 103 of the Succession Act; but the plaintiff has not in this suit adduced evidence proving his claim to be entitled to her estate, and accordingly no declaration should be made in his favour under the Specific Relief Act. This appeal, therefore, also fails.

In the Suit No. 199 of 1907 (out of which Appeal No. 117 of 1917 arises) the plaintiff sued to recover the estate of Jugal Kishore, alleging that in the year 1864 the three brothers, Srikishun, Bachchu and Jugal Kishore, separated and partitioned their properties between them, and that accordingly on the death of Anandi in 1904 the plaintiff as the next reversionary heir succeeded to Jugal Kishore's estate. The plaintiff also alleged in this suit that certain properties in Gya held under *mokurrari* leases in favour of Bachchu alone in fact belonged to the three brothers jointly and were partitioned with the other properties. The defendants denied the alleged partition and as an alternative relied upon the agreement of 1874 above referred to as amounting to a relinquishment by Anandi of her estate to the next reversionary heir Mahabir so as to vest the whole proprietary right in the latter. They also alleged that the Gya properties belonged to Bachchu alone.

Upon the issues so raised a large amount of oral and documentary evidence was adduced, and in the result the Subordinate Judge was satisfied, notwithstanding the decision in 1874, that the alleged partition had in fact taken place, and accordingly that Jugal Kishore at his death was separate in estate. He also held that the Gya properties belonged to the three brothers and were included in the partition. With regard to the transaction in 1874 the learned Judge held that the agreement executed on behalf of Anandi was not within the authority of her agent and was obtained by corruption, and that such agreement was never ratified by Anandi. He accordingly made a decree in favour of the plaintiff. An appeal to the High Court against this decision was dismissed. On the appeal by the defendants to the Board it at once appeared that upon the question of the partition and upon the question of the ownership of the Gya properties there were concurrent findings of fact in favour of the respondents which could not well be questioned; and accordingly the argument of the appellants turned on the legal effect of the transactions of 1874, which must now be more fully stated.

After the decree of the District Judge delivered on the 18th April 1974, by which he held that the three brothers were joint in estate and accordingly that Mahabir was entitled to a certificate, negotiations were entered into between Mahabir and the attorney of Anandi, her brother, Babu Dukharan Singh, and on the 17th May 1874, two *ekrarnamas* or agreements were executed. By one of these *ekrarnamas*, which was executed by the attorney on Anandi's behalf, after a recital of the recent litigation and the grant of the certificate to Mahabir, it was stated that Anandi, "in admission and acceptance of the judgment and order of the District Judge," and in consideration of the fact that Mahabir was the heir, proprietor and possessor of the estate of the three brothers, and that she had no proprietary interest therein and was entitled to maintenance according to the position of the family, "ceased from litigation." and that Mahabir, as the heir of the three brothers, had given her an 8-annas share

of a certain *mouzah* out of the joint estate of all three brothers for her maintenance during her life; and after reciting that Mahabir had on the same day executed an *ekrarnama* to the same effect, the agreement concluded: "Now contrary to the terms of these *ekrarnamas* my principal shall have no right, claim, dispute or demand in respect of the estates of the deceased persons against Babu Mahabir Prashad Singh." On the same day Mahabir executed another *ekrarnama* in similar terms, whereby he secured the agreed maintenance to Anandi during her life. In pursuance of these documents Mahabir was forthwith let into possession of the whole property of the three brothers; and from the date of these documents until her death in 1904 Anandi duly received the agreed maintenance without dispute or objection.

It was considered both by the Subordinate Judge and the High Court that these documents were executed by the agent of Anandi without authority and in consideration of the payment of a bribe to him. Their Lordships cannot accept that view. There was indeed some evidence to show that a sum of Rs. 3,000 was paid by Mahabir to the attorney some time after the execution of the documents; but it was not proved that this sum was not paid in due course to the attorney as agent for Anandi and duly accounted for to her. In any case, the agreement having been accepted and acted upon by both parties for a period of thirty years without objection, and the stipulated maintenance having been duly received by Anandi during the whole of that period, it is not open to the plaintiff now to dispute the authority which was plainly admitted by Anandi herself during her lifetime; and in view of this circumstance it appears to the Board that the agreements in question must be treated for all purposes as binding upon Anandi and the transaction cannot now be disturbed. In this aspect of the matter it became necessary for their Lordships to consider what was the true legal effect of the transactions referred to.

The power of a Hindu widow to surrender or relinquish her interest in her husband's estate in favour of the nearest reversioner at the time has often been considered and was fully dealt with by the Board in the recent case of *Rangasami Gounden* v. *Nachiappa Gounden* (1). As pointed out in that case, it is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights; and it may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property. In the present case there was indeed no formal surrender by the widow of her estate; but there was an express agreement, binding upon her, that for considerations which appeared to her sufficient she would abandon the claim which at the time she had a good right to make and would have no right, claim or demand in respect of the estate of her late husband. It is true that the documents were drawn up on the footing, not of a surrender of an acknowledged right, but of an admission that the right did not exist; but in substance, and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate. The question is no doubt one of difficulty, but upon the whole their Lordships have come to the conclusion that the execution of the two *ekrarnamas*, followed by the acceptance for thirty years of maintenance under the terms of those documents, amounted to a complete relinquishment by Anandi Koer of her estate in favour of Mahabir, and accordingly that the title of Mahabir's representatives is established and the plaintiff's action should have been dismissed on this ground.

Their Lordships will accordingly humbly advise His Majesty that the appeals in Suits Nos. 200 and 195 be dismissed and the appeal in Suit No. 199 allowed and that the last mentioned suit be accordingly dismissed. The plaintiffs will pay to the defendants their costs of the hearing of Suit No. 199 before the Subordinate Judge, except the costs of issues 4 and 5 (relating to the partition and the Gya estates) on which they succeeded, and will also pay to them their costs of the appeal to he High Court in that suit.

The defendants will pay the plaintiffs' costs of issues Nos. 4 and 5, with the usual set off. Upon these consolidated appeals to the Board, in which each party has partly succeeded and partly failed, there will be no costs on either side.

Order accordingly.

Solicitors for the Appellants:—Messrs. *Watkins & Hunter.*

Solicitor for the Repondents:—Mr. *E. Dalgado.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 111 of 1916.

December 9, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

RAJAGOPALAN *alias* SEETHARAMA IYER—PLAINTIFF—APPELLANT

versus

T. S. SUBBARAMA IYER (DECEASED) AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 462—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Compromise, petition for, on behalf of minor—Application for sanction of Court, statement in, that compromise was for minor's benefit—Endorsement of Court on petition—Order not expressly stating that compromise is for minor's benefit, effect of—Petition stipulating for sale of minor's properties not subject of razinama—*Guardian* ad litem, *power of, to sell property of minor—Father of minor joining in sale with guardian* ad litem, *effect of.*

An order of Court sanctioning a compromise on behalf of a minor party need not on the face of it state in so many words that the Court has considered the terms of the settlement and has come to the conclusion that the settlement is in the interests of the minor. [p. 356, col. 2.]

An endorsement of Court on the petition to sanction the compromise, which sets forth that the compromise is in the minor's interests, to the effect that the petition is granted is a sufficient compliance with the provisions of section 462 of the Civil Procedure Code of 1882. [p. 356, col 2.]

Kalavati v. *Chedi Lal*, 17 A. 531: A. W. N. (1895) 126; 8 Ind. Dec. (N. S.) 666, explained.

If a compromise is binding, it operates as a bar to the trial of any question forming the subject-matter of the compromise. [p. 359, col 1.]

If a Court sanctions an arrangement but some of its provisions cannot be embodied in the decree because they do not relate to the suit, those provisions can be enforced against the minors though not by way of execution of the compromise decree. [p. 359, col. 2.]

Where in pursuance of a compromise a sale of the minor's properties is effected by the father and also the guardian *ad litem* of the minor, the sale is good, though the guardian *ad litem* may not have the power to act on behalf of the minor. [p. 360, col. 2; p. 361, col. 1.]

Per *Abdur Rahim, J.*—Where an arrangement is sanctioned by the Court involving the sale of a minor's properties, it is within the competence of the guardian *ad litem* to effect the sale [p. 359, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Tanjore, in Original Suit No. 18 of 1914.

FACTS appear from the judgment.

The Hon'ble Mr. *S. Srinivasa Aiyangar* Advocate-General, (with him Mr. *K. Rajah Aiyar*), for the Appellant.—The compromise is not valid and effective as the leave of the Court was not obtained. The Court should have expressly stated in its order that it sanctioned the compromise as being beneficial to the minors. The mere endorsement on the Razinamah petition 'granted' is not sufficient compliance with the provisions of section 462 of the old Civil Procedure Code (Act XIV of 1882). The Razi petition only required the Court 'to be pleased to accept the Razinamah.' That means that the Court was to file the Razi in the usual course. It is clear that the Court did not apply its mind judicially to see if the Razi was beneficial to the minors. See Privy Council decision in *Manohar Lal* v. *Jadunath Singh* (1). Also *Ganesha Row* v. *Tulsa Ram Row* (2), *Subramanian Chettiar* v. *Rajeswara Dorai* (3) and *Kalavati* v. *Chedi Lal* (4).

Assuming that the compromise and the decree embodying it are valid, what the Court sanctioned was only the Razinamah. The provision regarding sale did not relate to the suit and the Razinamah did not refer to it. As the stipulation regarding the sale is not embodied in the decree, the sale-deeds, so far as they affected the minors' shares, are invalid. The deeds were executed by the guardian *ad litem* of the minors who was not competent to execute them. The fact that the father

(1) 28 A. 585: 8 Bom L. R. 489; 4 C. L. J. 8; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710; 33 I. A. 128 (P. C.).

(2) 19 Ind Cas. 515; 36 M. 295; 25 M. L. J. 150; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom L. R. 626; 14 M. L. T. 1; 1913) M. W. N. 575. 40 I. A. 132 (P. C.).

(3) 32 Ind. Cas. 258; 39 M. 115 (P. C.); 29 M. L. J. 856; 20 C. W. N. 201; 3 L. W. 149; 9 M. L. T. 150; 14 A. L. J. 153; 916) 1 M. W. N. 100; 23 C. L. J. 337; 18 Bom L. R. 860.

(4) 17 A. 531; A. W. N. (1895) 126; 8 Ind. Dec. (N. S.) 666.

signed the sale-deeds only shows that he conveyed his share.

Mr. *K. Srinivasa Aiyangar* (with him Mr. *A. Krishnasawmy Aiyar*), for the Respondents.—Section 462 of Act XIV of 1882 does not say that the Court sanctioning a compromise on behalf of a minor should adopt a particular form of language or that the order should expressly state that it is for the benefit of the minor. It is enough if the petition of compromise and the order thereon make it clear that the Court was satisfied that the arrangement was beneficial to the minor. The petition, Exhibit VIII, distinctly stated that the Razi was beneficial to the minors and the Court, on a perusal of the petition, passed the order 'granted'. In the cases relied by the Advocate General it was held *on the facts* that the leave of Court was not obtained.

There is no reason to put a limited construction on the order of the Court. What the Court sanctioned was the arrangement contained in the Razi petition, including the stipulation for sale. The entire arrangement was brought to its notice and it is not fair to presume that the Court sanctioned only a part of it. The fact that the Razinamah did not mention the fact of the sale is easily explained by the fact that under the judicial decisions then prevailing it was understood that the terms of the Razi that do not relate to the suit should not be embodied in the decree. The Razinamah must be read with the petition and, so reading it, the provision as to sale is a material part of the arrangement. The fact that the guardian *ad litem* of the minors signed the sale-deeds does not render them ineffective. There is no statutory bar to it. On the analogy of the English law as to the powers of trustees and executors, the guardian *ad litem* should be clothed with all the necessary powers to perform his duties. If he has the power to compromise suits and adjust execution proceedings, it follows that he could also transfer the property of the minor in carrying out a compromise.

Even if it was not competent to the guardian *ad litem* to execute the sale-deeds, it is enough to give them validity that the minors' father, the 1st defendant, signed them. He was competent to dispose of the property to discharge the debts that were incurred for family purposes and it cannot be said that he was only conveying his share. He is referred to as executing for himself to distinguish it from the execution by the guardian purporting to act for the minors.

JUDGMENT.

ABDUR RAHIM, J.—The real question for consideration is as to the binding character of the compromise proceedings which resulted in the decree Exhibit X and whether the conveyances Exhibits A, A-1 and B are valid transactions. The compromise was effected in a suit instituted to enforce a mortgage against the 1st defendant in this suit and his sons, the present plaintiff and defendants Nos. 2 to 5, who were at that time minors, being represented by their grandmother as guardian *ad litem*. That suit was Original Suit No. 29 of 1899. The main defence to the suit was that the mortgage was not binding on the minor defendants inasmuch as the debts for which the mortgage was executed had been incurred by their father for immoral and illegal purposes. A written statement was filed and issues were framed. The minor defendants, were represented by a very respectable Pleader of the Kumbakonam Subordinate Judge's Court. While the suit was pending, the parties came to an amicable arrangement and a compromise was effected. Exhibit VIII is the petition of compromise and along with it was filed a Razinamah Exhibit IX. A decree, Exhibit X, was passed in accordance with that Razinamah. The petition sets out the nature of the suit and the defence and states that, on an examination made of the accounts with the aid of the minors' relations and in the light of the investigations made, it was found that the amount mentioned in the hypothecation bond sued upon had been borrowed and spent by the 1st defendant, *i. e.*, the father, for the benefit of the family and for family purposes. Then it says that it had been settled through mediators that a sum of Rs. 6,500 should be paid by the defendants to the plaintiffs in full satisfaction of the latter's claim. Paragraph 5 states that it

had been arranged by the mediators that for this sum of Rs. 56,500 a sale-deed for Rs. 52,000 was to be executed in favour of the plaintiffs by the 1st defendant and by the guardian *ad litem* of the minors on behalf of the minors in respect of the lands in the hypothecated village, that an indemnity bond should also be executed with respect to the lands of one of the villages and that the defendants should pay to the plaintiffs within 1st March 1901 the balance of Rs. 4,000 with interest. The next paragraph says that "the said arrangement is most favourable to the said minors' interest and benefit", and the Court is asked "to accept the Razinamah presented herewith whereby a compromise for Rs. 56,500 has been made as aforesaid with the plaintiffs by me on behalf of the defendants Nos. 2 to 4." It is signed by Lakshmi Ammal, the guardian *ad litem* of the minor defendants.

The Razinamah referred to embodies all the terms of Exhibit VIII, excepting what is provided in paragraph 5 as to the sale of the villages for Rs. 52,500. What it says is that "Rs. 56,500 is to be paid in full satisfaction of the claims of the plaintiffs in that suit and out of this amount, Rs. 52,500 (the amount mentioned in Exhibit VIII as the price of the villages sold) is to be paid within 2nd March next and the defendants shall pay to the 1st plaintiff within 1st March 1901 the balance amount of Rs. 4,000." The Razinamah is signed both by Lakshmi Ammal and by the 1st defendant. Both these documents are dated the 28th February 1900, and were filed on the same day in the Subordinate Judge's Court. On Exhibit VIII the order passed is "granted" bearing date the 28th February, and on Exhibit IX the order is "decreed accordingly". The decree is drawn up in the terms of the Razinamah and is also dated 28th February 1900. In pursuance of these documents Exhibit A was executed both by the 1st defendant T. S. Subbarama Iyer and Lakshmi Ammal, the guardian of the minors, on the 2nd March 1900 with respect to some villages mentioned in Exhibit VIII. Exhibit B is another sale deed with respect to the remaining lands also executed on the 2nd March by the same parties. Both these documents refer to the settlement arrived at between the parties by the Razinamah and the decree passed in accordance with the Razinamah.

The first argument advanced by the learned Advocate General who appeared for the plaintiff-appellant is that the compromise is ineffective inasmuch as no leave of the Court was obtained. This argument is merely based on a criticism of the words in the last paragraph of Exhibit VIII, that is, "the Court will be pleased to accept the Razinamah presented herewith". It is suggested that this only meant that the Court was to file the Razinamah, not that the Court was asked to apply its mind to the terms of the Razinamah in order to see whether they were for the benefit of the minors or not. I think this is merely quarrelling with words. The petition sets out section 462 of the Civil Procedure Code, which provided for compromise of suits on behalf of minors. It states that the arrangement is "most favourable to the minors and for their benefit". There can be no doubt that the parties intended to ask the Court to give leave for compromise as required by section 462 of the old Code. The petition is signed by the guardian *ad litem* of the minors and the order made is "granted". That can only mean that the Court sanctioned the compromise as being for the benefit of the minors. The learned Advocate-General next argues that the order itself must show that the Court did, as a matter of fact, apply its mind to the terms of the arrangement and was satisfied that the arrangement was for the benefit of the minors. Section 462 does not require that the order of the Court granting leave should be expressed in any particular form. What it says is that "any agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minors." No doubt the Court in granting the leave has to consider whether the arrangement or compromise is such as can be said to be for the benefit of the minor, but I do not think that the law requires that the order of the Court should, on the face of it, state in so many words that the Court considered the terms of the settlement and came to the conclusion that the settlement was in the interests of the

minor. The question was before the Privy Council in three of the cases that have been brought to our notice, first, in *Manohar Lal* v. *Jadunath Singh* (1). There the compromise was held to be bad as, upon the facts, their Lordships found that leave of the Court had not been obtained as required by law. There was no such petition in that case, as there is here, expressed to be under section 462. The petition for leave in this case bears the signature of the Pleaders appearing for the minors, which is always some guarantee that the requirements of the law have been complied with, and there was no evidence in the Privy Council case, as there is here, that the matter was brought to the notice of the Court and the terms of the settlement explained to it. All that their Lordships laid down was that it must be shown that leave of the Court was obtained either by an order of the Court or in some other way not open to doubt. In *Ganesha Row* v. *Tulja Ram Row* (2) the principle enunciated in *Manohar Lal* v. *Jadunath Singh* (1) was confirmed. In *Subramanian Chettiar* v. *Rajeswara Dorai* (3) their Lordships refer to the above decisions and confirm the proposition previously laid down by them. If the law were, as contended by the learned Advocate-General, that the order of the Court must contain within its four corners a statement that the Court that considered the terms of the settlement had come to the conclusion that they were for the benefit of the minor, their Lordships would, in all likelihood, have so laid it down. We have, however, been referred by the learned Advocate-General to a decision of the Allahabad High Court in *Kalavati* v. *Chedi Lal* (4). No doubt, the learned Judges there did say that the Court sanctioning a compromise or giving leave ought to make it clear in the order itself that it had considered whether the compromise was beneficial to the minor. No doubt, the Court ought not to leave a matter of this sort in doubt. But it is a very different thing from saying that, if particular forms of expression are wanting in the order although it is proved otherwise that the matter was fully brought to the notice of the Court and the Court granted leave having before it all the considerations, that the compromise must fail on that account. That this is not the law, is just what has been pointed out by Jenkins, C. J., in *Virupakshappa* v. *Shidappa* (5). It may be mentioned, as has been pointed out before, that the new Code has used somewhat different language with respect to this matter. It requires by Order XXXII, rule 7, that leave of the Court should be expressly recorded in the proceedings. But this is an alteration of a minor character and here at all events we have got an order in writing. I have, therefore, no hesitation in finding that leave of the Court had been properly obtained as required by the law.

The next contention of the appellant was to the effect that what had been sanctioned by the Court was only the arrangement contained in the Razinamah Exhibit IX and the decree following upon the Razinamah. But this is not, to my mind, a correct interpretation of the order of the Court. The provision regarding sale in paragraph 5 of the petition was an essential part of the agreement by which the suit was compromised. That was placed before the Court, and the evidence of the Pleader who appeared for the minors shows that the terms were properly and fully explained to the Court. He is a leading practitioner of considerable position, and the learned Subordinate Judge entirely believed his evidence and nothing has been urged by the learned Advocate-General to throw doubt on it. In fact he did not make any such attempt. According to that evidence the whole of the arrangement was brought to the notice of the Court, and it will not be right to presume that the Court wanted to sanction only a part of that arrangement. The entire argument of the appellant is based on the wording of the latter part of paragraph 6, where it is prayed that the Court might be pleased "to accept the Razinamah presented herewith", but this leaves out of account the previous sentence in the same paragraph that "the said arrangement is most favourable to the said minors' interest and benefit", referring to paragraph 5 containing the provision for sale as well as to the preceding paragraphs. I trust it was the entire

(5) 28 B. 103.

arrangement which the Court was asked to approve as being beneficial to the minors. So far as I have followed the argument of the learned Advocate-General, he has not been able to suggest any plausible reason why the parties entering into an arrangement like this should have asked for the sanction of the Court for only a portion of it. It is perfectly true, however, that the Razinamah was presented along with the petition and the Court was asked to pass a decree in accordance with the Razinamah, and neither the Razinamah nor the decree contains the stipulation as to the sale of the properties. But that, to my mind, is easily explained by the practice of the Courts with reference to such matters as it obtained at the time in this Presidency. It had been ruled in *Venkatappa Nayanim* v. *Thimma Nayanim* (6) and *Muthu Vijaya Raghunatha Udayana Tevar* v. *Thandavaraya Tambiran* (7) that the relief given by a compromise decree should be the same as that claimed in the plaint or less and that any terms which do not come strictly within the scope of the suit could not be embodied in the decree. There can be no doubt that the practice of the Courts in this Presidency was in accordance with these rulings. In *Venkatappa Nayanim* v. *Thimma Nayanim* (6) the learned Judges laid down: "It seems reasonable to hold that the words 'so far as it relates to the suit' in section 375 must be restricted to relief which the Court could have given in the suit, and will not embrace reliefs which could only have been given in a suit based upon a different cause of action". In a more recent decision, however, in *Natesan Chetty* v. *Vengu Nachiar* (8), following *Joti Kuruvetappa* v. *Izari Sirusappa* (9), this view of the law has been dissented from. But that was long after the date of these transactions, which took place in 1899 and 1900. The frame of the three documents Exhibits VIII, IX and X clearly shows that the Court and the legal advisers of the parties were fully conscious of the law as it stood at the time. It was for that reason that, while the petition stated the terms of the compromise, the Razinamah left out the provision for sale, for it was apparently thought that such a provision could not properly go into the decree according to the above-mentioned ruling in *Venkatappa Nayanim* v. *Thimma Nayanim* (6). At the same time the Razinamah as well as the decree cannot be properly understood without reference to paragraph 5 of the petition, for according to the Razinamah as well as the decree Rs. 52,500 was to be paid within March 2nd, by which time the parties contemplated to complete the compromise by the execution of proper conveyances as provided in paragraph 5 of the petition Exhibit VIII. It may also be pointed out here that this point was never raised in the lower Court; it is not suggested in the plaint, no issue was framed with respect to it and the judgment, which is an extremely lengthy one, does not mention it. The learned Advocate General argues that this is a question of law and, therefore, it does not make any difference whether it was raised in the lower Court or not. I do not think that it is a pure question of law. Whether the Court wanted to sanction the entire arrangement or only a part of it depends upon what transpired in Court at the time. Evidence would have been forthcoming as to what was stated to the Court in this connection and whether this stipulation was brought to the notice of the Court and the Court wanted to sanction it or not. The Pleader of the minor defendants in that suit was examined at great length, and it was not suggested to him that the stipulation regarding the sale was not brought to the notice of the Court. I think there can be little doubt that this contention of the appellant is entirely unfounded.

The learned Advocate-General further urged that the petition, Exhibit VIII, did not contain some material facts which, if brought to the notice of the Court, might have induced the Court not to grant leave. It is said that some portion of the debts, amounting to about Rs. 10,000, was borrowed by the minor defendants themselves. No doubt if that was so, it ought to have been mentioned in Exhibit VIII. But that there was any such plea has not been proved. The written statement in that

(6) 18 M. 410; 6 Ind. Dec. (N. S.) 634.
(7) 22 M. 214; 8 Ind. Dec. (N. S.) 153.
(8) 3 Ind. Cas. 701; 33 M. 402; 20 M. L. J. 20; 6 M. L. T. 313.
(9) 30 M. 478; 16 M. L. J. 354.

suit, although apparently in the possession of the Pleader of the present plaintiff, was not produced, and there is nothing to show that any such plea was put forward. Besides in the plaint in this case there is no allegation that any facts were suppressed or concealed from the Court.

Then it was also argued that the appellant must be allowed to show, even if the compromise is a valid and binding one, that the debts, or some portion of them, were in fact incurred for immoral and illegal purposes. In my opinion this is an untenable proposition. If the compromise is binding, it operates as a bar to the trial of any questions forming the subject-matter of the compromise.

The next contention of the Advocate-General is that since the stipulation regarding the sale is not embodied in the decree, the sale-deeds Exhibit A, A-1 and B, so far as they affected the shares of the then minors, are not valid. Those deeds were executed by Lakshmi Ammal, the guardian *ad litem* of the minors, on their behalf as well as by their father, the 1st defendant in the former suit. The contention of the appellant is first of all that Lakshmi Ammal as guardian *ad litem* had no authority to execute the conveyance. The question is entirely bare of authority; but so far as I am concerned, I have little hesitation in holding that the conveyances in pursuance of Exhibit VIII are valid and binding transactions. It is not necessary to pronounce upon any general question as to how far, if at all, a guardian *ad litem* or next friend is empowered, in conducting litigation on behalf of a minor, to deal with any property of the minor, whether involved in the suit or not. Mr. A. Krishnasawmy Iyer, the learned Vakil for some of the alienees, has cited the analogy of the rule of English Law relating to the interpretation of the powers of executors, trustees or public bodies charged with certain duties for a general proposition that where the law requires or empowers a person to do a certain act, that person must be taken to be clothed with all the necessary incidental powers to perform that act. The duty of a guardian *ad litem* is not confined to the conduct of the defence in the suit, but also extends to execution proceedings in which the guardian continues to represent the minor. The guardian *ad litem* representing a minor in a suit is empowered with leave of the Court to compromise the suit and also to adjust the decree in execution proceedings; and it is urged that it may often happen that such a person could not discharge these duties properly if he was not empowered with the sanction of the Court to apply the property of the minor in carrying out a compromise or adjustment. It is not necessary to discuss the broad question in connection with this case. Here the minors were sued upon a mortgage. With the sanction of the Court a compromise decree was passed for a certain amount and the property was made liable to be sold in pursuance of the decree. Instead of allowing the property to be sold by public auction, it was found beneficial to the minors' interests that a portion of the property should be sold to the mortgagees in satisfaction of their claim. A provision like this seems to me to be a matter quite within the scope of the suit and one which could be properly sanctioned by the Court. I am of opinion that where, as here, as a part of the agreement arrived at between the parties the guardian *ad litem* who represented the minor applies to the Court to sanction an arrangement by which the compromise decree is to be satisfied, *e.g.*, by sale of some of the properties involved in the suit, and the Court finding the entire arrangement to be in the interests of the minor sanctions it, the provision for sale could be enforced. It was argued that the leave of the Court granted under section 462 does not necessarily mean any more than that the Court thinks that the arrangement is for the benefit of the minor and that it is no concern of the Court to see whether the arrangement can be effectively carried out and if so, by whom. But there can be no doubt upon the rulings of this Court, and this has not been disputed before us, that if the Court sanctioned an arrangement, but some of its provisions could not be embodied in the decree because they did not relate to the suit as ruled in *Venkatappa Nayanim* v. *Thimma Nayanim* (6), those provisions could be enforced against the minors, though not by way of execution of the compromise decree. The specific

arrangement in this case was that the grandmother of the minors as guardian *ad litem* in this suit should convey some portion of the mortgaged properties to the mortgagees in satisfaction of the compromise decree. It seems to me that, if such an arrangement be not within the competence of a guardian *ad litem* and the sanction of the Court accorded to it is to be of no effect, it might lead to very far-reaching results.

The sale-deeds can also be upheld on another ground. They were executed in accordance with the provisions of Exhibit VIII not only by the guardian *ad litem* of the minor defendants in that suit but by the 1st defendant, their father. It is suggested by the learned Advocate-General that each of these two parties, *i.e.*, the father and the minors through their guardian *ad litem* purported to deal with their respective shares. But this suggestion is not at all justified by the terms of the documents. There is no mention in them of any one's share in any village; each of the parties executing the documents clearly intended to deal with the entire property. That was the scope of the stipulation in paragraph 5 of Exhibit VIII and that is the effect of the conveyances Exhibits A, A. 1 and B. That being so, we may leave out of consideration the part played by Lakshmi Ammal, the guardian *ad litem* of the minor defendants, in joining in the conveyances. The debts were incurred for the purposes of the family, and in order to discharge those debts the father was competent to dispose of the family property. The mere fact that the minors joined in the deeds through a person who might or might not have had authority to represent them in the transaction cannot make any difference as to the effect to be given to the conveyances as the acts of the minor himself. This is amply supported by the ruling of the Judicial Committee in *Gharibullah* v. *Khalak Singh* (10). The facts of that case were essentially analogous to those of the present case. There a deed of mortgage was executed by the Karta or manager of the family, one Khalak Singh, as well as by a person purporting to act as the guardian of his minor brother. Their Lordships held, according to well established rulings, that there could be no guardian appointed under the Guardians and Wards Act for a minor member of a joint Hindu family and therefore the person purporting to act as guardian had no authority to represent the minor. Nevertheless they held that the transaction was valid, inasmuch as the debts were incurred for family purposes and Khalak Singh, the managing member of the family, executed the document. There is a similar ruling of this Court in *Surapa Raju* v. *Venkatyya* (11) and though the case of *Gharibullah* v. *Khalak Singh* (10) was not brought to the notice of the learned Judges, they laid down practically the same proposition. I am unable to see how this case can be distinguished in substance from those rulings which are based on what seem to me to be obviously good reasons. The father of the present plaintiff was clearly entitled to dispose of the properties in order to discharge these debts, and because the mortgagees or purchasers thought it safer that the minors should also be represented through their guardian *ad litem* or anybody else, that cannot make any difference as to the validity of the act of the plaintiff's father. I am, therefore, of opinion that this appeal fails altogether and must be dismissed with costs.

It may be mentioned that apart from the general defence, the 12th defendant in the suit also relied upon limitation, as he was made a party after the period of limitation had expired. The learned Advocate General did not press the case against him and did not challenge the dismissal of the suit so far as he was concerned.

I may point out that the judgment of the learned Subordinate Judge in this case is unduly prolix, covering 90 printed pages. It begins with verbatim copies of the pleadings, then sets out the issues and under each issue, states the contentions and arguments of the parties at great length. In dealing with the evidence, no attempt is made to concentrate attention upon such evidence as really throws light upon particular issues. Similarly with regard to the reported cases many passages are quoted at length, although the observations bearing on the questions at issue could be compressed within much shorter compass. There is a great deal of repetition throughout the

(10) 25 A. 407 (P. C.); 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483.

(11) 32 Ind. Cas. 802; (1915) M. W. N. 909.

judgment, with the result that it has necessarily taken up much of the time of this Court in finding out the conclusions of the learned Judge and the reasons on which those conclusions are based. We take this occasion to point out the desirability on the part of the lower Court to endeavour to set out the facts of the case, the questions for decision and the reasons for their conclusions in a way which would be of help to the Appellate Court in ascertaining without unnecessary difficulty how the case has been tried and how far the conclusions of the trial Court were justified.

OLDFIELD, J.—I have nothing to add to my learned brother's reasons for holding that no argument based on section 462 of the previous Code has been made good.

As regards the next point dealt with by him, *viz.*, the capacity of Lakshmi Ammal to execute Exhibit A as guardian *ad litem*, I am not prepared to adopt his reasons for his conclusion. It is, however, unnecessary that I should deal with this point, because I am able to concur in his alternative ground of decision that the execution of Exhibit A by T. S. Subbarama Iyer, the father of the plaintiff, was sufficient. In doing so, I desire only to refer to the actual language of Exhibit A. The persons executing it are detailed as, firstly, T. S. Subbarama Iyer; then his sons, and their names are given with a statement that they are minors; then Lakshmi Ammal is mentioned as guardian for the said minors and again there is a reference to "Subbarama Iyer, for himself." It is unnecessary that I should follow my learned brother through his treatment of the authorities and his statement of the law on this point, with which I with great respect entirely agree. I only wish to observe that the reference in the document to Subbarama Iyer executing it for himself need not and cannot be, as the learned Advocate-General contended, read simply as meaning that he is executing in respect of his own share. Subbarama Iyer is referred to as executing for himself in order to distinguish his execution from that of Lakshmi Ammal, who is referred to as executing for the minors. The plaintiff's argument here entails that Subbarama Iyer did execute it for himself, firstly, as owner of his share and secondly, as the father of the minors; that is quite sufficient to support the conclusion in favour of the defendants, and there is no necessity whatever to restrict the interpretation of the words referred to as the plaintiff proposes.

In these circumstances I concur in my learned brother's decision and also in his observations on the character of the lower Court's judgment. I may add that it seems to me regrettable that the lower Courts should think it necessary to set out the whole of the pleadings, as they usually do, *in extenso* in their judgments, especially where they are, as here, voluminous, in disregard of the fact that the parties usually think it necessary to print them, as in fact has been done in this case.

This appeal having been set down for being spoken to this day, the Court delivered the following

JUDGMENT

ABDUR RAHIM, J.—I think the respondents who are represented by Mr. K. Srinivasa Ayyengar and Mr. A. Krishnaswami Ayyer respectively should be allowed separate fees in this appeal. If they had not succeeded on the preliminary point, it is clear from the grounds of appeal that there would have to be separate arguments on behalf of the two sets of respondents. But Mr. K. Srinivasa Ayyengar has asked us also to apply rule 41 of the Appellate Side Rules (relating to practitioner's fees) to this case. It provides that "in cases of special difficulty or importance, the Judge or Bench disposing of an appeal or other matter may, on the application of a party, direct that ( ) a higher fee than would ordinarily be admissible under those rules be allowed, (2) two sets of fees be allowed to a party who has engaged more than one Advocate, Vakil or Attorney. No doubt in this case three senior leading Vakils of this Court have been engaged on the side of the respondents and the present rule regarding Vakil's fees may be taken to be quite inadequate to meet the costs of respondents in respect of Vakil's fees. But rule 41 is meant to apply only to exceptional cases, that is, cases of exceptional difficulty and importance and we are unable to hold that the present case is one of such a nature. It may be that the present rules in force regarding practitioner's fees are not in touch with the actual practice of the profession but that is a matter for the profession as

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well as the authorities to consider. So long as the rules prevail, we have to give effect to them even though their application in particular cases may work considerable hardship. All that I would order is one set of costs for the 8th respondent and another set for respondents Nos. 9 and 12 to 14.

OLDFIELD, J.—I agree.

Appeal dismissed.

M. C. P.

CALCUTTA HIGH COURT.

APPLICATION IN INSOLVENCY PROCEEDINGS NO. 120 OF 1917.

January 24, 1919.

Present:—Mr. Justice Rankin.

In the matter of ANSHU PROKASH GHOSE—INSOLVENT.

Presidency Towns Insolvency Act (III of 1909), s. 36—Examination of insolvent, how to be conducted—Creditor, whether can take part in examination—Examination of mortgagee from insolvent—Mortgagee, whether entitled to costs—Practice.

When an insolvent is examined under section 36 of the Presidency Towns Insolvency Act, the creditors have no right to take part in the examination. [p. 363, col. 1.]

Where at the instance of certain creditors of an insolvent, a mortgagee from the insolvent prior to the insolvency is examined under section 36 of the Presidency Towns Insolvency Act, with a view to challenging the mortgage, and at such examination the mortgagee is represented by Attorney or Counsel, he is not entitled to any costs against the creditors at whose instance the examination is held. [p. 365, cols. 1 & 2.]

Mr. *Langford James* (with him Mr. *B. C. Ghose*), for the Applicant.

Messrs. *N. N. Sircar* (with him Mr. *B. K. Ghose*), for the Respondent.

JUDGMENT.—This is a motion in the insolvency of one Anshu Prokash Ghose, who was adjudicated in this Court by order of the 3rd August 1917. The present applicant is Akhoy Chunder Ghose, who at one time was a partner with the insolvent, in a firm of building contractors called A. P. Ghose & Company, under articles of partnership, dated the 13th December 1915. By a mortgage-deed, dated 27th March 1917, wherein the partnership was recited, and the fact that it had been dissolved, the insolvent mortgaged to the applicant the premises No. 1-1, Issur Mill Lane, (subject to a prior mortgage) to secure the sum of Rs. 24,500 as being the amount for which the applicant was to release all claim against, and interest in, the partnership. This sum appears to have been calculated, not on the amount ascertained by the taking of an ordinary partnership account, but on the amount put into the business by the present applicant with certain interest.

On the 21st January 1918, the applicant, as mortgagee and with the consent of the Official Assignee, obtained an order from this Court under rule 18 of Schedule II of the Presidency Towns Insolvency Act, 1909, for sale of the property and for the taking of the mortgage accounts by the Registrar.

Two creditors, Messrs. Osler & Co. and the present respondents, Messrs. K. C. Ghattack & Sons, appeared by their Attorneys before the Registrar minded to investigate the claim. At the second hearing on the 6th March, Messrs. Osler & Co.'s Attorney examined the insolvent and after so doing, asked for the taking of the accounts to stand over pending enquiry. The respondents' Solicitor joining in this request intimated a desire to examine the mortgagee under section 36. I am quite satisfied of the reasonableness and propriety of this desire, having regard to the surrounding circumstances, the insolvent's evidence, the apparent conflict between the insolvent and mortgagee, and the lack of material and opportunity for getting to the bottom of the relationship and transactions between the two; and I notice that the mortgagee's Solicitor immediately took the very proper course of offering to facilitate the examination of his client under section 36, and to give inspection of documents. The respondents then applied for an order for the examination of the mortgagee by a petition which undoubtedly puts in the forefront the question of the validity of the mortgage-deed. The order of the 9th March, which was thus asked for and obtained, summoned the mortgagee to be examined respecting the alleged mortgage, and respecting the insolvent, his dealings or property. From the minutes of the proceedings before the Registrar I find that on the 13th, 19th, 20th and 21st March

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the present applicant was examined before the Court; his Attorney on the first occasion and his Counsel on the last three occasions being present and taking part on his behalf. In the end the respondents were not advised to attempt to have the mortgage declared invalid, and in these circumstances the present application is brought.

Now, the present application is an application which asks two things, first of all it asks that there may be an order against the creditor to pay the applicant's costs of attending by Solicitor and Counsel upon his own examination; it also includes a claim, of which I think nothing was said in argument before me, that a similar order should be made against the present respondents in respect of the applicant's costs of attending and taking part in the examination of the insolvent. So far as regards the latter part of the claim, there can be no doubt that that must be dismissed. I do not collect from the papers before me that there was any examination of the insolvent except his examination on the taking of the mortgage accounts, and his public examination; but if there was, if the insolvent was examined under section 36 at all, there can be no doubt that the mortgagee had no right to take part in that examination, and both he, his Attorney and his Counsel ought to have been excluded from the room.

I come to the main part of this claim—the claim, that is to say, as regards the costs incurred by the mortgagee in attending by Solicitor and Counsel for purposes of his own examination under section 36.

Now, it seems to me that I must dispose of that application, not (as I was asked to do) upon the footing that the applicant is a lucky man, or on the footing that the mortgage is one which now has got a doubt or taint about it still; I must dispose of it on the footing that the mortgage is valid, and that any appearance of suspicion was due either to the attitude of the bankrupt, or incompleteness of the available information or other circumstances over which the present applicant had no control; still less have I any right to assume that the petition was kept back in the applicant's interest. I have no evidence of the sort, and it looks to me rather as if the insolvent and the present applicant, at a time not very long afterwards, were at loggerheads. On the other hand, I must deal with it on the basis that in view of the circumstances, in view of the insolvent's story it was a proper case for enquiry and I must deal with it on that basis both by reason of the order obtained from the Court and because I think such are the facts.

What happens when a debtor is adjudicated? What happens is, that all his assets are vested in the Official Assignee who may never have heard of him or of his circumstances before. The creditors all rank upon an insufficient fund, and when the adjudication order is made, creditors, who up till then had no right to take any part in questions as between the insolvent and other creditors, become entitled to see that no mortgage is admitted unless it is genuine, that no debt is allowed to rank unless it is really due. Moreover, bankruptcy always commences with the act of bankruptcy, which may be at any time within three months of the petition, and subject to certain exceptions bankruptcy rips up the insolvent's transactions in the meantime, on the footing that during that period he has really been a person in possession of assets, the beneficial right to which was in his creditors. Now, it has long been a settled practice in bankruptcy that the ordinary right of discovery which a litigant has, is insufficient and inadequate to meet the case; ordinarily a litigation must be started, issues must be defined, and only then is it possible to have discovery at all, and the discovery must be confined to the issues; but a trustee in bankruptcy, or a creditor, has got to learn everything from the start, and for that purpose he is given what are intentionally inquisitorial powers, not confined to the determination of issues that have been raised; he is given those powers subject only to the control of the Court. There need not be an existing litigation; on the contrary if a creditor or a trustee has started litigation with the person whom he desires to examine, he has *prima facie* given up his right so to do and ought, except in special circumstances, then to be confined to the ordinary rights of discovery of a litigant. The purpose of section 36 is to inform the mind of the Court, of the trustee, of the creditor, to inform their mind for the purpose of enabling them to decide whether to embark upon litigation or not; but for such a power as

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this, the bankruptcy Court would be helpless, and it would be impossible to make any pretence of administration of the debtor's estate as the law requires.

In England for the last 15 years or so, and for a considerable time, I think, before that, there has been a well settled practice under the section which corresponds to our section 36, and that practice is this; the trustee never pays the costs of the witness attending by Solicitor and Counsel; he pays only the witness' travelling expenses and the witness' allowance; if there are no proceedings afterwards, or if proceedings are taken, and are unsuccessful, these costs are not allowed to be recovered by the person who has been examined under section 36. On the other hand, if proceedings are subsequently taken, and the trustee or creditor succeeds, the trustee or creditor is never allowed to include his costs of the examination in the costs of the motion which the other party is ordered to pay. The witness, in short, is treated as a witness, and is not treated for this purpose as a party at the examination. That being so, whenever a trustee or creditor brings a motion in bankruptcy, he is expected and required by the Court to have used those powers before he commenced his motion, and this is necessary because otherwise it will be impossible for the Court to exact the same standard of proof from trustees in bankruptcy as it would exact from any other litigant. If these powers are not to be used, and if the standard of proof is not to be lowered, it would result simply in this: that bankruptcy, instead of being a terror for fraudulent debtors, will become a mere convenience in their interests. Mr. Langford James cited to me two English cases. The first is the case, of *Waddell, Ex parte, Lutscher, In re* (1). I have read that case, and it seems to me that the utmost which it decides is, that the Court in such a case as the present would not be without power to make the order asked for. Moreover, the remarks made in the course of that case are *obiter*. Lord Justice James said: "This is not the case of a man who is charged with having property in his possession belonging to a bankrupt and is summoned to give evidence respecting it. In such a case it might possibly be said that there was a litigation between him and the trustee and that he was entitled to be protected by Counsel." Long since this case was decided in 1877, the English practice has been settled and established in the sense I have mentioned. When I come to consider the present case upon its merits, I do not find anything that makes me exercise my discretion in the light of *Waddell, Ex parte, Lutscher, In re* (1). The next case that was mentioned was a case under the Companies Act before. Mr. Justice Warrington: *Appleton French & Scrafton Ld., In re* (2). In that case it would appear that the original application which had been taken out asked for a summons for the examination of witnesses and also for leave to issue a misfeasance summons against them. The main argument, so far as I am able to collect from the judgment, went upon the question of jurisdiction to make the order asked for; but when that was decided in the affirmative, Mr. Justice Warrington goes on to say [*Appleton French & Scrafton Ld, In re* (2)]: "I desire to say in the strongest terms that my exercise of discretion in this case is not to be used as a precedent in any other case. I intend to lay down no such general rule, and I only make the order asked for under the particular circumstances of this case. The summons asked for leave to examine witnesses and leave to issue misfeasance summons, and the examination was asked for for the express purpose of establishing a case in support of the misfeasance summons. I agree that ordinarily persons examined under section 115 of the Act of 1862, as in bankruptcy, merely as witnesses, would not be entitled to be paid out of the assets or otherwise their costs of employing Solicitors or Counsel," and then his Lordship cited *Waddell, Ex parte, Lutscher, In re* (1). I am not very clear what the special circumstances in the case before Mr. Justice Warrington were that made him make an order that should not be regarded as a precedent. I think they were these, that the applicant in that case in asking for a misfeasance summons asked for a summons under sections 115, because he thought in that way he could not only institute a litigation at once, but could get a part of the evidence which he required for that litigation taken in

(1) (1877) 6 Ch. D. 328; 36 L. T. 345; 26 W. R. 9.

(2) (1905) 1 Ch. D. 749 at p. 755; 74 L. J. Ch. 471; 93 L. T. 8; 53 W. R. 601; 12 Manson 335.

the other way so as not to make himself liable to pay costs. Some such notion as that or perhaps some other exceptional circumstances may be the explanation; but as far as the precedent is concerned, I shall follow Mr. Warrington's request and I shall not accept it as a precedent in an ordinary case.

On the facts of the case before me I think there are no special circumstances except possibly one. It would appear that this mortgagee has been examined at different times on, at any rate, four days before the Registrar. *Prima facie*, that is a much longer time than an examination under this section ought to be allowed to take. I am not going to assume that there was anything irregular or wrong, so far, at all events, as the respondents here are concerned. There is no evidence whatever of that. I do notice that the Attorney for the insolvent was present at the examination and if he took any part in the examination, that action was quite wrong. That is the only fact that I can see that I ought to regard as at all a special fact in this case. Whether if a part, a large part, of the four days can be shown to have been occupied by the examination on behalf of the insolvent, I should be disposed to make an order in another application, is a question. There can be no order against the present respondents. In the presence of the Official Assignee, possibly in the presence of any subsequent encumbrancer on the mortgaged property, there might be a question of asking me to make the costs of defending his right part of the mortgagee's costs. There might also in another application be a question of making a case for asking me to give some portion of his costs out of the estate. I do not invite either application on the part of the present applicant but I keep my mind open. All I say at present is, that there is to my mind no case here why, in my discretion, I ought to make the order asked for against the respondent. In India, far more than in England, it is necessary to encourage creditors to look after themselves in connection with bankruptcy. I cannot get creditors to take nearly enough interest in the administration of the estates before me, and I am certainly not going to lay it down that the costs of an honest and necessary enquiry are to be thrown upon the creditors who take part in the administration within their rights, in any greater decree or upon any stricter footing than is the practice at home. For these reasons the present motion is dismissed with costs. I certify for Counsel.

Application refused.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT NO. 355 OF 1918.

February 15, 1919.

Present:—Mr. Justice Marten.

KHEMCHAND ISSARDAS—PLAINTIFFS

versus

KHAIRUDDIN RANGLAHI AND ANOTHER —DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXXV, r. 4—Interpleader suit—Claimants, failure of, to appear—Procedure.

Where in an interpleader suit both the claimants fail to appear, the proper course for the Court is to follow the procedure laid down in the first part of rule 4 (1) of Order XXXV of the Civil Procedure Code and to declare that the plaintiff is discharged from all liability to the defendants in respect of the money claimed, award him his costs, dismiss him from the suit and direct that after getting his taxed costs he must pay the balance of the money in his hands into Court to the credit of the suit. [p. 367, col. 1]

The order might further provide that it is to be without prejudice to any claim by the defendants or either of them for payment out of Court, or alternatively that the suit may proceed in the names of one of them as plaintiff in place of the original plaintiff or alternatively that an issue be directed to determine the rights of the two defendants *inter se*. [p. 367, col. 1.]

Mr. *M. C. Setalvad*, for the Plaintiffs.

JUDGMENT.—This is a very curious case. It is an interpleader suit brought by the plaintiffs but neither of the two defendant-claimants appears at the trial. The 1st defendant has not entered an appearance at all in the suit. The 2nd defendant did appear by a Solicitor in the suit but has not appeared at the trial.

The question, therefore, that arises, assuming the plaintiffs make out their case, is what relief the Court ought to grant.

The facts very shortly are these. The plaintiffs are commission agents, and in

July 1917 they received instructions from defendant No. 1 by telegram to sell 112 bales of cotton which were being consigned to the plaintiffs through defendant No. 2. They were also instructed to honour a *hundi* for Rs. 12,000 which the defendants or one of them were to draw on the plaintiffs. The cotton arrived and was duly sold and the *hundi* was honoured and paid by the plaintiffs. After doing all that, and after giving credit for the sale proceeds, and after debiting the parties with the *hundi*, there remains a balance of Rs. 2,553-2-7, which the plaintiffs admit are due from them.

Now what has happened is this: that defendant No. 2 claims that he was really the pledgee of the goods, that he was really the consignor to the plaintiffs and that as between himself and defendant No. 1, he ought to receive the balance of the purchase-money.

A reference to Daniel's Chancery Practice, Vol. II, 7th Edn., at p. 1275, shows that interpleader was originally a remedy in the Equity Courts and was begun by a bill of interpleader. Subsequently by statute interpleader was extended to the Common Law Courts and was later on amplified and is now governed by the Rules of the Supreme Court which will be found in R. S. C. O. 57. Those Rules are somewhat to the same effect as the provisions as to interpleader embodied in section 88 and in the 1st Schedule, Order XXXV, of the Civil Procedure Code.

Mr. Setalvad has not referred me to any of our Bombay High Court Rules dealing specifically with interpleader. As far as my recollection goes, I do not think we have any Rules modifying what is to be found in the Civil Procedure Code. One knows that interpleader is rather a technical subject, and that it is not always open to the parties to obtain relief by way of interpleader. I have not had the benefit of any argument on the point, but, as far as I can see, the plaintiffs have, according to the practice here, properly taken their proceedings by plaint. Proceedings by originating summons do not appear to be open to them, as would be the case in England. Therefore, as far as I can see, this is a case where within the meaning of section 88, two or more persons claim adversely to one another the same debt from the plaintiffs.

I think, therefore, the suit has been properly brought. The evidence in support of it is in order, and, therefore, as far as the plaintiffs are concerned, I think they have done all they can.

Now comes the question, what course I ought to adopt? Turning to Order XXXV, rule 4, it provides that:—

"At the first hearing the Court may (*a*) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or (*b*) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit."

There are also certain other alternatives. Under sub rule (2) if I find that the admissions of the parties or other evidence enable me to do so, I may adjudicate the title to the thing claimed. Or, again, under sub rule (3) if I find that the admissions of the parties do not enable me so to adjudicate, then I may direct issues to be framed and tried, and can proceed to try the suit in the ordinary manner.

That is all very well, when there are two claimants before the Court, but in fact I have got neither the one nor the other. I cannot possibly try an action where I have got neither the plaintiff nor the defendant, nor, on the other hand, can I adopt the course of merely dismissing the claim of one or dismissing the claim of the other. There is money in the hands of the plaintiffs which admittedly does not belong to them. Therefore I must make some order which will put matters in train for the due disposition of this sum and for its custody meanwhile, and which will at the same time give a complete discharge to the present plaintiffs.

Mr. Setalvad did refer me to one case of *Eveleigh* v. *Salisbury* (1). It was an interpleader suit and there neither the plaintiff nor the claimant appeared. It was the case of a Sheriff having seized certain goods, and there the Court simply directed so much of the goods to be sold

(1) (1836) 3 Bing (N. S.) 213; 3 Scott 671; 5 D. P. C. 369; 132 E. R. 425.

as would satisfy the Sheriff's charges and directed the Sheriff to abandon the rest of the goods. In other words, it directed the Sheriff to withdraw after realising his charges.

I cannot take that course here, because I cannot put matters in *statu quo* as was done there. I must make some order as to what is to be done with the moneys in the hands of the plaintiffs.

On the whole I think that the proper course will be to follow strictly the first part of the rule 4 (1) of Order XXXV and to declare that the plaintiffs are discharged from all liability to the defendants in respect of the money claimed, award them their costs and dismiss them from the suit, and treat this as the first hearing.

Then I will direct that the plaintiffs after getting their taxed costs must pay the balance of the Rs. 2,558 into Court to the credit of this suit.

Then the order will provide that it is to be without prejudice to any claim by the defendants or either of them for payment out of Court, or alternatively that the suit may proceed in the names of one of them as plaintiff in place of the present plaintiffs, or alternatively that an issue be directed to determine the rights of the two defendants *inter se*.

I think the order may also say, to make it quite clear, that this should be treated as an order at the first hearing under rule 4 (1) (*a*) of Order XXXV of the Civil Procedure Code.

Then Mr. Setalvad said he would also like to have an injunction. I do not know that he really requires an injunction, but certainly one of the defendants has threatened the plaintiffs with proceedings, and I think it may properly form part of the order that on payment into Court of the balance the defendants and each of them are to be restrained from taking any further or other proceedings against the plaintiffs in relation to the suit goods or the proceeds of them.

I think that really deals with the points.

My order will, therefore, be:—

Direct plaintiffs' costs to be taxed and paid out of the Rs. 2,558 in plaintiffs' hands. Direct balance of Rs. 2,558 to be paid to the Accountant-General to the credit of this suit.

Declare that, on such payment, plaintiffs will be discharged from all liability to defendants or either of them in respect of the suit goods or the proceeds thereof, and direct that thereupon the plaintiffs be discharged from this suit and that defendants and each of them be thenceforth restrained from taking any further or other proceedings against plaintiffs in respect of said goods or the proceeds thereof.

This order to be without prejudice to any claim by defendants or either of them for payment out of Court or for the suit to proceed in either of their names as plaintiff or for an issue to be tried.

This order to be treated as made on the first hearing under Order XXXV, rule 4 (1) (*a*), of the Civil Procedure Code. Liberty to apply.

The draft decree is to be submitted to me before it is passed and entered.

Notice of this order is to be given to both claimants, defendants Nos. 1 and 2.

Order accordingly.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL No. 94 OF 1918

AND CIVIL REVISION PETITION No. 1226 OF 1918.

August 1, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Burn.

ODAYAMANGALATH APPANNI NAIR—APPELLANT

versus

ISAAK MACKADAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 135, O. XXXVIII rr. 1, 3—Surety bond, construction of—Undertaking to produce defendant at time and place ordered and to be liable for decree amount in default—Appearance of defendant in Court to conduct case—Release of surety on application for discharge, validity of—Privilege of party while in Court on Court business—Liability of surety where decree passed on compromise—Contract Act (IX of 1872), s. 135.

ODAYAMANGALATH APPANNI NAIR *v.* ISAAK MACKADAM.

A person executed a security bond undertaking to produce the defendant in a suit at the time and place ordered by the Court, and that on his failure to do so, he and his property would be liable for the amount payable to the plaintiff. While the defendant was in Court conducting his case, the surety asked to be relieved from his obligation, but as the defendant was unwilling to surrender, the application was disallowed. Thereafter the plaintiff and defendant agreed to a consent decree which was put into execution against the surety. On appeal the District Judge discharged the surety from his obligation. On second appeal to the High Court:

Held, that in order to discharge the surety from his obligation it was necessary for the defendant to appear in pursuance of a summons or warrant, or to voluntarily surrender to the Court, and to submit himself to be dealt with by the Court as directed by Order XXXVIII of the Civil Procedure Code and that as the defendant was not before the Court in the manner above indicated and did not surrender, the surety could not be discharged. [p. 369, col. 2.]

Where a person becomes surety for the production of the defendant in a suit, the fact that the parties effect a compromise, instead of going to trial, would not relieve the surety of his obligation to the Court. [p. 370, col. 2; p. 371, col. 2.]

A party who is before the Court to conduct his own case or to give evidence should not be arrested while he is before the Court or when leaving the Court house. [p. 370, col. 2; p. 371, col. 2.]

The provisions of the Civil Procedure Code should be strictly complied with in taking surety bonds. [p. 370, col. 1.]

Appeal and petition against the order of the District Court South Malabar, in Civil Miscellaneous Appeals Nos. 28 and 29 of 1918 respectively, preferred against the orders of the Court of the Additional District Munsif, Calicut, in Execution Petition No. 2513 of 1917, and Miscellaneous Petition No. 342 of 1917 respectively, in Original Suit No. 325 of 1917 on the file of that Court.

FACTS appear from the judgment.

Mr. *K. P. M. Menon*, for the Respondent, took the preliminary objection that the civil revision petition did not lie to the High Court, as the District Judge's order, even though wrong in law, was not lacking in jurisdiction. The civil miscellaneous appeal also went with the civil revision petition and followed the fate of the latter.

The Court overruled the objection so far as the civil miscellaneous appeal was concerned.

Mr. *C. Madhavan Nair*, for the Appellant.—The bond is not in the form specified in the Civil Procedure Code. The surety could not be discharged as the conditions laid down in Order XXXVIII, rule 3, Civil Procedure Code, have not been fulfilled. The defendant was not brought to Court under coercive process. He was present to conduct his own case and, as is apparent from the Munsif's judgment, he declined to surrender himself. His mere presence in Court would not amount to surrender, unless he submitted to the Court to be dealt with under Order XXXVIII. Under section 135 he is immune from arrest while in Court on Court business.

The provisions of section 135 of the Contract Act do not apply, as the bond was given to the Court and the section only applies to contractual relations between the parties.

Mr. *Menon*, for the Respondent.—The surety's obligation ceases when the defendant is somehow before the Court after he has applied for discharge. It would be meaningless not to secure the defendant when he is actually in Court but to let him go and then issue fresh process against him. The defendant was in Court only in connection with the very case in which he was required to furnish security.

The decree having been passed by consent of parties, the surety was discharged from his obligation. *Vide* section 135 of the Contract Act.

JUDGMENT.

SESHAGIRI AIYAR, J.—The original suit was instituted against one C. W. Fuller. In the course of the suit an application was made for his arrest. When he was brought before the Court, the respondent before us agreed to stand surety for him. Thereupon Fuller was released from custody. I shall refer to the terms of the bond and its legal effect later on. Subsequent to this, the surety asked the Court, at a time when Fuller was before it to conduct his case, that he should be relieved from his obligation to produce the defendant. The District Munsif did not apparently agree to this course. Thereafter the plaintiff and the defendant agreed to a consent decree which has now been put into execution. The surety, whose bond was not in terms discharged, now pleads that by his producing the defendant before the Court and praying to be relieved from responsibility the liability which he undertook under the bond was put an end to. There is a further contention that as the parties

to the suit instead of going to trial agreed to a decree by consent, the surety was discharged under section 135 of the Indian Contract Act. The District Munsif rejected these contentions and ordered execution. On appeal the District Judge has reversed the order. A civil miscellaneous appeal against the order refusing execution against the surety and a civil revision petition against the order discharging the surety from liability have been filed in this Court.

Mr. Menon for the respondent raised a preliminary objection that as the District Judge in the exercise of his appellate powers released the surety from liability and as his decision on law does not affect his jurisdiction, the civil revision petition is incompetent. As regards the civil miscellaneous appeal his contention is that if the civil revision petition goes, the ground of appeal in civil miscellaneous appeal fails and should be dismissed. It may be that for the hearing of the civil revision petition the preliminary objection has some force. But as the same order has been passed in the appeal from which the civil miscellaneous appeal has been presented, we are entitled in second appeal to scrutinize the correctness of that order. I must overrule the objection so far as it relates to the civil miscellaneous appeal.

Now to the merits. Mr. Madhavan Nair at the outset referred us to the terms of the bond which ought to have been taken by a Civil Court under Order XXXVIII. Form No. 2 in Appendix F of the Code of Civil Procedure is far more comprehensive than the bond which has been taken in the present case. The attention of the District Judge should be drawn to the incompleteness and inaccurate language of the bond now before us. It is desirable that in taking bonds of this description the provisions of the Code should be strictly complied with. Nonetheless we are not concerned now with what might have been the terms of the bond but only with the interpretation of the actual agreement that was signed. We must, therefore, deal with the liability of the surety with reference to the bond which he actually executed. By that bond which is Exhibit A in the case, the surety undertook "to produce the defendant at the time and place ordered by the Court. If I fail to do so, I and my properties are liable for the amount payable to the plaintiff." The question for consideration is, did he produce the defendant at the time and place ordered by the Court? The procedure to be adopted on an application by the surety for discharge, from liability is contained in Order XXXVIII, rule 3. Two contingencies are contemplated in that rule. The first is an application by the surety for discharge, whereupon the Court decides either to summon the defendant or to issue a warrant for his arrest. Clause (3) of that rule provides for the discharge of the surety: "On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security." It is conceded that there was no summons or warrant against the defendant. He was in Court for the purpose of conducting his suit. The next point is did he surrender himself on that occasion? The District Munsif says: "He also expressed his unwillingness to surrender that day. I declined to arrest him on the spot, as he being a party attending Court for the purpose of conducting his case is exempt from arrest." In order to satisfy the requirements of a surrender it is not enough that a party is before the Court, but he should submit himself to be dealt with by the Court as directed by Order XXXVIII. The sentence from the Munsif's judgment which I quoted makes it clear that the defendant did not surrender.

Learned arguments were addressed to us upon the question whether it is necessary that the defendant must be in a position to be arrested in order that the requirements of production by the surety may be satisfied. The two provisions of the Code which have a bearing on this question are Order XXXVIII, rule 1, and section 135. Under Order XXXVIII the Court is empowered at any stage of the suit to issue a warrant to arrest the defendant and to bring him before the Court. At first sight it may appear as if the defendant is liable to be arrested while he is engaged in the conduct of his suit. But turning to section 135 the meaning of the Legislature seems to be clear. The first

clause of section 135 provides for immunity of judicial officers from arrest while discharging their judicial functions. By clause 2 the parties to the suit, Pleaders and witnesses are exempted from arrest. The latter portion of clause (2) says that in cases in which the party before the Court is guilty of contempt, the exemption would not apply to him. Clause (3) provides for a further exception and enables a decree-holder to apply for the arrest of the judgment-debtor immediately after the decree. These are the only two exceptions which the law has recognised, and it seems to me that notwithstanding obvious inconveniences in requiring that an application should be made for the arrest of a judgment-debtor, while allowing him to get away from Court, the Code leaves us no room for doubt on the matter. The principle enunciated in section 135 has long been recognised in England and in India. It is not necessary to consider the vexed question whether the rule has been enacted in favour of parties or to safeguard the rights of the Court. I am inclined to the view, which has found favour with some eminent Judges both in this country and in England, that the intention of the Legislature is to enable Courts to render justice as between party and party by not subjecting a person who is expected to assist them in the discharge of his duties to the disability of a possible arrest. However that may be, the principle of exemption has been well stated in *Appasami Pattar* v. *Govinen Nambiar* (1) in these terms: "The well-established rule of English law that a witness or party to a civil suit, whose attendance is required on a trial before a judicial tribunal, is protected from arrest on civil process during the time reasonably occupied in going to, attending at, and returning from, the place of trial, rests on a principle which applies with full force here, namely that freedom from the fear of arrest encourages willing attendance and thus tends to the advancement of justice." That case is also an authority for the proposition that a party who comes to Court to give evidence should not be arrested while he is before the Court. The principle of this decision has been followed in a later decision in *Zainab Bee* v. *Official Assignee of Madras* (2). In that case the learned Chief Justice and Mr. Justice Oldfield held that, while a person appeared in Court to prosecute an insolvency petition, he should not be arrested for claims arising under the petition for insolvency. *John* v. *Carter* (3) also contains observations to the same effect. Mr. Menon strenuously contended that it would be a meaningless procedure to demand that a fresh process should issue for bringing a person to Court without taking steps to detain him in custody while he is already actually before it. As I said before, the rule of exemption of a party appearing to conduct a case is a principle founded on a well recognised theory of jurisprudence which we are not at liberty to ignore. I am, therefore, unable to agree with the view of the District Judge that the presence of the defendant in Court, albeit it was for conducting his suit at the time when the surety asked the Court to discharge him from obligation, was a compliance with Order XXXVIII, rule 3.

There is one other contention of Mr. Menon which must be referred to. He argued that as his client undertook the liability only for any decree that may be passed on trial and as the ultimate decision of the Court was based on a compromise, the bond spent itself out. Mr. Madhavan Nair furnished two answers for this contention and I think both of them are right. The first is that the surety bond does not say that the liability is to be only for a decree that may be passed on contest. There is nothing unreasonable in a surety agreeing to be bound by a decree which may be passed either after trial or with the consent of parties. In the absence of a special stipulation in that behalf there is no ground for limiting the liability only to a decree passed after contest. If there has been collusion between the plaintiff and the defendant in obtaining the decree, the surety is not without remedy. Secondly, section 135 of the Indian Contract Act contemplates contractual obligations between the parties. Under the Code of Civil Procedure the bond is given to the Court and any infringement of the terms of the bond

(1) 4 M. H. C. R. 145.

(2) 24 Ind. Cas. 513.
(3) 4 B. L. R. O. C. J. 90.

is a violation of the obligations to the Court and therefore the agreement between the parties which resulted in a compromise decree has not the effect of discharging his liability to the Court. For all these reasons I think the order of the District Judge should be reversed and that of the District Munsif restored with costs here and in the Court below. The civil revision petition is dismissed without costs.

BURN, J.—Action was taken against the 1st defendant in Original Suit No. 325 of 1917 (Calicut Additional District Munsif's Court) under Order XXXVIII, rule 1, of the Code of Civil Procedure. Security was furnished and the surety is the respondent in civil miscellaneous second appeal and civil revision petition. The bond which he executed does not follow the wording of the form given in the Appendix to the Code of Civil Procedure, but the variation does not appear to me to be material for the disposal of the present matter. The liability with which the surety has been saddled by the Court of first instance is clearly within the terms of the bond. The surety can escape only by showing that his liability has been terminated. The bond was executed on 31st December 1915 and the suit was disposed of on the 15th November 1917, when a decree was passed in favour of the plaintiff in accordance with the terms of a compromise entered into between him and the defendants. On the same day the surety applied to the Court to be released from his obligation, on the ground that business engagements would prevent him from producing the defendant before the Court in future. The 1st defendant was present in Court and the Court was asked to take him into custody. The District Munsif declined to do so, holding that the 1st defendant was exempt from arrest because he was attending the Court as a party for the purpose of conducting his own case. The 1st defendant was allowed to leave the Court and summons was issued for his appearance (Order XXXVIII, rule 3). He did not appear and steps were not taken as the surety failed to pay the requisite *batta*. The respondent's application for discharge was dismissed on the 5th June 1918 and the decree-holder was permitted to proceed in execution against the respondent, but these orders were reversed by the District Judge. The decree-holder has, therefore, preferred the present civil miscellaneous second appeal and civil revision petition. The appeals before him (District Judge) were disposed of simultaneously and there is in effect only one judgment. I think the whole matter is open for consideration.

The District Judge was of opinion that by the mere fact of the 1st defendant's appearance in Court, the obligation of the surety was discharged. In this, I think, he was wrong. The procedure provided by Order XXXVIII, rule 3, had to be adopted before the Court could grant the discharge. The issue of a warrant is in any event discretionary and I am inclined to agree with the District Munsif that in the present instance, the 1st defendant was protected against arrest in Court by the provisions of section 135 of the Code of Civil Procedure. It is immaterial that his presence was in connection with the suit in which security had been required, *vide* in *Appasami Pattar* v. *Govinen Nambiar* (1) and in *Zainab Bee* v. *Official Assignee of Madras* (2). Order XXXVIII, rule 3, contemplates that the application of a surety should be disposed of after the defendant has been brought before the Court for the purpose of the application or has surrendered to the Court for this purpose. These conditions were not complied with in the case.

For the respondent the principle underlying section 135 of the Contract Act has been referred to, and it has been contended that as the 1st defendant entered into a compromise with the plaintiff without the assent of the surety, the latter is discharged from his obligation under the security bond. This provision is not, in my opinion, applicable. The respondent had made himself liable for the amount that might be adjudged against the defendant. This adjudication might follow a compromise which the Court considers lawful and the liability of the surety is not limited to cases where there has been a contest to the finish. The liability of a surety is neither greater than nor different from that which he undertook.

I agree that the orders of the District Judge should be set aside and those of the

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District Munsif restored with costs of the civil miscellaneous second appeal.

Appeal allowed.

M. C. P.

BOMBAY HIGH COURT.

CASE No. 3 OF 1915.

June 9, 1919.

Present :—Sir Norman Macleod, KT., Chief Justice.

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Prize Court—Vessel belonging to neutral having hostile commercial domicil, whether can be condemned —Orders in Council, effect of—Crown, right of, to alter law applicable to Prize Courts.

Where it is found by a Prize Court that on the outbreak of war a claimant who is a neutral subject had his *commercial* domicil in enemy territory and that at the time of the capture of the vessel and for a long time after he had no intention of removing that domicil to a neutral country, the vessel must be condemned as lawful prize [p 379, cols. 1 & 2.]

(Authorities discussed and reviewed.)

While the Crown cannot by Orders in Council prescribe or alter the law to be administered by a Court of Prize, the Court would act on Orders in Council in every case in which they amount to a mitigation of the Crown's rights in favour of the enemy or neutral, as the case may be. [p 372, col. 2.]

Messrs. *Strangman* and *Nicholson*, for the Government.

Messrs. *Mirza* and *Inverarity*, for the Claimant.

JUDGMENT.—On the 11th March 1915, I delivered a preliminary judgment in the matter of the S.S. Karadeniz. I was then of opinion that I was bound by an Order in Council of the 20th August 1914 to consider the Declaration of London as governing this case, that under Article 57 of the Declaration the neutral or enemy character of a vessel is determined by the flag she is entitled to fly, and that before the capture the Persian Government had recognised this vessel's right to fly the Persian Flag. That, therefore, the vessel could not be condemned as lawful prize unless I was satisfied that in spite of the apparent validity of the transfer of the vessel to the claimant, the control of the vessel remained in the hands of the Turkish vendors. On the evidence there was considerable justification for my holding that there was an arrangement between the claimant and the vendors that the latter should retain the control of the vessel and use the transfer as a means of getting her to the nearest Turkish port under the Persian Flag, but the claimant asked to be allowed to produce further evidence regarding the *bona fides* of the transfer, so I directed the cause to stand over for further proof. Some further evidence has now been taken in England on commission, but owing to the continuance of hositilities the claimant has been unable to procure the evidence he wanted from Constantinople. However, owing to a recent decision of the Privy Council the Government have asked me to set down the cause for further argument, and I have heard the arguments of Counsel on the question whether the vessel should not be condemned as lawful prize on the ground that the commercial domicil of the claimant at the time of the capture was Turkish. Their Lordships of the Privy Council held in *The Zamora* (1), that while the Crown cannot by Orders in Council prescribe or alter the law to be administered by a Court of Prize, the Court would act on Orders in Council in every case in which they amount to a mitigation of the Crown's rights in favour of the enemy or neutral, as the case may be.

Then, in *The Proton* (2) the question arose whether Article 57 of the Declaration of London, which it was declared by the Declaration of London Order in Council No. 2 of 1914 should be adopted and put in force, prescribed the law to be administered by a Court of Prize or directed that the rights of the Crown were to be mitigated in favour of a neutral or of the enemy. The judgment says :—

"In their Lordships' opinion the former is the effect of the article. It declares that a Court of Prize shall determine the character of a vessel alleged to be of enemy character by one single circumstance, the character of the flag which she is entitled to fly, and not by the entire body of relevant circumstances, which determine the truth as to that character. This is a positive prescription as to a material part of the law of evidence...The terms of this article are little adapted to a

(1) (1916) 2 A. C. 77; 85 L. J. P. 89; 2 P Cas. 1; 114 L. T. 626; 60 S. J. 416; 32 T L. R 436 (P. C.).

(2) (1918) A. C. 578 at p. 581; 87 L. J. P. C. 114.

waiver of His Majesty's rights in favour of others ; they clearly purport to prescribe the law on a topic which has been the subject of many decisions."

In my previous judgment I said :—

"But for the change effected by Article 57 there would have been no difficulty in deciding this case. According to the authorities the claimant at the outbreak of hostilities for the purposes of Prize Law would be considered a Turkish subject by reason of his mercantile domicil, unless within a reasonable time he transferred himself and his property to another country. See *The Ariel* (3). But this he had no intention of doing. It was by mere chance that he was at Piræus when the war broke out, and in his evidence he said that he intended to go back as soon as the Dardanelles were open to look after his business. It was immaterial to him whether war was going on or not."

I have now been asked by Counsel for the claimant to reconsider the opinion I then expressed regarding the commercial domicil of the claimant, when the question was one of mere academical interest, while Counsel for Government contend that on the authority of *The Proton* (2) it is clear that the vessel must be condemned unless I can come to a different conclusion. I am not prepared to say now that the question is so free from difficulty as I thought it was when I delivered my first judgment.

However, it has been argued for the claimant that I definitely decided that I was bound by the Order in Council and that it is not open to me to reconsider the case in the light of the judgment of the Privy Council in *The Proton* (2). I think I am entitled, before final judgment is given, either condemning or releasing the vessel, to reconsider any opinion I have previously expressed.

The Hague Convention does not apply to this case, as it was not ratified by Turkey. If then I can find that the Karadeniz bore an enemy character, she must be condemned. I shall now consider the authorities on that point.

"If a person has a settlement in a hostile country by the maintenance of a commercial establishment there, he will be considered a hostile character and a subject of the enemy country, in regard to his commercial transaction, connected with that establishment": Kent's International Law, p. 217.

In *The Indian Chief* (4) it was laid down by Sir William Scott that for all commercial purposes the domicil of the party without reference to the place of birth becomes the test of national character. The character that is gained by residence ceases by non-residence and is an adventitious one, no longer adhering to the subject of it from the moment he puts himself in motion to quit the country *sine animo revertendi*.

Therefore Kent says that the most important test is the *animus manendi*.

In *The Gerasimo* (5) it was laid down that :—

"The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country."

The property of a person not resident in enemy territory may acquire a hostile character.

In *The Jonge Klassina* (6) a claim was made by a Mr. Ravie, describing himself as Ravie of Birmingham, to certain goods coming to be imported from Holland under the authority of a license. Ravie had been to Amsterdam in connection with the export of the goods and the Court ordered their confiscation on the ground that it appeared from the evidence that Ravie had been as substantially employed in the trade of Amsterdam as any other mercantile firm of that place.

In *The Ann* (7) the ship under American colours was seized in the river Thames on the 1st August 1812. A claim was made by the master who was also sole owner of the ship, describing himself to be a British subject and as such entitled to the benefit of an Order in Council of November 1812 directing the restitution of British ships under the American Flag. The claimant said he was born in Falkirk in Scotland,

(4) (1800) 3 Rob. 12 at p. 20.
(5) (1857) 11 Moore P. C. 88 at p. 96; 5 W. R. 450; 14 E. R 628.
(6) (1804) 5 Rob. 297.
(7) (1813) 1 Dod. 221 at p. 223.
(8) (1857) 2 English Prize Cases 600 at p. 606,

that during the last seven years he had been chiefly at sea but when at home he had lived and still lived at Bathgate in the Shire of Linlithgow, where his wife and family were, that he was a British subject but that about sixteen years ago he had been admitted a citizen of the United States of America for the purpose of commerce only. The Court said: "Why *this* transaction is for the purpose of *commerce*: According to his own account, then, he ceased to be a *British* subject for *commercial* purposes." Nor did the mere circumstance of leaving his wife and family in Scotland avail him for the purpose of retaining the benefit of his national character.

In the leading American case of *The Venus, Rae, Master* (8) the decisions of the English Courts on the subject of national character acquired by residence and on the consequences of such acquired character were recognised as being founded on sound principles of public law.

"As a consequence of the doctrine of domicil, the Court decided (by a majority) that if a citizen of the United States should establish his commercial domicil in a foreign country, and hostilities should afterwards break out between that country and the United States, his property, shipped before knowledge of the war, and while that domicil continued, would be liable to capture, on the ground that his permanent residence had stamped him with the national character of that country.....The doctrine of enemy's property, arising from a domicil in an enemy's country, is taken strictly; and equitable qualifications of the rule are generally disallowed, for the sake of preventing frauds on belligerent rights, and to give the rule more precision and certainty." Kent's International Law, page 223.

In *The Eumæus* (9), decided in November 1915, Sir Samuel Evans said that Professor Dicey's definition of 'commercial domicil' as such residence in a country for the purpose of trading as makes a person's trade or business contribute to or form part of the resources of such country and renders it, therefore, reasonable that the hostile, friendly or neutral character should be determined by reference to the character of such country, was sufficiently clear and accurate for practical purposes.

It must be noted, however, that a person who has an interest in a house of trade in one country, although not resident there, is sometimes said to have a commercial domicil in that country and a personal domicil in the country in which he resides. See *The Anglo-Mexican* (10).

"Again, it seems clear that a neutral wherever resident may, if he owns or is a partner in a house of business trading in or from an enemy country, be properly deemed an enemy in respect of his property or interest in such business. He acquires by virtue of the business a commercial domicil in the country in or from which the business is carried on, and this commercial domicil, though it does not affect his property generally, will affect the assets of the business house or his interest therein with an enemy character."

From the opinion of the majority in *The Venus, Rae, Master* (8) Marshall C. J., dissented, contending that a commercial domicil wholly acquired in time of peace ceases at the commencement of hostilities, that the presumption of an intention to return to the native country at the first opportunity is to be entertained and that this presumption ought to shield the property from condemnation until delay or circumstances destroy that presumption. If then property of a neutral with a commercial domicil in belligerent territory is liable to capture although shipped before the outbreak of war, it would follow that a ship belonging to such a neutral, if captured at sea or in port on the outbreak of war, would be liable to be treated as an enemy ship, although the owner may have had no opportunity of absolutely relinquishing his commercial domicil.

I have searched through some hundreds of decisions of the Prize Courts of the Allies during this war in the hopes of finding a case the facts of which were in any way approximate to the facts in this case, but without success. *The Venus, Rae, Master* (8) was referred to by Sir Samuel Evans in the case of *The Manningtry* (11) decided in

(8) (1814) 8 Cranch 251 at pp. 314, 315; 3 Law. Ed. XIII U. S. 553.
(9) (1915) 1 Br. & Col. P. C. 605; 60 S. J. 605; 32 T. L. R. 125.
(10) (1918) A. C. 422 at pp. 425, 433, 434.
(11) (1916) P. 329 at pp. 339, 340; 1 P. Cas. 497; 60 S. J. 75; 32 T. L. R. 36.

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October 1915. Certain goods had been shipped before the outbreak of war by a partnership of four members. three of whom were in the position of British subjects and the fourth was a German subject. The place of business was in Germany. The President said:

"The question to be determined would be what the position was in the circumstances of this case with regard to the right of capture or seizure of the goods at sea after the commencement of hostilities. If a subject of a belligerent or a neutral had a business in hostile territory at the outbreak of war, and resided there, he would, according to international law, have a commercial domicil there, and his goods would be subject to capture at sea after hostilities, although shipped before the war, ... [*The Venus, Rae, Master* (8)]. Apart from a commercial domicil by residence, the property of a person may acquire a hostile character, independently of his national character or his personal residence. If a person be a partner in a house of trade in an enemy's country, he is, as to the concerns and trade of that house, deemed an enemy: Pratt's Edn. of Story, p. 60; and the property of the house of trade established in an enemy country is considered liable to capture and condemnation as prize: Wheaton, Inter. Law, 4th Edn. (1904), section 334. The rule is succinctly stated by Story, J., in *The Friendschaft* (12): 'It has been long since decided in the Courts of Admiralty that the property of a house of trade established in the enemy's country is condemnable as prize, whatever may be the domicil of the partners. The trade of such a house is deemed essentially a hostile trade and the property engaged in it is, therefore, treated as enemy's property, notwithstanding the neutral domicil of any of the company'. But it seems also to be settled that in such cases confiscation will not take place at the commencement of war, if the trade has been carried on during peace, unless the person affected continues his connection with the trade after the war: Pratt's Edn. of Story, p. 61... *The Vigilantia* (13). It is not easy to see why, in the case of a partner in a hostile house of trade, time should be given to sever connection after war before confiscation by capture at sea is permitted, *when no such opportunity is given to a person having a commercial domicil by residence in hostile territory.* But I accept the law as it stands."

In his dissenting judgment in *The Venus, Rae Master* (8) Marshall, C. J., discussed how a commercial domicil might be terminated. He said:—

"If a British subject, residing abroad for commercial purposes, takes decided measures, on the breaking out of war, for returning to his native country," and again,

"An immediate discontinuance of trade, and arrangements for removing, followed by actual removal within a reasonable time, unless detained by causes which might sufficiently account for not removing, would fix the intention to change the domicil".

In *The Manningtry* (11) the President decided that the British partners had not taken immediate steps, as their duty was, at the outbreak of war, to divert the goods from reaching Germany and condemned their shares. If they had been neutral the case would have been different.

"The question turns upon the stage at which in the case of a pre-war shipment a neutral partner in an enemy house of trade ceases to have his share in the partnership property protected from confiscation... One test would be whether the neutral partner has done anything actively after the commencement of hostilities to further or facilitate the delivery of the goods to the enemy house...If the neutral does no act after the war in regard to the goods, but merely allows them to proceed in the ordinary course, I find it difficult to hold that his share in the goods innocently shipped should be forfeited. He has no duty in regard to the goods towards the belligerent State to stop their delivery because he has an undivided share in them. His situation appears to me to differ in that respect from that of a partner who is a subject of the belligerent State." *The Anglo Mexican* (14).

It would also seem that in the President's opinion a British subject carrying on a business in Germany but not resident there would be allowed an opportunity to sever his connection, as he cites with

(12) (1819) 4 Wheat. 105 at p. 107; 4 Law Ed. XVII U.S. 525.

(13) 1 C. Rob. 1 at p. 15.

(14) (1916) P. 112 at p. 116; 85 L. J. P. 148; 2 P. Cas. 80; 114 L. T. 807; 60 S. J. 418.

approval a passage from Calvo, Vol. IV, section 1937, p. 70:—

"According to these principles, if a merchant domiciled in a neutral country does not take at the commencement of the war immediate measures for withdrawing his goods from a commerce which has no longer a neutral character and to which he could legitimately attend in time of peace in the country of a belligerent, he cannot guarantee his goods from capture and from hostile confiscation by alleging that personally he resides in a neutral country."

In these days there would no doubt be difficulties placed in the way of withdrawing property, but I presume from this passage that if a British or a neutral subject engaged in trade in Germany at the outbreak of the war in August 1914, but not resident there, had goods at sea belonging to that trade, they would not be liable to capture and confiscation, provided the owner had taken such immediate steps as were open to him to divert the goods from that trade.

These questions were discussed by Judge Cator in the case of *The Lutzow* (No. 4) (15) before the Egyptian Prize Court in March 1916.

The Lutzow was a German ship which was captured and condemned as prize. A claim was made to certain goods on board her by the American Trading Company which had a branch in Hamburg. The goods had been bought by the Hamburg branch and had been shipped for transmission to another branch at Kobe. It was held that at the time of the capture the ownership was in the Hamburg branch and the goods were, therefore, to be treated as *prima facie* belonging to an enemy. The learned Judge criticised adversely the law as laid down by the majority of the Court in *The Venus, Rae Master* (8). He referred to *The Ocean* (16), in which a British subject settled as a partner in a house of trade in Holland had made arrangements for dissolution but was only prevented from removing personally by the violent detention of all British subjects who happened to be within enemy territories at the breaking out of war. Sir William Scott said:—

"It would, I think, under these circumstances, be going farther than the principle of law requires, to conclude this person, by his former occupation, and by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal."

Judge Cator remarks: "This...was the case of a partnership, but Sir William Scott makes no point of that fact." Again *The Venus, Rae, Master* (8) "declares that the supposed right of election on the outbreak of war does not exist." "This doctrine", it says, "is believed to be as unfounded in reason and justice as it is in law." But the learned Judge declined to consider the decision in *The Venus, Rae, Master* (8) good law. He concludes:

"No one can wish to inflict needless hardship on British subjects or on neutrals, and if on the outbreak of war a non-enemy, be he neutral or British, resident or non-resident, promptly closes his business and merely takes the steps necessary to remove his own property from the enemy country, I think he is entitled to do so."

The learned Judge further expressed the opinion that Sir Samuel Evans in *The Manningtry* (11) had not approved of the decision in *The Venus, Rae Master* (8) but from the passage which I have underlined (italicised) above, it would appear that the President felt himself bound to accept the decision although he thought that there was a good deal to be said in favour of the dissenting judgment.

In May 1915 the Prize Court at Malta had to deal with the claim of one S. Hovaghimain to certain goods forming part of the cargo of the SS. Erymanthos, a German steamer, which was captured and condemned as prize. The claimant was an Egyptian subject and a sleeping partner in a firm at Alexandria but he was domiciled and carried on business in Constantinople. On the outbreak of war he left Constantinople and came to reside in a neutral country. The Court expressed the opinion that he was not to be treated as an enemy subject. The

(15) (1916) 2 Br. & Col. P. C. 122 at pp. 129, 134.
(16) (1804) 5 C. Rob. 90 at p. 91.

facts of the case are not very fully set out on the record, but if, as it seems, the goods were consigned to the claimant at Alexandria, the Court may have considered that they did not belong to the trade carried on in enemy territory.

The decision of Judge Cator was reversed on appeal by the Privy Council [*The Lutzow* (17)] on the ground that the goods had been ordered by and belonged to the Japanese branch. Their Lordships said at page 441:

"On the outbreak of war the appellants were entitled to save themselves from being treated by Great Britain and her Allies as an enemy in respect of their German branch by promptly ceasing to carry on trade in Germany, and if for the purpose of doing so they removed from Germany by sea any property they then had in Germany, it would during its transit for that purpose be free from seizure and condemnation as enemy property."

In *The Anglo Mexican* (10) a claim was made by a naturalised American who had a one-fifth share in a German partnership. Their Lordships said at page 425:—

"An acquired domicil may be abandoned, and if prior to the actual capture the owner has already done some unequivocal act indicating an abandonment of his acquired domicil in the country of the enemy, the goods will *prima facie* be treated as belonging to a neutral. It has been sometimes urged that neutrals, resident in a country which by the outbreak of hostilities becomes an enemy country, ought to be allowed a reasonable time after such outbreak to elect whether they will abandon or retain their acquired domicil. This point was discussed in *The Venus, Rae, Master* (8). In that case the majority of the Judges of the Supreme Court of the United States decided against allowing any interval for election...The English authorities are not conclusive one way or the other. The point does not, however, fall to be determined on this appeal, for the respondent was not at the outbreak of hostilities permanently resident in Germany."

The Lordships also said:—

"If (a neutral not resident), having such a commercial domicil in a country which by the outbreak of war becomes an enemy country, he desires to avoid the consequences entailed by such domicil, he may avail himself of the interval allowed by law to discontinue or dissociate himself from the business in question. Inasmuch, however, as goods at sea when the war commenced may be captured before such reasonable interval has elapsed, the Court will in a proper case take notice of a discontinuance or dissociation taking place after the capture, or will even adjourn proceedings in the Prize Court, to give an opportunity for such discontinuance or dissociation."

There are, therefore, four classes of neutrals who may be engaged in trade in enemy territory on the outbreak of war:—

1. Resident; 2. Non-resident; 3. Resident and partners with enemy subjects; and 4. Non-resident and partners with enemy subjects.

The property of class 1 would be liable to capture at sea and confiscation on the outbreak of war if the decision in *The Venus, Rae Master* (8) must be followed, but the decision of the Privy Council in *The Gerasimo* (5) seems to lay down the opposite view and allow such a neutral a right of election. The property of class 2 would not be liable, provided the claimant took immediate steps on the outbreak of war to prevent it reaching enemy territory.

In classes 3 and 4 there seems to be a distinction according as the claimant is a subject of the other belligerent country or of a neutral country.

In the case of the former, a British subject at any rate is bound to take immediate steps to divert the goods from reaching enemy territory.

In the case of the latter, if in class 4, he is only bound to refrain from taking any active steps to enable the goods to reach enemy territory. If in class 3 I presume his duty would be the same, though I have not found any decision on the point.

Now the present claimant as regards the Karadeniz, which was his own private property, clearly comes within class 1, unless the fact that he was by accident temporarily residing in Greece at the outbreak of war can bring him within class 2. Such a question, as far as my

(17) (1918) A. C. 435 at p. 441; 87 L. J. P. C. 52.

researches have gone, has not been discussed before. It seems to me just possible that a Court of Prize guided by principles of equity might decide in favour of such a claimant, even if it held that he came within class 1, provided he took immediate steps to announce his intention of abandoning his enemy domicil and to prevent the goods from reaching enemy territory.

It cannot be disputed that on the outbreak of war with Turkey the claimant's commercial domicil was Turkish. He was born in Constantinople, he had always resided and carried on business there. About 1912 he became a Persian subject in order to free his children from the obligation to serve in the Turkish army, but that made no difference to the way in which his business was conduc'ed. He left Constantionple on the 21st October for Piræus because he had heard that one of his ships had been damaged there in a collision, but up to the 5th November he had disclosed no intention of giving up his business in Constantinople. When war broke out, he sent a man to Constantinople to remove his wife and family as he was afraid for their safety because they were Greeks, and they arrived at Piræus about the 13th or 14th November, but that by itself would not constitute a step towards getting rid of his commercial domicil in Turkey. See *The Ann* (7).

He said in examination in chief that he did not intend to go back to Constantinople as long as the present Government was in power. In cross-examination he said: "I object to the Young Turks' Government. I shall go back as soon as the Dardanelles are opened. It is immaterial to me whether war is going on or not. I want to go to look after my business." It was suggested that as the evidence was given on the 23rd February, two or three days after the Allied Naval Forces had commenced an attack on the Dardanelles, that the claimant was referring to the possibility of the forcing of the Straits and the capture of Constantinople by the Allies, but I do not think the claimant can be considered as meaning anything more than that he wanted to get back to Constantinople as soon as he could. Then in re-examination he said: "If I got to Constantinople I would try and get my ships to Piræus. I have some immoveable property and some cash there (Constantinople). I don't want to trade there while war continues."

The claimant had a partner called Bachrato, a Turkish subject, in Constantinople, who was looking after the agency business with reference to the other steamers in which the claimant had an interest, and if the Karadeniz had not been seized in Bombay, there is no certainty that the claimant would not have returned to Constantinople, or, if he had elected to remain at Piræus, that he would not have continued to direct the business at Constantinople from there.

The difficulty of the case lies in the fact that it may be said that he came within class 2 above, and that he had no opportunity after the declaration of war, when he happened to be in Greece, of making his election to retain or renounce his commercial domicil. It may well be that finding himself outside Turkey, and recognising the impossibility of removing his property from Turkish jurisdiction, he might have decided on carrying on such business as he could with the ships under his control outside Turkish limits, and it might, therefore, be conceded that thus he would have done everything in his power, which the Law of Nations required, to give up his commercial domicil in Turkey so as to render immune from capture property connected with a business carried on without the limits of Turkish territory. What importance is to be attached to his answer in re-examination? His objection to the Turkish Government must have been one of very recent growth, as he had made no attempt to remove himself from subjection to it before November 1914. In an unguarded moment he said in cross-examination he wanted to go back to look after his business, *not to remove it*; it did not matter to him whether a war was going on or not. Then he saw his mistake and said that if he got to Constantinople he would try and get his ship to Piræus. Against that there was the undeniable anxiety of the claimant, as soon as he had bought the ship, to get her out of Bombay to Busrah, a Turkish Port. On the 16th and 19th November he got telegrams despatched from Piræus inquiring whether the ship had left for Busrah. Is that consistent

with an intention after the outbreak of war to remove his property as far as possible from Turkish territory? Does it not rather point to the fact that his after-expressed intention was influenced by the ship not having been able to proceed to Busrah and having been captured in Bombay? Is there anything to lead me to suppose that if the ship had got to Busrah, the claimant would have done anything to get rid of his commercial domicil in Turkey? Can it be said that the claimant was *sine animo revertendi*? On the best consideration that I can give to these questions I have come to the conclusion that on the outbreak of war the claimant had his commercial domicil in Turkey, and that at the time of the capture and for many months after he had no intention of removing that domicil to a neutral country. Nothing is said in the claimant's petition of the 15th January 1915 regarding any such intention. The only evidence now is the claimant's statement made before me, at a time when it was clearly influenced by the events which had happened and made in contradiction to his evidence already given. Therefore, even if the claimant can be considered as belonging to class 2, he has not proved what it was necessary for him to prove in order to save the ship.

If *The Venus, Rae Master* (8) is not to be followed, and no distinction can be drawn between classes 1 and 2, both having a right to elect, the result will be the same.

If the claimant on the outbreak of war had directed that the ship should remain in Bombay and had announced that he dissociated himself entirely from his business in Turkey, leaving the question of his being able to remove his property from Turkish territory to depend on the attitude of the Turkish Government, I do not think it would have been according to the law administered by Prize Courts to condemn the ship. But the claimant did absolutely nothing towards abandoning or denouncing his Turkish domicil. He does not come within the scope of the judgment of Marshall, C.J., in *The Venus, Rae Master* (8), when he said, "there must be an immediate discontinuance of trade and arrangements for removing followed by actual removal within a reasonable time".

Therefore, in my opinion, on the best consideration I can give to this very difficult case the ship must be condemned as lawful prize. This decision, whether reversed or upheld on appeal, still leaves open the question whether the transfer to the claimant was made in good faith.

Vessel condemned.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 345 AND 401 OF 1918.

April 23, 1919.

Present.—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

S. N. PALANIVELAPPA GOUNDAN—DEFENDANT—APPELLANT IN S. A. No. 345 OF 1918 AND RESPONDENT IN S. A. No. 401 OF 1918

versus

NACHAPPA GOUNDAN—PLAINTIFF—RESPONDENT IN S. A. No. 345 OF 1918 AND APPELLANT IN S. A. No. 401 OF 1918.

Specific Relief Act (I of 1877), s 31—Rectification of instrument—Gift, deed of—Property, wrong description of—Title, whether perfected—Remedies open to transferee—Declaration of title, suit for—Evidence Act (I of 1872), ss. 95, 96, 97—Subsequent bona fide *purchaser for value without notice, position of—Preference.*

Section 31 of the Specific Relief Act is only an enabling section. It is open to a transferee to seek relief by rectification under this section, but that is not his only remedy. He can protect his title as defendant without rectification. He can sue for a declaration that the property belongs to him without seeking rectification, in which case he can avail himself of the provisions of sections 95 to 97 of the Evidence Act. [p. 381, col. 1.]

Where property is transferred to a person and the deed of transfer gives a wrong number or description of the property conveyed which does not belong to the transferor, the transferee is entitled to treat his title to the property that was really intended to be conveyed as complete at the time of the execution and registration of the document, and to plead misdescription as a defence in an action against him for the recovery of the property, invoking in aid the provisions of sections 95 to 97 of the Evidence Act. [p. 381, col. 1.]

A subsequent *bona fide* purchaser for value without notice of the property that was intended to be conveyed by the prior deed of transfer, will have preference as against the first transferee if the latter, by his act or omission, made it possible for the transferor to deal with the property, the principle being that of two innocent transferees the one who has rendered it possible for the owner to deal with the property a second time must suffer for his negligence, [p. 381, cols. 1 & 2.]

PALANIVELAPPA GOUNDAN *v.* NACHAPPA GOUNDAN.

Second appeals against the decree of the Court of the Subordinate Judge, Coimbatore, in Appeal Suit No. 86 of 1917, preferred against the decree of the Court of the Principal District Munsif, Erode, in Original Suit No. 248 of 1916.

FACTS appear from the judgment.

Mr. *C. V. Anantha Krishna Iyer*, for the Defendant-Appellant.—The plaintiff acquired no title under Exhibit C. Survey No 560 was not conveyed to him under that document. The only remedy open to the plaintiff was to have applied for rectification of the document under section 31 of the Specific Relief Act. His title is not complete until rectification. He might have sued for a declaration that Survey No. 560 passed to him under Exhibit C. Even then, there must be a prayer for rectification.

Defendant was a *bona fide* purchaser for value without notice of the plaintiff's title. It was the plaintiff's negligence in not seeking rectification that enabled his grantor to deal with the property a second time. He must, therefore, suffer and his claim cannot have precedence over that of the defendant. Defendant was not bound to go behind the title deeds Exhibits I and II, which were given to him at the time of the sale.

Mr. *A. Viswanatha Aiyar*, for the Plaintiff-Respondent.—The mention of Survey No. 553 in Exhibit C was a patent mistake. It was a mistake for Survey No. 560 which really belonged to his grantor, Both the lower Courts found that Survey No. 560 is what is referred to as Survey No. 553 in Exhibit C. The plaintiff is not bound to seek for rectification. Section 31 of the Specific Relief Act does not render that course obligatory. He might defend an action against him for possession, letting in evidence as to the property that in reality passed to him under sections 95 to 97 of the Evidence Act.

The defendant is not a *bona fide* purchaser for value. Defendant is a resident of a neighbouring village and knew the parties well. He could easily have ascertained by reference to the partition deed under which the land fell to his vendor's share and to Exhibit C and to Exhibit K, mortgage of the suit land by plaintiff, that what was really conveyed to plaintiff was No. 560 and he purchased the property at his risk. He could not claim priority over the plaintiff.

JUDGMENT.—As the lower Appellate Court has not properly understood the pleadings and has not applied the law correctly, it is necessary to state the facts. One Kuttianna Goundan was the absolute owner of the properties in suit. By two contemporaneous deeds, Exhibits B and C, he disposed of the whole of his property in April 1906. By Exhibit B, he gave some property to his concubine with remainder over after her death to the plaintiff. By Exhibit C, he gave all the remaining properties to the plaintiff, who was his nephew. The uncle and nephew subsequently fell out and there was another document in 1908. This is Exhibit D. By it, the plaintiff gave back a portion of the properties covered by Exhibit C to Kuttianna. By Exhibits B and C, the donor purports to give to the donees Survey No. 553 consisting of 6 acres 52 cents. It is the common case of all the parties that Kuttianna was not possessed of Survey No. 553. Further the extent of Survey No. 553 which belongs to a third party is not acres 6·52 in extent. The donor was the owner of the Survey No. 560, which is 6 acres and 52 cents in extent. There can be no doubt that it was this property that was referred to as Survey No. 553, and this is found by both the lower Courts.

After these transactions Kuttianna sold to the defendant Survey No 560 in 1911. The concubine died a month before the suit. The case for the plaintiff is that he became the owner of Survey No. 560 under Exhibit C and that there was no title left in Kuttianna to sell that property to the defendant. The District Munsif gave a decree to the plaintiff as prayed for. In appeal, the Subordinate Judge has taken the view that Exhibit D was the only basis of the plaintiff's title. There is no warrant for this conclusion It is not pleaded that Exhibit D superseded Exhibit C. There is no issue about it and even in the grounds of appeal to the lower Appellate Court, there is no complaint that Exhibit D should be regarded as the only title under which plaintiff should claim.

Both the Courts below have dealt with the case as if plaintiff's case was one for rectification of Exhibit C. In this Court also, the authorities quoted by the learned Vakil for the defendant referred to this aspect of the case. In our opinion the Courts below were wrong. Section 31 of the Specific Relief Act is only an enabling section. It is open to the transferee to seek relief by rectification under it. If he gets a decree for rectification, the plea of a possible innocent purchaser that he got it *bona fide* for value without notice might be avoided. But the transferee is not bound to seek this remedy. He can protect his title as defendant without rectification : see *Rangasawmi Aiyangar* v. *Sowri Aiyangar* (1). He can have a declaration as plaintiff that the property belongs to him without seeking rectification. In such cases, the provisions of sections 95 to 97 of the Evidence Act can be availed of by him. This was the course pointed out in *Karuppa Goundan* v. *Periathambi Goundan* (2). The learned Vakil for the defendant suggested that even in such cases there must be a prayer for rectification. We do not think that it was held in *Karuppa Goundan* v. *Periathambi Goundan* (2) that without rectification, the title would not be complete. What was said was that if the plaintiff asked for this relief, it may be granted by amending the plaint. As was pointed out in *White* v. *White* (3), the decree declaring that Survey No. 560 was covered by Exhibit C would give to the plaintiff all that he wants. We are, therefore, of opinion that the plaintiff's claim to the property was complete by the execution and registration of Exhibit C.

There is the further question whether this title can prevail against that of a *bona fide* purchaser for value without notice. If the plaintiff by his act or omission made it possible to the grantor to deal with the property and if the purchaser, without knowledge that Survey No. 560 was really conveyed by Exhibit C, *bona fide* paid consideration, it may be that he would be entitled to the property in preference to the plaintiff. The principle is well settled that of two innocent transferees, the one who has rendered it possible to the owner to deal with the property a second time must suffer for his negligence. It is not necessary to cite authorities for this proposition.

Before finally disposing of this case, we must ask the Subordinate Judge to return a finding on the question, in the light of the above observations, "Whether the defendant is a *bona fide* purchaser for value without notice."

No fresh evidence should be adduced. The finding should be submitted within six weeks and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Coimbatore submitted the following

FINDING.—A finding has been called for by the High Court on the following issue:—

"Whether the defendant is a *bona fide* purchaser for value without notice?"

2. It is urged by the appellant that as Kuttianna, the vendor of the land under Exhibit II, put the defendant in possession of the sale deed Exhibit I under which Kuttianna's father acquired the land and as Exhibit II made no mention of a partition deed, it was unnecessary for the defendant to have ascertained anything more about the title of Kuttianna to the land.

3. No doubt the partition deed Exhibit E under which the land fell to the share of Kuttianna at a division between himself and his brothers, the deed of gift Exhibit C under which the land was given to plaintiff along with some other lands by Kuttianna, Exhibit K which is a mortgage bond executed by plaintiff in respect of the suit land among others and attested by defendant and Exhibit D which is a settlement deed executed between plaintiff and Kuttianna and attested by defendant, refer to the suit land by a wrong Survey No. 553 while it is really 560 Exhibit D does not mention the suit land as having been allotted to plaintiff, but only refers to the northern moiety of it as having been given to one Ammani Ammal for life for her maintenance. The title of plaintiff under Exhibit C in respect of the suit land remains unaffected as observed by their Lordships in appeal.

4. Defendant is a merchant of Erode living at Selambagoundenpalayam, which is 2 or 3 miles from the village at which the plaintiff is living and the suit land is

(1) 29 Ind. Cas. 583; 39 M. 792; (1915) M. W. N. 448; 18 M. L. 75; 29 M. L. J. 229.
(2) 30 M. 397; 2 M. L. T. 336.
(3) (1873) 15 Eq. 247; 42 L. J. Ch. 238; 27 L. T. 752.

situate. He was aware of the disputes between the uncle and the nephew and of the arrangement come to as regards the enjoyment of lands. He also knew that a moiety of a land was given to Kuttianna's concubine for maintenance. If defendant knew that only one Nanja land was reserved for Kuttianna's enjoyment, it was but reasonable defendant should have ascertained how Kuttianna Gounden got the suit land. Kuttianna Gounden had brothers. If there was partition, defendant was bound to ascertain whether Kuttianna Gounden got it under the partition deed. If this had been done, it would have revealed the fact that the land was referred to by a wrong number. Then it would have also brought to light the fact that subject to one moiety of it being enjoyed for life by Ammani Ammal, the whole of it was given to the plaintiff under the deed of gift.

5. There seems to be no doubt whatever that Ammani Ammal was in possession and enjoyment of the northern moiety until her death a few months before the institution of the suit, and the Cist of the land has been paid by plaintiff from 1907. It is more likely that, as stated by plaintiff's witnesses Nos. 1 to 8, the land was in the possession of plaintiff than it was in the possession of Kuttianna Gounden as stated by plaintiff's witness No. 9. Defendant exercised no reasonable diligence to ascertain and find out how Kuttianna was entitled to the property, whether Kuttianna was in possession and enjoyment of the land and who paid the assessment of the land.

6. The mere payment of the consideration spoken to by defendant and borne out by an entry in his account book and the inferential evidence given by defendant's witness No. 1 that as there is a recital in Exhibit II as to payment, the consideration would have been paid, do not impress me as sufficient in this case to find that there was actual payment of consideration in spite of defendant's position as a man paying a large Kandayam and income tax as a trader.

7. I find that defendant is not a purchaser for value without notice.

These second appeals coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by the Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and dismiss Second Appeal No. 345 of 1918 with costs. As a result of this conclusion, the decree in Second Appeal No. 401 of 1918 will be reversed and the decree of the District Munsif will be restored. As was held by the Subordinate Judge in the appeal we have confirmed, there must be an enquiry as to mesne profits in respect of the property covered by Second Appeal No. 401 of 1918 as well and a final decree embodying the result must be passed. There will be no costs in this Court in Second Appeal No. 401 of 1918. Plaintiff will have his costs in the lower Appellate Court.

M. C. P.

Appeal No. 345 *dismissed*;
Appeal No. 401 *allowed*.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2358 OF 1917.

May 16, 1919.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir Ashutosh Mookerjee, Kt., and Mr. Justice Newbould.

ASUTOSH MUKHOPADHYA AND ANOTHER —DEFENDANTS—APPELLANTS

versus

HARAN CHANDRA MUKHERJEE AND ANOTHER—PLAINTIFFS AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Landlord and tenant—Mourasi mokarrari *lease, construction of—Rent payable partly in cash and partly in kind—Value of paddy payable, fixing of, effect of.*

In a *mourasi mokarrari* lease the rent was fixed at the rate of Rs. 1-6-8 *gandas* per year in cash in addition to paddy rent at the rate of 7 *aris* per year, and the price of the paddy was fixed at a certain rate per *ari* and taking the cash and the price of paddy together the total rent was stated in the lease to be fixed at Rs. 16- 6-8 *gandas*. In the lease there was also a clause that there shall be no increase or abatement in the *jama*:

Held, per *Curiam* (*Newbould, J.*, dissenting)—(1) that the lease being *mourasi mokarrari* the rent was a fixed one, and that the landlords were entitled to recover only at the rate of Rs. 16-6-8 *gandas* per year, as noted in the lease, as the total rent and not at any higher sum, though the price of paddy might vary from time to time; [p. 384, col. 1; p. 385, col. 1.]

(2) that the parties should be held to that which they had said in the contract and the Court should

not speculate to arrive at the conclusion that the provision regarding the total yearly rent had been inserted merely for the purpose of registration fee. [p. 384, cols. 1 & 2; p. 385, col. 1.]

Per *Mookerjee, J.*—The Court will give effect only to such intention as the parties were able to express by the language used in the document, and it will not be concerned with any unexpressed intention which they might have entertained. The suggestion that the quantity of paddy deliverable might have been valued for the purpose of payment of the registration fee was a speculation for which there was no foundation. [p. 385, col. 2.]

To hold that the amount of rent would vary from year to year according to the market price of the paddy would be to destroy the character of the lease as *mourasi mokarrari*. [p. 386, col. 1.]

Per *Newbould, J.*—The recovery of paddy rent at its cost value as it varies from year to year is not inconsistent with the tenure being a *mokarrari* one. When the value of the paddy varies, the value of the cash may also be said to vary in comparison with the paddy. [p. 386, col. 1.]

In the absence of any agreement in the *kabuliyat* to pay the total rent in cash, the statement fixing the total rent at Rs. 16-6-8 *gandas* can be taken as a statement added to the document for the purpose of fixing the stamp duty and the registration fee. [p. 386, col. 2.]

Baneswar Mukherji v. *Umesh Chandra*, 7 Ind. Cas. 875; 37 C. 626, relied on.

Appeal against the decree of the Additional District Judge of 24-Perganas, dated the 20th August 1917, affirming that of the Munsif, First Court at Barasat, dated the 28th July 1916.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *Narayan Chandro Kar*), for the Appellant.—This appeal is on behalf of the defendants, and it arises out of a suit for rent. The Courts below have erred in giving the plaintiffs a decree for the full amount claimed by them. The question is whether the total rent payable under the lease is fixed or is liable to variation as the price of paddy rises or falls. I submit that upon a proper construction of the lease the parties had fixed the amount of rent at Rs. 16-6-8 *gandas*. There is no foundation for the finding of the Courts below that the total rent was inserted merely for the purpose of determining the stamp duty. The *kabuliyat* is a *mourasi mokarrari* lease, and the character of the lease would be destroyed if the rent be held to be liable to variation according to the rise or fall of the price of the paddy. I rely on *Afar* v. *Surja Kumar Ghose* (1), *Nilmadhab Mahapatra* v. *Keshab Lal Mahapatra* (2), *Bipro Charan* v. *Suchand Roy* (3) and *Dwarika Nath Mukerjee* v. *Dwijendra Nath Ghosal* (4).

Babu *Atindra Nath Mukherjee*, for the Respondents, urged that although the rent was fixed in perpetuity, it was liable to variation according to the variation of the price of the paddy. The total rent was inserted merely for the purpose of determining the registration fee and stamp duty. Referred to *Baneswar Mukherji* v. *Umesh Chandra* (5), *Akbar Ali* v. *Durga Kripa Sen* (6), *Sheikh Isaf* v. *Gopal Chandra Dey* (7), *Chandra Kumar Singh* v. *Kali Prosad Chuckerbutty* (8). The case in *Nilmadhab Mahapatra* v. *Keshab Lal Mahapatra* (2) was distinguishable, because there the tenant had an option to pay the whole rent in cash whereas in the present case the tenant had no such option to pay the whole rent in cash.

Dr. *Dwarkanath Mitter* briefly replied.

JUDGMENT.

SANDERSON, C. J.—This is an appeal from the judgment of the learned Additional District Judge of 24-Pergannas, whereby he affirmed the judgment of the Court below, and the only question which arises on this appeal is with reference to the amount of rent which is payable under the contract in writing, a translation of which has been handed up to us.

I think it is desirable in this case to draw attention to the terms of the plaintiff's claim, and we are indebted to my learned brother Mr. Justice Mookerjee, who is sitting with us at our request, for having our attention drawn to the claim. The claim is one for Re. 1-6 8 *gandas* in cash, the value of the paddy is Rs. 23-12, making a total of something over Rs. 30; then in addition to that, the plaintiffs have claimed 25 per cent. on the Rs. 30 odd, making an amount of Rs. 7 odd and altogether Rs. 38-9. The 25 per cent. is obviously a claim in pursuance of section 68 of the Bengal Tenancy Act. Therefore, it is obvious that, that is a claim for rent and nothing else. Otherwise, the plaint-

(1) 7 Ind. Cas. 842; 12 C. L. J. 649; 15 C. W. N. 849.

(2) 40 Ind. Cas. 819; 26 C. L. J. 94.
(3) 8 Ind. Cas. 945; 12 C. L. J. 595.
(4) 53 Ind. Cas. 103; 30 C. L. J. 37.
(5) 7 Ind. Cas. 875; 37 C. 626.
(6) 8 Ind. Cas. 944; 12 C. L. J. 589.
(7) 8 Ind. Cas. 896; 12 C. L. J. 593.
(8) 9 Ind. Cas. 223.

iffs could not have claimed 25 per cent. on the amount which they had claimed.

In order to justify this claim, the plaintiffs must satisfy us that there was a covenant in the contract to pay such a claim.

The document was a *mokarrari* and *mourasi kabuliyat*. The *kabuliyat* was in respect of 4 *bighas* and "at the rent at Rs. 1.6.8 each and 7 *aris* of paddy the market price whereof is Rs. 15." Then comes a phrase as to the translation of which there was a little dispute, although I think the translation given by the learned Vakil for the appellants and that given by the learned Vakil for the respondents did not differ very much. On behalf of the appellants it was said that the Bengali words (of that phrase) ought to be translated as follows: 'Taking the cash and the price of paddy together, the total rent being fixed at Rs. 16 6 8 *gandas*." The learned Vakil for the respondents translated them as follows: "Taking the cash and the price of paddy together, assessing the total rent at Rs. 16.6.8 *gandas*." As I have said before, I do not think there is any material difference between the two translations. Then the document goes on as follows: "And on payment of Rs. 30 as *salami*, and covenant that I will maintain the boundaries and shall pay the cash rent fixed every year in Bhadra and Pous and the paddy in the month of Magh every year in one *kist*." Then there are several other provisions to which I need not refer. Then there is the following clause: "There shall be no increase or abatement in the *jama*." At the end are these words: "To this effect I hereby execute this *mokarrari mourasi kabuliyat*."

On behalf of the respondents it was contended that the material sentence to which I have referred was inserted merely for the purpose of determining the registration fee. On the other hand, on behalf of the appellants it was contended that the parties had agreed to fix the total rent which was payable under this contract and had fixed this amount at Rs. 16.6 8 *gandas*. The question we have to decide is which of these constructions is the correct one.

In my judgment the appellants' contention is the correct one.

The first thing to be noticed is that this is a *mourasi mokarrari kabuliyat*, and, therefore, one would expect to find a fixed rent. In the next place, the parties should be held to that which they have said in the contract, and I do not see why the Court should speculate and as a result of that speculation arrive at the conclusion that the important provision to which I have referred had been inserted merely for the purpose of determining the registration fee. I think there might be good reason for the parties having fixed the rent: the parties may have thought that it would be more prudent, as between themselves, to fix the amount which should be taken as the value of the paddy rather than have a dispute upon each occasion as to the market value of it, in case it were not delivered. That is a point to which the late Chief Justice Sir Francis Maclean drew attention in giving his judgment in an unreported case, decided by Sir Francis Maclean, and Mr. Justice Banerjee, Appeal from Appellate Decree No 966 of 1895 [*Duarika Nath Mukerjee* v. *Diwijendra Nath Ghosal* (4)], to which our attention was drawn. The Bengali words which were used in the present contract are, no doubt, not the same as the Bengali words in the contract with which Sir Francis Maclean and Mr. Justice Banerjee had to deal, but it was contended by the learned Vakil for the appellants, and I think it is not denied by the learned Vakil for the respondents, that there was practically no difference in the meaning of the two phrases, and I was much struck with the judgment of Mr. Justice Banerjee, when referring to the Bengali phrase used in the contract in that case, he said, "the words in the original.....are a well-known Bengali expression, which means a great deal more than a provisional settlement of the rent for the incidental purpose of ascertaining the stamp duty. The lease was a *mokarrari mourasi* lease, and, when such a document mentions a certain sum of money as the '*jama abadarita*' which words may well be rendered as 'the fixed rent,' the meaning of the document seems to be very clear, that the parties wanted to fix the value of the paddy, that is the part of the rent which was payable in kind."

Being impressed with that the learned Judge's judgment as to the meaning of the words, I thought it was desirable that we should have the assistance of one of the learned Judges of this Court who are thoroughly acquainted with the Bengali

language, and that is the reason why I asked my learned brother Mr. Justice Mookerjee to sit with us:—and we shall have the advantage of his judgment presently. The best construction that I can put upon this contract is the one that is contended for by the appellants. Looking at the document as a whole I think the parties did intend to fix the total rent which should be paid in the event of non-delivery of paddy, namely, Rs. 16-6-8 *gandas*.

There are several cases dealing with points somewhat similar to the point which we have had before us to day, but there is no case which is exactly the same. The words in each of the cases differ to some extent from the words of the contract in this case. Consequently, I do not think there is any question which should be referred to a Full Bench, as we were asked to do by the learned Vakil for the respondents. In my judgment, it is our duty to put on the contract the best construction we can.

For these reasons I think that the appeal should be allowed, with costs.

MOOKERJEE, J.—I agree that this appeal must be allowed. In my opinion, in the events which have happened, the landlords are entitled to recover rent from the tenants only at the rate of Rs. 16 6 8 *gandas* under the terms of the contract between them.

The lease is described as a *mourasi mokarrari kabuliyat* and the rent payable thereunder is fixed in perpetuity. This is manifest from the concluding words "*dharjya jami jamar opor komi beshi asile asibe na*", in other words, at no time would *there be reduction or increase in the land and the rent fixed.*

The document states that the rent is payable partly in cash and partly in kind. The cash rent is payable at the rate of Rs. 1 6 8 *gandas*, and the paddy rent is payable at the rate of Rs. 7 3 16 *gandas* an *ari*. The document further states that the market value of the paddy is Rs. 15 and the total rent is Rs. 16 6 8 *gandas* (obtained by the addition of the rent in cash and the money value of the rent-in-kind). It is fairly clear that upon the lease taken as a whole the rent was fixed at Rs. 16-6-8 *gandas*, if the tenant should fail to deliver the paddy under the terms of the contract.

It has been suggested by the learned Vakil for the respondents that this was not the true intention of the parties, but we must remember that we have to give effect only to such intention as the parties were able to express by the language used in the document; the Court is not concerned with any unexpressed intention which they might have entertained. The suggestion that the quantity of paddy deliverable might have been valued for the purpose of payment of the registration fee is a speculation for which there is no foundation either in the document or in the evidence.

There are many cases to be found in the books on the construction of documents of this character, more or less varying in their terms. The earliest case I have been able to trace in which the suggestion was made that the money value of the paddy was stated for purposes of the registration laws is that of *Sohobut Ali* v. *Abdul Ali* (9). The theory that the paddy is valued either for the purpose of convenience of the parties or for the purpose of registration re appears in two later cases, *Akbar Ali* v. *Durga Kripa Sen* (6) and *Sheik Isaf* v. *Gopal Chandra Dey* (7), the latest case where it is reiterated is *Baneswar Mukherji* v. *Umesh Chandra* (5). On the other hand, there are decisions where the Court has construed the agreement strictly, without travelling beyond the terms expressed there: and, amongst cases of this class reference may be made to *Bipro Charan* v. *Suchand Roy* (3), *Afar* v. *Surja Kumar Ghose* (1) and *Nilmadhab Mahapatra* v. *Keshab Lal Mahapatra* (2). It now transpires that the earliest case on the point is in the same direction, namely, the unreported decision of the late Chief Justice Sir Francis Maclean and Mr. Justice Banerjee in *Dwarika Nath Mukerjee* v. *Dwijendra Nath Ghosal* (4), and it is probable that if that ruling had been reported, the current of decisions of this Court might have been uniform. I have read the judgment of Mr. Justice Banerjee in the case just mentioned, and I entirely agree with that learned Judge as to the meaning of the expression "*abadharita jamma*". The expression used in this case is not "*abadharita*" but

(9) 8 C. W. N. 151.

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"*dharjya*." The two words however, are derived from the same root, and, in my opinion, they have clearly the same significance.

If we were to accede to the contention of the respondents, the result would be to destroy the character of this lease as a *mourasi mokarrari kabuliyat*; the amount of rent payable would vary from year to year according to the market price of the paddy. This, in my opinion, was not the intention of the parties, so far as that intention can be gathered from the words used in the document.

NEWBOULD, J.—With respect, I find myself unable to agree with the learned Chief Justice and my learned brother Mr. Justice Mookerjee.

The facts of this case seem to me to be undistinguishable from the facts of the case of *Baneswar Mukherji* v. *Umesh Chandra* (5). There was as here a *mokarrari kabuliyat*, the annual rent was cash rent and a paddy rent. In the *kabuliyat* the paddy was valued and the total of the cash rent and valuation of the paddy rent was stated as settled in perpetuity, and it was held that the statement as to the market value of the paddy was explicable by the desirability of stating that amount for the purpose of fixing the stamp duty. It seems to me that to give any other meaning to this portion of the *kabuliyat*, we have now had to consider, would contradict the terms of the document. The market value of the paddy rent and the total rental of Rs. 16-6-8 *gandas* are stated at the commencement of the document and subsequently comes the covenant to pay the cash rent on two different occasions and the paddy at a later date each year. There is nothing in the covenant suggesting that there is any option given to the tenant to substitute cash rent for the portion of the rent which is payable in paddy. The recovery of the paddy rent at its cash value, as it varies from year to year, does not seem to me to be inconsistent with the tenure being a *mokarrari* one. When the value of the paddy varies, the value of the cash may also be said to vary in comparison with the paddy. The effect of variation is diminished by fixing, as in this case, the rent partly in cash and partly in kind. In the absence of any agreement in the *kabuliyat* to pay the total rent in cash, I cannot see that the statement fixing the total rent at Rs. 16-6-8 *gandas* can be given any other meaning than a statement added to the document for the purpose of fixing the stamp duty and the registration fee. I would, therefore, dismiss the appeal.

SANDERSON, C. J.—The result is that we allow the appeal, set aside the decrees of the Courts below, and direct that a decree be drawn according to the judgment of the majority of the Court.

Appeal allowed.

P. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

MADRAS HIGH COURT.
FULL BENCH.
APPEAL AGAINST APPELLATE ORDER
No. 22 OF 1915.
September 3, 1919.

Present :—Sir Abdur Rahim, KT., Officiating Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

ANGAMUTHU CHETTI—DEFENDANT No. 1—PETITIONER—APPELLANT

versus

VARATHARAJULU CHETTI—PLAINTIFF—RESPONDENT—RESPONDENT.

Hindu Law—Widow—Surrender by widow of her estate to reversioner—Provision for maintenance and residence, effect of—Requisites of surrender.

A reasonable stipulation for residence and maintenance contained in a deed of surrender by a Hindu widow of her estate to the reversioner does not affect the validity of the deed, provided the surrender is a *bona fide* one of the entire interest of the widow in the whole estate and is not a mere device to divide the estate with the next reversioner. [p. 391, col. 2; p 393, cols. 1 & 2.]

Behari Lal v. *Madho Lal Ahir*, 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 88; 9 Ind. Dec (N. s.) 603 (P. C.), *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* 53 Ind. Cas 347 (P. C.), explained.

Case-law reviewed.

Per *Oldfield, J.*—The surrender which the law recognises is a surrender of the estate held by the widow as such; and it will not be the less total owing to a reservation in her favour of a right of maintenance, to which she was not previously entitled as widow, even if that right be secured on part of the property comprised in her widow's estate. [p. 393, col. 1.]

Per *Seshagiri Aiyar, J.*—To make a surrender effectual, it must comply with the following

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requirements:—(1) it must be in favour of the nearest reversioner, (2) there must be no reservation, (3) it should be made *bona fide* and not as a device to effect a bargain between the widow and the reversioner. A provision for maintenance does not, in the least, affect the spiritual character of the surrender or derogate from its completeness. If a transaction is *ex facie* and in intention a surrender and reserves no portion of the property surrendered to the widow, the fact that the surrenderee agrees to provide for the maintenance of the surrenderor would not vitiate the transaction. [p. 393 col. 2; p. 394,col. 1.]

Appeal against the order of the District Court of Madura, dated the 6th September 1917, in Appeal Suit No. 116 of 1917, preferred against the order, dated the 5th January 1917, of the Court of the District Munsif of Melur at Madura, in Execution Application No. 212 of 1916 in Execution Petition No. 329 of 1915, in Original Suit No. 534 of 1912 on the file of the Court of the Principal District Munsif of Madura.

This appeal coming on for hearing on the 7th of February 1919, the Court (Oldfield and Seshagiri Aiyar, JJ.) delivered the following

JUDGMENT.—Since the judgment before us was delivered, the law in question, especially so far as it is stated in the case of *Rangappa Naik* v. *Kamti Naik* (1), on which the lower Appellate Court relied, has been re-stated in the judgment of the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (2).

It is, moreover, not clear whether the lower Appellate Court intended to find that Exhibit I effected a total surrender of the widow's rights.

We, therefore, call on the lower Appellate Court to return findings, in the light of the foregoing, on the following issues :—

(1) Did Exhibit I effect a total surrender of the widow's right ? and

(2) If the surrender was partial, did Exhibit I effect a valid transfer to Mariappa Chetty ?

Findings should be returned on the evidence on record within six weeks. Seven days will be allowed for filing objections. A copy of the judgment of the Judicial Committee is communicated herewith to the lower Appellate Court for use and return.

(1) 31 M. 366; 3 M. L. T. 355; 18 M. L. J. 309 (F. B.).

(2) 50 Ind. Cas. 438; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 22 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

In compliance with the order contained in the above judgment, the District Judge of Madura submitted the following

FINDINGS.—I am asked to submit findings upon the following issues :—

(1) Did Exhibit I effect a total surrender of the widow's rights ? and

(2) If the surrender was partial, did Exhibit I effect a valid transfer to Mariappa Chetti.

The recent decision of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (2) has been referred to by the High Court, and I have carefully perused it.

2. Exhibit I recites the death of M. Govindan Chettiar, husband of the two widows executing the document, about a month previously, the claim by Govindan's brother, Mariappa Chettiar, that they had been undivided, the fact that there were creditors to be settled, and states that in accordance with the advice of Panchayatdars Mariyappa Chettiar shall take and enjoy the properties with absolute rights and the widows shall have no right or concern therein. This is undoubtedly an absolute surrender of all rights and the schedule shows that even household utensils and book debts were surrendered. There was, however, some consideration, Rs. 500 in cash and Rs. 300 worth of jewels which she had been wearing, to the one widow and a promise of maintenance to the other widow, Thangammai. There was also a stipulation that if Thangammi should wish to live separately, she could then claim for her maintenance a certain wet land and a room in the house. It is argued that this was a reservation of a portion of the property and, therefore, the surrender was not total. Exhibit IV, a sale-deed executed by Mariappa two years later, certainly mentions that he had allotted a room to Thangammai and reserves that room to her for her life. As a matter of fact it appears that Thangammai ultimately died in Mariappa Chettiar's house, and, therefore, presumably there was no occasion for the stipulations in Exhibit I to come into force.

3. Exhibit I is undoubtedly a document surrendering all the life-interests which Thangammai had in her late husband's properties. I do not see that a stipulation for maintenance can affect it, for if her husband had been undivided and she had had no

interest in her husband's property, she would have been entitled to maintenance from her husband's brother. She, therefore, divested herself of all her rights and fell back upon what she would have been entitled to if she had had no rights. I, therefore, consider that her surrender was total. In the case reported as *Chinnaswami Pillai* v. *Appaswami Pillai* (3) it was held that a stipulation for maintenance cannot affect the validity of a surrender. It is argued that the recent Privy Council decision has overruled that case, but it does not appear to me to be so.

4. I, therefore, return a finding on issue 1 in the affirmative, and on that, issue 2 does not arise.

This appeal coming on for hearing on the 17th of July 1919 after the return of the above finding of the lower Appellate Court upon the issues referred by this Court for trial, upon perusing the grounds of appeal, the judgments and orders of the lower Appellate Court and the Court of first instance, the material papers in the suit, and the said finding of the lower Appellate Court and the memorandum of objections to the said finding filed by the appellant and upon hearing the arguments of Mr. *A. Krishnaswami Aiyar* and Mr. *K. Rajah Aiyar*, for the Appellant, and of Mr. *K. S. Jayarama Aiyar*, for the Respondent, the Court (Seshagiri Aiyar and Odgers, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The finding is that the widow surrendered the whole property she inherited from her husband by Exhibit I, which contained a stipulation that if Thangammai (meaning the widow) should wish to live separately, she could then claim for her maintenance a certain wet land and a room in the house. Mr. A. Krishnaswami Aiyar argues that this stipulation vitiates the surrender: Mr. Jayarama Aiyar, on the other hand, contends that the provision for maintenance and residence does not detract from the completeness of the surrender and the stipulation objected to is not within the mischief of the pronouncement of the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (2). We are inclined to think that the Board had not in its mind provisions for maintenance which even a widow "effacing herself" must have for the sustenance of her physical body. At the same time, the language of the Privy Council is very comprehensive and may affect any reservation of property, whether it is for maintenance or not. We are aware that Abdur Rahim and Oldfield, JJ., are inclined to restrict the scope of the Privy Council judgment to instances in which a temporal advantage is obtained in the guise of surrender. But they follow the view of Sadasiva Aiyar and Napier, JJ., in *Chinnaswami Pillai* v. *Appaswami Pillai* (3), which was based on the judgment of the Full Bench of the High Court in *Nachiappa Gounden* v. *Rangaswami Gounden* (4), which was under appeal before the Judicial Committee. As we said before, the language of Lord Dunedin goes further than that employed in the Full Bench judgment of the High Court: and as the question is one of great importance and may recur often, it seems desirable, in our opinion, that there should be an authoritative pronouncement by the Full Bench on the subject. We have, therefore, resolved to refer for the opinion of the Full Bench the following question:

"Is a deed of surrender by a Hindu widow invalid by reason of a provision for maintenance and residence in her favour contained therein?".

This appeal came on for hearing in pursuance of the Order of Reference to a Full Bench on the 25th and 26th August 1919.

Mr. *A. Krishnaswamy Aiyar* (with him Mr. *K. Rajah Aiyar*), for the Appellant.—The essentials of a surrender are fully dealt with by the Privy Council in *Behari Lal* v. *Madho Lal Ahir* (5) and *Rangasami Gounden* v. *Nachiappa Gounden* (2). The effect of a surrender is said to be "as if the widow had operated her own death." So any provision detracting from an absolute withdrawal by the widow would render the surrender incomplete and so invalid.

[OLDFIELD, J.—The real question resolves itself into whether this provision for main-

(3) 48 Ind. Cas. 147; 35 M. L. J. 512; 8 L. W. 512; (1918) M. W. N. 756; 42 M. 25; 24 M. L. T. 403.

(4) 26 Ind. Cas. 757; 28 M. L. J. 1; (1915) M. W. N. 53; 2 L. W. 69. 17 M. L. T. 87.

(5) 19 C. 236 (P. C.); 19 I. A. 30; 6 Sar. P. C. J. 85; 9 Ind. Dec. (N. S.) 603.

tenance is in effect a retention of part of the estate surrendered, or a consideration for the transfer to the reversioner.]

In either view the surrender would be bad. No widow is compelled by law to surrender, but the law says that if she decides to surrender of her own free will, she must be prepared to renounce completely, becoming thereby a Bairagi or Sanyasi. *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (6).

[ABDUR RAHIM, OFFG. C. J.—But the provision for maintenance is not an interest in the estate, nor does she have it as a legal 'widow'.]

Then the provision is a consideration for the transfer. But a surrender cannot be a transfer for consideration, as then the widow would not be operating her death.

[ABDUR RAHIM, OFFG. C. J.—The legal entity called the 'widow' dies on surrender, but the human being is not dead and has to live.]

A widow who inherits her husband's estate has no right in law to maintenance, as what is called 'a right to maintenance' means at law. In any case there cannot be a transfer for consideration. See *Marudamuthu Nadan* v. *Srinivasa Pillai* (7), *Rangasami Gounden* v. *Nachiappa Gounden* (2).

SESHAGIRI AIYAR, J.—The surrender is complete and valid. It may be that the *quid pro quo* is bad.]

There can be no such dissociation, as the *quid pro quo* comes in only by and on account of the surrender. Even a separate reconveyance has in this respect been held to invalidate surrenders. *Sriramulu Naidu* v. *Andalammal* (8).

[ABDUR RAHIM, OFFG. C. J.—As a device used to divide the estate, such transactions are set aside.]

A surrender is not a transfer, but an extinction or renunciation of the proprietary title of the qualified owner. Hence there can be no consideration passing. See *Debi Prosad* v. *Golap Bhagat* (9), *Nachiappa Gounden* v. *Rangaswami Gounden* (4), *Raj Kishore* v. *Durga Charan Lal* (10), *Satyalakshmi Narayana* v. *Jagannadham* (11).

But the following cases take a contrary view *Rangasami Gounden* v *Nachiappa Gounden* (2), Appeal No 162 of 1916, *Mulugu Katayya* v. *Mudigonda Chandramowli Sastri* (12) and Appeal No. 373 of 1915. Appeal 373 of 1915 is based on *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (13), which is not good law after *Rangasami Gounden* v. *Nachiappa Gounden* (2). In *Mulugu Katayya* v. *Mudigonda Chandramowli Sastri* (12) the observation is plainly *obiter*. *Diltor Koer* v. *Harku Singh* (14) takes a similar view.

Mr. *K. Srinivasa Aiyangar* (with him Mr. *K. S Jayarama Aiyar*), for the Respondent.—Under the old Hindu Law, the widow was not an 'heir' to her husband's estate. She had only a right to maintenance. It was Jimutavahana who, by construing an ambiguous text, made her an heir. See Ghose's Hindu Law, Volume II. page 891, Volume I, page 229; Narada, Chapter XIII. The widow comes in as an interloper for her lifetime and when she goes out either by surrender or by death, the normal rule of succession is restored. *Gunga Pershad Kur* v. *Shumbhoonath Burmun* (15). If she surrenders, then the original right of maintenance remains to her, whether she stipulates for it or not. It has been held that even an annuity stipulated for on surrender is good. See *Jadomoney Dabee* v. *Surodaprosono Mookerjee* (16). This is cited in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (6) and *Debi Prosad* v. *Golap Bhagat* (9). The maintenance of the widow is for the benefit of the husband, as observed in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (6). A surrender, being a pious act, cannot be taken to deprive the husband of such benefit. *Raghunath Singh* v. *Kura Kumari* (17).

[OLDFIELD, J.—Then why is it said that Courts should not encourage surrenders?]

(6) 10 C. 1102 (F. B.); 5 Ind. Dec. (N. S.) 737.
(7) 21 M. 128 (F. B.); 8 M. L. J. 69; 7 Ind. Dec. (N. S.) 447.
(8) 30 M. 145; 17 M. L. J. 14.
(9) 19 Ind. Cas 278; 40 C. 721 at p. 758; 17 C. W. N. 791; 17 C. L. J. 499.
(10) 29 A. 71 at p. 75; A. W. N. (1906) 272; 3 A. L. J. 755.
(11) 42 Ind. Cas. 939; 34 M. L. J. 229; 6 L. W. 765; (1917) M. W. N. 854; 22 M. L. T. 408.
(12) 36 Ind. Cas 407; 31 M. L. J. 403; 20 M. L. T. 148; 4 L. W. 149; (1916) 2 M. W. N. 137.
(13) 31 M. 416.
(14) 41 Ind. Cas. 631; 2 P. L. J. 578; 1 P. L. W. 760; (1917) Pat 225.
(15) 22 W. R 393.
(16) 1 Boulnois 120 at p. 134; 3 Ind. Dec. (O. S.) 72.
(17) 38 Ind. Cas. 167; 1 P. L.W. 453; (1917) Pat. 94.

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Because very often a surrender is made to serve as a device.

[ABDUR RAHIM Offg., C. J.—The Privy Council say that it would possibly be defeating the right of the reversioner entitled at the time of the widow's death].

I rely upon *Diltor Koer* v. *Harku Singh* (14), *Chinnaswami Pillai* v. *Appaswami Pillai* (3) and other cases already cited as being in my favour. *Karetti Brahmanaikudu* v. *Kareti Mahalakshmi* (18) follows *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (13).

Mr. *A. Krishnaswamy Aiyar*, in reply.—The widow was a normal 'heir' under Hindu Law until the Mitakshara first denied the heirship. See *Gudimetla Vencataraju* v. *Bollozu Kottaya* (19), *Narayanasawmi Naidu Garu* v. *Tirumalasetti Subbaya* (20), *Soundararajam* v. *Arunachalam Chetty* (21). In *Jadomoney Dabee* v. *Sarodaprosono Mookerjee* (16), Jackson, J., takes a strong view in favour of my contention at pages 123, 124.*

OPINION.

ABDUR RAHIM, Offg. C. J.—The answer to the question referred depends mainly upon the interpretation of the scope and effect of a recent ruling of the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (2), where the law on the subject of surrender and alienation by a Hindu widow has been authoritatively considered. They begin by pointing out that these two classes of transactions are different in their nature and legal incidents. Surrender is described as "an effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date." In another place it is stated to be a withdrawal of the widow's life-estate so that the whole estate should get vested at once in the grantee, thus approving of the proposition as stated in *Behari Lal* v. *Madho Lal Ahir* (5) by Lord Morris that "according to Hindu Law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate." Then their Lordships sum up the law in these words: "An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner." It may be observed here that their Lordships speak of surrender as an alienation and in another place as a gift. But that, in my opinion, cannot be taken to obscure in any way the distinction between a surrender as defined above and an alienation of the whole or part of the estate on the ground of necessity. So far as this judgment of the Privy Council goes, I find no warrant for holding that, where a transaction is by way of surrender of the widow's whole interest in the whole estate in favour of the nearest reversioner and such surrender is *bona fide* and not a mere device to divide the estate with the reversioner, it would not be valid in law simply because the deed of surrender makes a *bona fide* provision for a reasonable maintenance and residence for the widow or widows making the surrender. On the other hand, it seems to me that their Lordships intended to lay down that if the conditions mentioned by them were satisfied, that was all that was required for a valid surrender and any provision or benefit reserved for the widow not inconsistent with those conditions would not affect the legality of the transaction. Mr. A. Krishnaswamy Aiyar contends that the description of surrender as "an effacement of the widow which in other circumstances is effected by actual death or by civil death opening the estate of the deceased husband to his next heirs at that date," shows that any provision for maintenance and residence in favour of the widow surrendering her life estate is inconsistent with a proper surrender. But I fail to appreciate this argument. If the Privy Council had intended any such result, I think they would have made it clear that reservation of any sort of benefit or provision for maintenance would vitiate a surrender. On the other hand, all

(18) 17 Ind. Cas. 487; (1913) M. W. N. 433; 24 M. L. J. 533; 13 M. L. T. 463.

(19) 16 Ind. Cas. 139; 23 M. L. J. 223 at p. 227; 12 M. L. T. 230; (1912) M. W. N. 861.

(20) 16 Ind. Cas. 698; 24 M. L. J 79 at p. 83; (1913) M. W. N. 96.

(21) 33 Ind. Cas 858 (F. B.); 39 M. 136 at p. 159; 29 M. L. J. 793 at p. 816; 2 L. W. 1247 at p. 1266; 18 M. L. T. 552 at p. 568; (1916) 1 M. W. N. 31.

*Page of 1 Boulnois—*Ed.*

ANGAMUTHU CHETTI v. VARATHARAJULU CHETTI.

that they were prepared to lay down was that it must not be a device to divide the estate with the reversioner. The transaction which has given rise to this reference, it is conceded, is not such a device, but a *bona fide* surrender. All that was argued was that the stipulation by the nearest reversioner in whose favour the surrender is made (which was a payment of a lump sum of Rs. 500 to one widow for her maintenance and an undertaking to maintain the other widow and to provide for their residence), though perfectly reasonable, was in itself sufficient to vitiate the surrender. As I said, this contention is not borne out by the judgment of the Privy Council. It is obvious that if it were to be accepted, if the law were that the widow surrendering her estate cannot stipulate for her maintenance, that would virtually be prohibiting surrenders in most of the cases, even though the widow be actuated by a *bona fide* desire to divest herself of the entire estate which she inherited from her husband in favour of the next heir.

Mr. Krishnaswami Iyer was not able to produce a single authority in support of his proposition. On the other hand, as far back as 1856 Sir James Colvile, then Chief Justice of the Calcutta High Court, laid down that a relinquishment of the inheritance by a widow in consideration of maintenance, in favour of the next heir was valid. See *Jadomoney Dabee* v. *Sarodaprosono Mookerjee* (16). It was not, so far as one can gather, for the first time that the law was so laid down in 1856. On the other hand, it would appear from *Lukhiprea Dassee* v. *Sheosundri Dassee* (22), referred to by Sir James Colvile, that that was the Hindu Law as understood for a long time. In *Lalla Kundee Lall* v. *Lalla Kalee Pershad* (23) a surrender was upheld as a family arrangement in spite of a stipulation for maintenance. In *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (6) the previous authorities appear to have been fully discussed, including the case in *Jadomoney Dabee* v. *Sarodaprosono Mookerjee* (16). I find no suggestion in the judgment of Garth, C. J., or of Mitter, J., throwing doubt on what was laid down by Colvile, C. J., nor is there any doubt cast on that proposition in the elaborate judgments of Jenkins, C. J., and Mookerjee, J., in *Debi Prosad* v. *Golap Bhagat* (9), referred to with approval by the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (2). In this Court in *Rangappa Naik* v. *Kamti Naik* (1) it was laid down that a provision for maintenance does not vitiate a surrender and though their Lordships of the Privy Council in the recent case have said that they did not approve of "a good deal of what was said" in that case, I cannot assume that they meant to hold that the High Court's ruling was bad on this particular point. That was also how the law was enunciated in *Chinnaswami Pillai* v. *Appaswmi Pillai* (3), although the learned Judges, following the Full Bench of the High Court in *Nachiappa Gounden* v. *Rangaswami Gounden* (4) [which was the case in appeal to the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (2)] laid down certain other propositions which were disapproved by the Privy Council. I may also mention that sitting with Oldfield, J., I had recently to consider the effect of the recent Privy Council ruling on this point and on the matter being more fully discussed on this occasion, I am strengthened in my view that there is nothing in the judgment of the Privy Council to militate against what appears to me to have been always understood as the law, namely, that a reasonable stipulation for maintenance and residence does not effect the validity of a surrender, provided it is a *bona fide* surrender of the entire interest of the widow in the whole estate and is not a mere device to divide the estate with the next reversioner. That is how I would answer the question under reference.

Since I had prepared the above opinion, the judgment of the Privy Council in the consolidated appeals from Bengal Nos. 100 of 1916, etc. [*Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (24)] delivered by Viscount Cave on 30th June 1919 (not yet reported in the Law Reports) has come to my notice. It certainly confirms the view of law I have expressed In that case in the course of certain proceedings under the Succession Certificate Act instituted by the adopted son of one of three Hindu brothers alleging that they were joint in estate, the

(22) 5 S. D. Bengal 457; 10 Ind. Dec. (o. s.) 1002.
(23) 23 W. R. 307.
(24) 53 Ind. Cas. 347 (P. C.).

widow of one of the brothers also claimed his estate, alleging that they had divided, an agreement was arrived at by which in consideration of certain property being allotted to her for maintenance during her life she gave up all her rights in favour of the adopted son. Their Lordships held that the agreement which was subsequently acted upon amounted to an effective surrender. It does not appear that the surrender was even attacked on the ground that it was made in consideration of the widow being given a certain portion of the estate for her maintenance during her life; in any case the Privy Council had no hesitation in upholding the surrender in spite of such a provision. They say: "In the present case there was indeed no formal surrender by the widow of her estate: but there was an express agreement, binding upon her, that for considerations which appeared to her sufficient she would abandon the claim which at the time she had a good right to make and would have no right, claim or demand in respect of the estate of her late husband. It is true that the documents were drawn up on the footing, not of a surrender of an acknowledged right, but of an admission that the right did not exist: but in substance, and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate. The question is, no doubt, one of difficulty, but upon the whole their Lordships have come to the conclusion that the execution of the two *ekrarnamas*, followed by the acceptance for thirty years of maintenance under the terms of those documents, amounted to a complete relinquishment by Anandi Koer of her estate in favour of Mahabir, and accordingly that the title of Mahabir's representatives is established and the plaintiff's action should have been dismissed on this ground"

OLDFIELD, J.—The reservation in favour of the widow of a right to maintenance is a common term in surrenders; and it is not necessary to explain or justify it, as proposed by Mr. K. Srinivasa Aiyangar for respondent, with reference to any fiction of a revival, when her separate property passes from her, of the right she would have enjoyed, if no such property had ever been in question and the family had been joint. It is a sufficient reason for allowing the validity of a surrender, notwithstanding the inclusion of provision for the widow's maintenance, that she cannot be supposed to make a surrender so comprehensive as to deprive herself entirely of the means of subsistence. Yet that, except in the rare cases in which she has or has means of earning separate income, would be entailed by acceptance of appellant's argument. No doubt the widow has been described in some authorities as operating by the surrender her physical or civil death. But those, as Sadasiva Aiyar, J., held in *Chinnaswami Pillai* v. *Appaswami Pillai* (3), are "loose expressions, which can mean only that the reversioner succeeds in such a case as if the widow died at the moment of surrender" and should not be pressed as embodying the law in all their implications.

As the judgment just delivered shows, there is very little authority dealing directly with the matter; but, so far as it goes, it is in respondent's favour We have, moreover, been shown no decision, in which the inclusion of a *bona fide* provision for maintenance was regarded as invalidating a surrender; and the negative inference is strong, since, if the contrary view had been tenable, it would have afforded a clear and immediate ground of decision in the majority of the cases in the reports. The contention that a surrender cannot be valid, unless it is literally of the whole estate and reserves no benefit to the widow whatever, has been supported by reference to the latest comprehensive exposition of the law on the subject, the judgment of the Judicial Committee in *Rangasami Gounden* v. *Nochiappa Gounden* (2); and certainly according to it the surrender must be of the whole estate. But it is material that in that case the widow retained or received more than a mere right to maintenance, since she was also allowed possession of certain *mittah* lands, and, as the latter fact was a sufficient foundation for the conclusion against the validity of the transaction as a surrender, there is no reason for assuming that the effect of the stipulation for maintenance was considered or influenced the decision. It is indeed clear that the widow's acceptance of some benefit was not regarded as inconsistent with her effacement or the total withdrawal

of her estate, which was held essential to the validity of her surrender, since reference was made in the course of the judgment to the necessity for the surrender being "*bona fide* and not a mere device to divide the estate with the reversioner", requirements which would be meaningless, if the widow's right to receive anything were denied *in toto*. And this interpretation is confirmed by the fact that in a very recent decision, received since the argument on the present reference, *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (24) (Privy Council Appeal No. 100 of 1906) the Judicial Committee, proceeding statedly in conformity with *Rangasami Gounden* v. *Nachiappa Gounden* (2) and reiterating the necessity for a *bona fide* and total renunciation by the widow of her right, held that such a renunciation was effected by a document, under which she was to hold certain land for life for her maintenance, that being the sole stipulation for her benefit. The surrender, which the law recognises, is, as I understand these decisions and as the language used in the later suggests, a surrender of the estate held by the widow as such; and it will not be the less total owing to a reservation in her favour of a right of maintenance, to which she was not previously entitled as widow, even if that right be secured on part of the property comprised in her widow's estate.

It is conceded that the provision for residence must stand or fall with that for maintenance. I concur with the learned Chief Justice in answering the question referred in the negative.

SESHAGIRI AIYAR, J.—The question for decision may be examined from three standpoints, *Firstly*, with reference to the recent decision of the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (2); *secondly*, with reference to the theory of surrender, apart from decided cases: and *thirdly*, with reference to decided cases.

Mr. Krishnaswamy Aiyar's attempt was, in the main, directed to showing that the pronouncement of the Judicial Committee leaves Indian Courts no option in the matter. The judgment has been ably commented upon. The Board had before them a case which was not essentially one of surrender. They had mainly to deal with the proposition whether the consent of a reversioner to an alienation was conclusive proof of its binding character. Incidentally they referred to the distinction between surrender and alienation. In dealing with these matters they roughly classified them under three heads: (*a*) surrender proper, (*b*) indirect surrender and (*c*) alienation. As regards alienation they held that the consent of the immediate reversioner was only presumptive proof of its validity. In this connection they point out that the principle is an offshoot of the theory of surrender which alone is referred to by the Smrithi writers. As regards surrender itself, they say:—"The surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner." As regards indirect surrender, they seem inclined to hold that where the widow in possession alienates to a stranger and the consideration wholly passes into the hands of the immediate reversioner, the transaction may be regarded as one of surrender

The learned Vakil for the appellant relied upon certain expressions in the judgment, for the broad proposition that there should be no element of *quid pro quo* in effecting the surrender. The expression "civil death" and "effacement" must be taken to have been used figuratively *qua* the estate surrendered. I am clear that it was not the intention of Lord Dunedin that these words should be understood as suggested in this Court. Reading the whole judgment it is apparent that the noble Lord thought that to make a surrender effectual, it must comply with the following requirements. (1) It must be to the nearest reversioner; (2) there must be no reservation, and (3) it should be done *bona fide* and not as a device to effect a bargain between the widow and the reversioner. Mr. Karishnaswamy Aiyar wanted to import a fourth condition, namely, entire absence of consideration. I do not think there is anything in the judgment to support this suggestion. As I said in the Order of Reference, and suggested at the course of hearing, a provision for maintenance does not in the least affect the spiritual character of the surrender. The commonest instance of a *bona fide* surrender is where a religiously inclined widow seeks relief from the worries of temporal management,

of her estate and retires to a place of pilgrimage like Benares, she would then surrender the whole of her property to the next reversioner; But she will have to live even in Benares. Any provision made for her maintenance there would not, in the least, derogate from the completeness of the surrender. Therefore, in my opinion, if a transaction is *ex facie*, in substance and in intention a surrender which reserves no portion of the property to the widow, the fact that the surrenderee agreed to provide for the maintenance of the surrenderor should not vitiate the transaction.

Since this case was argued, the judgment of the Judicial Committee in Appeal No. 100 of 1916 [*Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (24)] from the Calcutta High Court has been circulated to us. That decision makes it clear that a provision for maintenance would not affect the validity of a surrender. In the judgment of the Board the passage quoted by the learned Chief Justice makes it clear that if the provision for maintenance is *bona fide* and reasonable, the transaction will be upheld.

An examination of the texts on which the theory of surrender has been built, leads to the same conclusion. Mr. K. Srinivasa Aiyangar in his very interesting argument drew attention to the fact that excepting Yagnavalkya and Vishnu, none of the Smrithi writers recognised the right of a Hindu widow to a share in the joint family property. The two Smrithi writers apparently gave expression to the prevailing sentiment at the time they wrote. When the texts were commented upon, two theories were propounded. Vygnaneswara held that the texts should be confined to awarding property only where the husband had become divided from the rest of the family. His view was that the theory of survivorship should not be prejudiced by granting a share to the widow. Jeemutha Vahana did not agree with this interpretation. He held that the share should be allotted, whether the family was divided or undivided. At the same time he gave expression to a sentiment which has since assumed large proportions. The unpretentious words in Chapter II, section 1, paragraph 59, "if her right ceases or never takes effect, the residue of the estate is taken in the same manner as they (reversioners) would have succeeded if the widow's right had never taken effect" have led to all the trouble. As I understand the position, both Vygnaneswara and Jeemutha Vahana were trying to placate male opinion against the innovation by Yagnyavalkya and Vishnu. Both of them wanted to put limitations upon the texts. Jeemutha Vahana apparently thought that by enabling the widow to give up the estate he would expound the text in a manner not very unacceptable to persons who have been accustomed to the belief that women have no share in the joint family property. However that may be, there is no doubt that the prevalent idea was that by surrender the widow would gain spiritual benefit, and that for this end she should walk out of the estate as if the property still belonged to the undivided family and as if her husband had never become divided from the rest. As Subramania Aiyar, J., pointed out in *Marudamuthu Nadan* v. *Srinivasa Pillai* (7), the principle enunciated by Jeemutha Vahana has been applied to cases governed by Mitakshara. The conclusion I come to is that the theory that by the operation of surrender the widow secures for herself at least as much right as she would have had, had she never taken the property by inheritance is inferable from the language of Jimutha Vahana. It follows from this that any provision for maintenance would be perfectly legitimate and would not offend against the doctrine of surrender. This is the view which underlies the decision of the Chief Justice Colvile in *Jadomoney Dabee* v. *Sarodaprosono Mookerjee* (16), although Mr. Justice Jackson was of a different opinion. Colvile, C. J., refers to *Lukhipree Dassee* v. *Sheosundri Dassee* (22) in support of his view, and this undoubtedly must have been in the mind of Mr. Justice Mitter when he says in *Gunga Pershad Kur* v. *Shumbhoonath Burmun* (15) that relinquishment brings in the normal rule of succession.

Lastly, turning to decided cases, it seems to me that the weight of authority is against the contention of Mr. Krishnaswamy Aiyar. In *Marudamuthu Nadan* v. *Srinivasa Pillai* (7) it was held that the surrender must be absolute and complete. *Sriramulu Naidu* v. *Andalammal* (8), which was

very much relied on, was really a case of a device by the widow to get advantages for herself and for her dependents in the guise of a surrender. The observations in *Mulugu Katayya* v. *Mudigonda Chandramowli Sastri* (12) that there should be no benefit for the widow except possibly for maintenance, is purely *obiter* and was not a considered pronouncement. On the other hand, Mr. Justice Sadasiva Aiyar in *Chinnaswami Pillai* v. *Appaswami Pillai* (3) lays down explicitly that an obligation to maintain does not vitiate a surrender. One of his reasons for the conclusion is that the surrenderor would have otherwise a right to be maintained. This statement is in accordance with the decision in *Raghunath Singh* v. *Kura Kumari* (17); but I think there is force in the contention of the learned Vakil for the appellant that the surrenderor can have no legal claim against the surrenderee, at least in cases of surrender of her husband's self-acquired properties. But this criticism of one of the reasons for the opinion does not affect the main conclusion. In *Challa Subbiah Sastri* v. *Palury Pattabhiramayya* (13) an absolute surrender, which was followed by a reconveyance, was held good. In Appeal No. 162 of 1916 the learned Officiating Chief Justice has put the theory of surrender on the ground that the widow by walking out of the estate is practically restoring the property to the joint family. In *Pilu Appa Nalwade* v. *Bebaji Naru Mang* (25) there was a reservation of the estate which was held to vitiate the surrender. In *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (6), although the case was one of alienation and observations relating thereto may be open to exception, having regard to the recent pronouncement of the Judicial Committee, Garth, C. J., referred to surrender as if all that is necessary is that there should be completeness and *bona fides*. In *Behari Lal* v. *Madho Lal Ahir* (5) there was no conveyance of estate at all but only the right of management. It was held by the Judicial Committee in that case that the transaction cannot be supported as a surrender. The observations of Mookerjee, J., in *Debi Prosad* v. *Golap Bhagat* (9) are really in favour of the view that a *bona fide* reservation for maintenance would not affect the validity of a surrender. Therefore, the authorities do not lend support to the contention advanced by the learned Vakil for the appellants. I agree in the answer given by the learned Officiating Chief Justice.

M. C. P.

Answered in the negative.

(25) 4 Ind. Cas. 584; 34 B. 165; 11 Bom. L. R. 1291.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 51 OF 1919.

July 24, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

VANICHAND RAJPAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAKHMICHAND MANECKCHAND—DEFENDANT—RESPONDENT.

Letters Patent (Bom.), cl. 15—"Judgment", meaning of—Order refusing injunction to restrain suit, whether judgment—Appeal, whether lies.

An order refusing to restrain the defendant from prosecuting a suit filed by him against the plaintiff in a Court of a Native State is not a judgment within the meaning of clause 15 of the Letters Patent of the Bombay High Court, and no appeal, therefore, lies against such an order under that clause. [p 396, col. 1.]

Per *Macleod, C. J.*—The word "judgment" in clause 15 of the Letters Patent of the Bombay High Court means a decision which affects the merits of the question between the parties by determining some right or liability. [p. 396, col. 1.]

Per *Heaton, J.*—If an order directly involves a real question of jurisdiction, if its effect is to give jurisdiction or to take away from the Court jurisdiction, then an appeal will lie against such order under clause 15 of the Letters Patent [p. 397, col. 1.]

Messrs. *Setalvad* and *Desai*, for the Appellants.

Mr. *Kanga*, for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is an appeal from the order of Mr. Justice Pratt on an

application made by the plaintiffs on motion that pending the hearing and final disposal of this suit the defendant, his servants and agents might be restrained by an order and injunction of this Honourable Court from prosecuting the suit filed by him against the plaintiffs in the Court of the Morvi State. The learned Judge held that the motion failed and directed the plaintiffs to pay the costs of the motion.

A preliminary point has been taken that no appeal lies against that order. It is admitted that the appeal could only lie under clause 15 of the Letters Patent, and that, therefore, no appeal lies, unless the order can be considered as a judgment. A "judgment" in clause 15, according to the decision in *Justices of the Peace for the town of Calcutta* v. *Oriental Gas Company* (1), which has been followed in this Court, means a decision which affects the merits of the question between the parties by determining some right or liability. The questions in this suit appear in the prayers of the plaint. It was prayed, first, that it might be declared that the partnership between the plaintiffs and the defendant was dissolved on or about the 26th day of June 1917; that since the date of the said dissolution the plaintiffs were the sole owners of the assets of the said firm; that the defendant had no interest in the profits of the said firm since the date of the dissolution; and then the plaintiffs further asked that pending the hearing and final disposal of this suit the defendant, his servants and agents should be restrained from prosecuting the suit he filed in the Court of the Morvi State.

Now the defendant in this suit filed a suit in the Morvi Court on the 4th January 1919, praying that the Court should take an account of the partnership business and realise its assets, and that on such account being taken, the Court would be pleased to pass a decree in the plaintiff's favour for such amount as appears due to him from the defendants or for whatever relief he might be entitled.

The plaintiffs in this suit did not file their plaint until the 14th May 1919. Now it is difficult to see how the order of Mr. Justice Pratt, refusing to grant the injunction asked for, is a decision which affects the merits of the questions between the parties by determining any right or liability on either side. It has been suggested that the effect of refusing to grant the injunction would be to oust the jurisdiction of this Court. If the jurisdiction of this Court in this suit is in any way ousted, it is owing to the fact that the plaintiff in the Morvi suit preferred to file his plaint there, and might get a decree in that Court which would bar, under section 13 of the Civil Procedure Code, the plaintiffs' suit in this Court, unless the plaintiffs can succeed on any of the exceptions to that section. We have been referred to the case of *Sonabai* v. *Tribhowandas* (2). In that suit Mr. Justice Davar ordered the plaintiff to deposit with the Prothonotary a sum of Rs. 3,000 as security for the first defendant's costs. It was objected on appeal as a preliminary point that no appeal lay against the order, and it was conceded that there could only be an appeal if the order was a judgment within the meaning of clause 15 of the Letters Patent. Mr. Justice Batchelor said in referring to the case of *Hadjee Ismail Hadjee Hubeeb* v. *Hadjee Mahomed Hadjee Joosub* (3):—

"I am of opinion that this reasoning covers the case of the order now under discussion, for the effect of it is, at least conditionally, to deprive the Court of the jurisdiction which it otherwise would have to try the plaintiff's suit."

That is not the case here. If the order of Mr. Justice Pratt is allowed to stand, the jurisdiction of this Court is not ousted as a direct consequence of that order. It may be ousted in future by the defendant in this Court obtaining a decree in the Morvi Court. But whether that will occur or not remains for future decision. I can see nothing in this order which brings it within the definition of "judgment" above referred to.

(1) 8 B. L. R. 433; 17 W. R. 364.

(2) 32 B. 602 at p 610; 10 Bom. L. R. 337.
(3) 13 B. L. R. 91 at p. 101; 21 W. R. 303

Therefore in my opinion the preliminary point is good and no appeal lies.

We have heard Counsel, however, for the appellants on the merits. I may say that in my opinion the decision of the learned Judge in the Court below was perfectly correct. The appeal will, therefore, be dismissed with costs throughout.

HEATON, J.—I agree both that the order of the Court below was correct on the merits, and also that no appeal lies. It may be that the definition of the word "judgment," as used in clause 15 of the Letters Patent, which was quoted by my Lord the Chief Justice, is not exhaustive. I gather from the case of *Hadjee Ismail Hadjee Hubeeb* v. *Hadjee Mahomed Hadjee Joosub* (3) that if the order directly involves a real question of jurisdiction, if its effect is to give jurisdiction or to take away from the Court jurisdiction, then an appeal will lie. But there is nothing of that kind in this case. It is not disputed in this appeal that the Court had jurisdiction to grant or refuse an injunction. But it is contended that the effect of refusing an injunction was to deprive the Court of its own jurisdiction. To my thinking, if the jurisdiction of the Court can in any way be affected, it is, or rather it will be, (because the event has not yet happened) by operation of law. If the Morvi Court makes a decree, then by the operation of section 13 of the Civil Procedure Code the High Court here may be debarred from proceeding with the suit. But to refuse to prevent the natural operation of the law in that way, is not to cause an ouster of the jurisdiction. Therefore, I agree that the appeal should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2041 OF 1918.

August 1, 1919.

Present :—Mr. Justice Sehagiri Aiyar and Mr. Justice Burn.

SUBRAMANIA PATHAN—PLAINTIFF—APPELLANT

versus

KATTAMBATH RAMA—DEFENDANT—RESPONDENT.

Landlord and tenant—Lease—Inundation by sea water of premises demised—Rent, suit for—Abatement, claim for, whether available to tenant—Transfer of Property Act (IV of 1882), s. 108 (B) (e), scope of.

Where a portion of property demised under a document of lease is inundated by sea water and is rendered unfit for cultivation, the tenant is, in an action for rent, entitled to proportionate abatement. [p. 398, col. 2.]

Sheik Enayutoollah v. *Sheik Elaheebukhsh*, W. R. (1864) Act X Rulings 42, *Salimullah* v. *Kali Prosonno*, 33 Ind. Cas 349; 22 C. L. J. 569, followed

The principle underlying section 108 (B) (e) of the Transfer of Property Act is not applicable to such a case. [p. 398, col. 2.]

Second appeal against the decree of the District Judge of South Kanara in Appeal Suit No 73 of 1918, preferred against the decree of the Court of the District Munsif of Kasargad in Original Suit No. 524 of 1916.

FACTS.—Certain premises were in the occupation of the defendant as lessee when a portion thereof was rendered permanently unfit for cultivation by ingress of salt water. On a suit by an assignee of the right to collect rents, the defence was that the tenant was entitled to proportionate abatement. The claim was allowed by the lower Appellate Court.

Mr. *Ananthakrishna Aiyar*, for the Appellant.—Section 108 B (*e*) of the Transfer of Property Act enacts that where a portion of the leased premises is rendered unfit for cultivation by flood, etc., (ingress of the sea in this case), the lease shall be void at the option of the lessee. See also *Dhuramsey* v. *Ahmedbhai* (1), *Breul & Co.* v. *Haji Sidick* (2). Notice to determine the lease is essential.

[SESHAGIRI AIYAR, J.—Do you say that the principle of apportionment has no application to this case?].

That principle applies only to cases of

(1) 23 B. 15; 12 Ind. Dec. (N. S.) 10.
(2) 6 Ind. Cas. 906; 12 Bom. L. R. 474

devolution or partial alienation. *Bruel & Co.* v. *Hari Sidick* (2) is confirmed on appeal in *Sidick Haji Hoosein* v. *Bruel & Co.* (3); Redman on Landlord and Tenant, page 406. See also *Izon* v. *Gorton* (4).

Mr. *K. P. Lakshmana Rao*, for the Respondent.—As the Transfer of Property Act has no application to the suit lease, the question is whether the dispute cannot be decided without resort to the principles of that Act. I submit that under the general law the tenant is entitled to the abatement in question. Woodfall on Landlord and Tenant, page 479, Foa on Landlord and Tenant, page 122 (referring to page 63, Volume VII of Bacon's Abridgment). The law is that a tenant shall not suffer by reason of an act of God. The English cases cited for the appellant are all cases of accident by fire or other 'accidents' which can be repaired, as distinguished from cases where the premises are rendered substantially and permanently unfit. *Salimullah* v. *Kali Prosonno* (5).

Mr. *K. B. Venkatchalam*, for Mr. *C. V. Ananthakrishna Aiyar*, in reply.—If the Transfer of Property Act cannot apply, I submit that the law relating to contracts which subsequently become impossible of performance applies.

JUDGMENT.—The finding of the Court below is that a portion of the demised premises became unfit for paddy cultivation, because it was inundated by sea water. The question, therefore, arises whether the tenant can plead as a defence to a suit for rent that he is entitled to proportionate abatement. There is not much authority on the subject. Mr. Ananthakrishna Aiyar contended that the principle of section 106, clause B (*e*), of the Transfer of Property Act was applicable and that the only remedy open to the tenant was to have avoided the lease *in toto*. Mr. Lakshmana Rao for the respondent argued that the Transfer of Property Act, not being in terms applicable to agricultural tenancies, the application of the principle underlying the section must depend upon whether there are recognised pre-existing rules on the subject which render the application of the principle inequitable. He drew our attention to *Sheik Enayutoollah* v. *Sheik Elaheebuksh* (6) and *Salimullah* v. *Kali Prosonno* (5) and contended that, prior to the enactment of the Transfer of Property Act, the principle of rateable apportionment was recognised in this country. We may say that the idea is in accordance with the notions of natural justice and unless we are compelled to apply the provisions of the Act, there is no ground for not following the judgment of Sir Barnes Peacock in *Salimullah* v. *Kali Prosonno* (5).

Even if the principle of section 108, clause B (*e*), is to be invoked, it is not clear that the present case is covered by the accidents enumerated. From the earliest times flooding by sea-water has not been recognised in England as standing on the same footing as destruction by fresh water floods. It is explained in 18 Halsbury, page 431 that, whereas deterioration by fresh water flooding is reparable, flooding by sea water would render the land practically unfit for all time to come. Whatever may be the reason, it was laid down in Bacon's Abridgment, Volume VII, page 63, that the tenant could claim abatement where the leased land was flooded by sea water and this view has been accepted as good law by all text writers. Woodfall, page 479, Foa, page 112, and Halsbury, Volume XVIII, page 481. Therefore even under the Transfer of Property Act following these authorities the word flood may have to be restricted to sea water flooding. Further, it is open to argument whether section 108 B (*e*) is exhaustive of the rights of the tenants. Avoidance of tenancy is no doubt one mode of relief. But does it exclude the notion that the claim for abatement is available to him? The English Law seems to countenance the view that avoidance is the only remedy, *Baker* v. *Holtpzaffell* (7). In *Sidick Haji Hoosein* v. *Bruel & Co.* (3) and *Dhuramsey* v. *Ahmedbhai* (1) the principle has been accepted. However that may be, in our opinion, as the Act is not in terms applicable, there is

(3) 8 Ind. Cas. 1049; 35 B. 333; 12 Bom. L. R. 1055.

(4) (1830) 132 E. R. 1193; 5 Bing. (N. C.) 501; 2 Arn. 39; 7 Scott 537; 8 L. J. C. P. 272; 3 Jur. 653; 50 R. R. 772.

(5) 33 Ind. Cas. 349; 22 C. L. J. 569.

(6) W. R. (1864) Act X Rulings 42.

(7) (1811) 4 Taunt. 45; 4 Ves. 115; 13 R. R. 556; 128 E. R. 244.

no reason for importing by way of analogy these technical considerations discussing rights between landlord and tenant in respect of agricultural tenancies. We think the learned Judge was right. The second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 905 OF 1918.

April 22, 1919.

Present:—Sir John Wallis, KT, Chief Justice, Justice Sir William Ayling, Kt., and Mr. Justice Sadasiva Aiyar.

K. SATHI AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAMANDI PANDARAM—PLAINTIFF—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s. 25—Minor, custody of, suit for, maintainability of—Procedure.

A civil suit for the custody of a minor will not lie in the Civil Courts. To obtain such custody proceedings must be taken under the Guardians and Wards Act. [p. 403, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 22 of 1918 (Appeal Suit No. 652 of 1917 on the file of the District Court) preferred against the decree of the Court, of the District Munsif of Alatur in Original Suit No. 276 of 1916.

FACTS.—Suit by the father to recover custody of his minor child from the mother who, according to plaintiff, was persuaded to leave him by her father, the 2nd defendant. Admittedly plaintiff had taken another wife and 1st defendant stated that she left him of her own accord on account of cruelty and ill-treatment. The District Munsif dismissed the suit, following *Muthuverappa Chetti* v. *Ponnuswami Chetty* (1), on the ground that the removal was not to the welfare of the minor. The Subordinate Judge, on appeal, decreed the suit. The defendants appealed.

This second appeal came on for hearing on the 3rd February 1919 before Bakewell and Phillips, JJ.

Messrs. *T. R. Ramachandra Aiyar*, and *P. G. Krishna Aiyar*, for the Appellants.—The Courts have no jurisdiction to grant the relief prayed for. Act VIII of 1890 provides a special procedure which bars a regular suit. See section 7. See also *Mrs. Annie Besant* v. *Narayaniah* (2) and *Sham Lal* v. *Bindo* (3), which clearly lay down the law. An application under the Act alone will lie.

[PHILLIPS, J.—The section of the Act deals only with guardians appointed by Courts. It does not say that a father is to be deprived of his rights over his son.]

No doubt the Court can appoint the father as guardian. But the welfare of the minor is the test. The father, because he is such, cannot insist on being appointed guardian.

[PHILLIPS, J.—Suppose the child is kidnapped and the kidnapper, being wealthy, treats the child better than the father can or does. Is the father to be deprived of his right?]

That is a question under the Penal Code. But no child will be removed from a custody where he gets better treatment solely because the applicant is the father.

Sham Lal v. *Bindo* (3) says that the Act is exhaustive and bars suits. It is followed in *Utma Kuar* v. *Bhagwanta Kuar* (4). Even though there is no express bar in the Act, the intention of the Legislature was such. See *Arunachallam Pillay* v. *Iyama* (5) following *Mrs. Annie Besant* v. *Narayaniah* (2). Sections 25 and 4 read together include also a natural guardian. See *Dayabhai Raghunathdas* v. *Bai Parvati* (6).

The Act is exhaustive. On an application under the Act notice is to be served on all persons interested, while in a suit it is only

(1) 18 Ind. Cas. 16; (1911) 2 M. W. N. 561; 10 M. L. T. 477; 22 M. L. J. 68.

(2) 24 Ind. Cas. 290; 38 M. 807; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 12 A. L. J. 1155; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 41 I. A. 314 (P. C.).

(3) 23 A. 594; 1 A. L. J. 266; A. W. N. (1904) 135.

(4) 29 Ind. Cas. 416; 37 A. 515; 13 A. L. J. 743.

(5) 29 Ind. Cas. 769; 8 Bur. L. T. 123; 8 L. B. R. 211.

(6) 28 Ind. Cas. 597; 39 B. 438; 17 Bom. L. R. 332.

on the defendant. That is the ruling in *Mrs. Annie Besant* v. *Narayaniah* (2). Also the District Court was held to have no jurisdiction even though it could try all suits of a "civil nature."

Sharifa v. *Muns Khan* (7), followed in *Achratlal Jekisendas* v. *Chimanlal Parbhudas* (8), is against my contention. But even there the Court was not satisfied as to the correctness of the view taken. The Calcutta cases are all before the Act but wholly in my favour. There is no case in Madras after the Act.

Mr. *C V. Ananthakrishna Aiyar*, for the Respondent.—The Act only consolidates the previous enactments and covers only the ground covered by them. It is not, therefore, exhaustive. There is no provision in it for applications by parents and other natural guardians who are not always appointed as a matter of course. Section 9 of the Civil Procedure Code does give the plaintiff a right of suit. See *Mathuraban* v. *Tewary* (9), which follows the Bombay view and dissents from *Arunachallam Pillay* v. *Iyama* (5).

In any case I am entitled to be declared the father.

Mr. *Ramachandra Aiyar*, in reply.—*Dayabhai Raghunathdas* v. *Bai Parvati* (6) is authority that the Act applies to a father also. Section 25 applies to him. *Mohideen Ibrahim Nachi* v. *Mahomed Ibrahim Sahib* (10) says that a father can apply under section 25.

See also *Muthuveerappa Chetti* v. *Ponnuswami Chetty* (1), which says that under the Hindu Law no one has an absolute right to be guardian.

ORDER OF REFERENCE TO A FULL BENCH.

The only question for determination is whether a suit by a father to recover possession of his minor child is maintainable in a Civil Court, or whether the sole remedy is by proceedings under the Guardians and Wards Act (VIII of 1890). In the latter case the procedure would be by application to the District Court under section 25 of the Act, and it has been held in *Dayabhai Raghunathdas* v. *Bai Parvati* (6) that this section is applicable to all guardians, and not only to guardians appointed by Court, but the Provincial Small Cause Courts Act distinctly recognizes a right of suit, for suits for the custody of a minor are not cognizable by a Court of Small Causes (Article 37). It has been held that such a suit is maintainable both in this Court [*Krishna* v. *Reade* (11)] and in Bombay [*Sharifa* v. *Mune Khan* (7)], but a contrary view has been taken in Allahabad [*Sham Lal* v. *Bindo* (3)]. It is now argued that the decision of the Privy Council in *Mrs. Annie Besant* v. *Narayaniah* (2) has overruled the Madras and Bombay decisions, but this proposition has been distinctly negatived in *Achratlal Jekisendas* v. *Chimanlal Parbhudas* (3). The argument is based on the statement of the Privy Council in *Mrs. Annie Besant* v. *Narayaniah* (2) that the District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. The previous passage, which we quote below, also supports the contention:—

"The real question was whether he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education. Again, it was not and could not be disputed that the letter of 6th March 1910 was in the nature of a revocable authority. The real question was whether in the events which had happened the plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants, bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence."

From this it would appear that in the opinion of their Lordships, the District Court had only jurisdiction under Act VIII of 1890 so far as the case under reference was concerned, but they do not appear to have specifically decided the question of whether any suit like the present one is maintainable in a Civil Court.

We may point out that the decision in *Krishna* v. *Reade* (11) was under Act IX of 1861, which was held to be an enabling Act only, and that Act VIII of 1890 is a consoli-

(7) 25 B. 574; 3 Bom. L. R. 167.
(8) 37 Ind. Cas. 215; 40 B. 600; 18 Bom. L. R. 582.
(9) 44 Ind. Cas. 753; 10 Bur. L. T. 136.
(10) 38 Ind. Cas. 894; 39 M. 603; 30 M. L. J. 21.

(11) 9 M. 31; 3 Ind. Dec. (N.S.) 418.

dating and amending, Act although in other respects the provisions appear to be the same; also that the actual decision in *Achratlal Jekisendas* v. *Chimanlal Parbhudas* (8) was based on the fact that the father never had custody of the child, but it has been held by this Court in *Mohideen Ibrahim Nachi* v. *Mohamed Ibrahim Sahib* (10) that this fact does not prevent the application of section 25 of the Act of 1890. Section 25 does not expressly state whether the procedure thereunder should be by plaint or petition, when no application has been made for the appointment or declaration of a guardian by the Court.

In view of the apparent conflict between the decision in *Krishna* v. *Reade* (11) and the recent *dictum* of the Privy Council, we think it advisable to refer to a Full Bench the question whether a Mufassil Court other than a District Court has jurisdiction to entertain a suit by a father for the custody of his child.

This second appeal came on for hearing on the 9th and 10th April 1919 before the Full Bench.

Mr. *P. G. Krishna Aiyar*, for the Appellant. —Act VIII of 1890 fully provides for the case. *Krishna* v. *Reade* (11), when the Act of 1861 was in force, is the only case where a suit is held to lie. But that Act was only an enabling Act while the present is a consolidating Act.

Mrs. Annie Besant v. *Narayaniah* (2).

[WALLIS, C. J.—The suit there was filed in the District Court. How do you determine the Court for bringing the suit?]

The plaintiff puts his own value and the forum is based on the value. In the case of applications under the Act, section (4), clause (2), fixes the District Court.

[Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.—In the arguments before the Privy Council the question whether a suit will lie or not was not allowed to be argued.]

[AYLING, J.—Apart from the Acts of 1890 and 1861 had the Courts jurisdiction to entertain suits?]

There was no such jurisdiction.

[WALLIS, C. J.—Such jurisdiction was part of the prerogative of the Crown and so there must have been such jurisdiction.]

The cases are *Krishna* v. *Reade* (11) (suit lies); *Huro Soondures Boistobee* v. *Joy Doorga Boistobee* (12) (application alone lies); *Venkamma* v. *Savitramma* (13) doubts *Krishna* v. *Reade* (11). *Mohideen Ibrahim Nachi* v. *Mahomed Ibrahim Sahib* (10), *Mushraf Husain* v. *Mohammad Jawad* (14), *Sham Lal* v. *Bindo* (3), *Joy Kishen Mookerjee* v. *Jodoonath Ghose* (15), *Utma Kuar* v. *Bhagwanta Kuar* (4).

WALLIS, C. J.—The real point is what do the Privy Council mean in *Mrs. Annie Besant* v. *Narayaniah* (2)?]

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.—Prior to the Act of 1861 there were other Acts under which it has been held that suits like the present were of a civil nature and cognisable by the Civil Courts. In *Mrs. Annie Besant* v. *Narayaniah* (16) this High Court held that the Act of 1890 did not take away the common law right to proceed by suit. The case in *Mrs. Annie Besant* v. *Narayaniah* (2) was for a declaration that the minors were wards of Court. The Privy Council say that the only provision of law under which the period of minority could be extended so as to allow the declaration was in the Act of 1890 alone. So the only effective remedy that could be had under that Act could be granted only by a District Court. What ways were open for recovery of custody of the child was a question which was argued but was held unnecessary. See at pages 814, 816, 818, 820.*

[SADASIVA AIYAR, J.—If there are to be concurrent remedies, as stated in the Allahabad case, is there not a possibility of conflict of decisions, *e. g.*, two persons, each claiming to be guardian, apply one by suit and the other under the Act.]

Section 48 of the Guardians and Wards Act lays that orders under the Act are conclusive, so the suit would become futile.

SADASIVA AIYAR, J.—If a decree had already been passed?]

It could be vacated by application with a copy of the order under the Act.

A consolidating Act simply contains in one Act the provisions of all previous Acts and in supersession of them. It is the same as a codifying one except that the latter

(12) 4 B. L. R. App. 36; 13 W. R. 112.
(13) 12 M. 67; 4 Ind. Dec. (N. S.) 396.
(14) 48 Ind. Cas. 60; 21 O. C. 194; 5 O. L. J. 616.
(15) 3 W. R. 1.
(16) 21 Ind. Cas. 789; 15 M. L. T. 1; 25 M. L. J. 661; (1914) M. W. N. 1 Sup.

*Pages of 38 M.—Ed.

incorporates judicial decisions also. The present Act is only a consolidating Act as it purports to be. So common law rights are not affected.

The Act does not contemplate applications by the father at all, see section 19.

[WALLIS, C. J.—The power of the Court under the Act must be taken to prevail over the rights of any decree-holder in a suit in the Munsif's Court.]

No Court will appoint any one else as guardian when there is a father, unless the father is not eligible.

Suits for the custody of a minor are recognised and exempted from the operation of the Provincial Small Cause Courts Act. See Exempted Suits, Article 37.

See also Trevelyan on Minors, p. 189.

Section 25 makes no mention of the father.

[Mr. *Krishna Iyer.*—*Dayabhai Raghunathdas* v. *Bai Parvati* (6), says that the father can apply.]

The Act applies only to persons appointed by Court.

[SADASIVA AIYAR, J.—Sections 20, 21, etc., seem to apply equally to a natural guardian.]

The scheme of the Act indicates that the father's power is absolute and cannot be inquired into.

Even assuming that the Act applies to the father, the common law right of suit is not taken away by it. In England the action of trespass still subsists even though a writ of *habeas corpus* is the easier remedy and more resorted to: *Queen* v. *Clarke* (17), *Dominus Rex* v. *Smith* (18). *Sharifa* v. *Mune Khan* (7) follows these two cases. *Achratlal Jekisendas* v. *Chimanlal Parbhudas*(8) followed in *Mathuraban* v. *Tewary* (19). Bacon, Volume III, page 405.

[WALLIS, C.J.—Is the jurisdiction anything apart from the prerogative of the Crown?]

See section 52 of the Act.

See also section 1 of the Act of 1861.

A father cannot get any relief under section 25 of the Guardians and Wards Act, which imposes certain conditions on the guardian. For a father will not be asked to submit to such conditions merely because a Court intervenes.

[WALLIS, C. J.—We must take it that the Act which applies to all guardians applies also to the chief guardian of all, the father.]

At most that is only a cumulative right and a suit to recover custody is different from a suit for declaration as in *Mrs. Annie Besant* v. *Narayaniah* (2). See at page 822.* Compare Order XXI, rule 100, and the independent right of suit.

Mr. *F. G. Krishna Aiyar*, in reply.—Guardians in the Act include a *de facto* guardian like the father, see *Wallace Sitha Boi* v. *Wallace Radha Boi* (20). The procedure under the Act is not strictly summary except that it is by petition. If a suit is allowed, then a deadlock is likely to ensue by a possible conflict of decisions. The suit in *Mrs. Annie Besant* v. *Narayaniah* (2) was for the recovery of custody of children. Act IX of 1887 was passed while the enabling Act of 1861 was in force. Act VIII of 1890 consolidates all the Statute Law on the subject and so Act IX of 1887 cannot be read so as to conflict with Act VIII of 1890. It may be that section 19 of the Guardians and Wards Act does not refer to a father as it speaks of appointment, but section 25 clearly refers to a father as well.

The procedure under section 25 is far from being summary, see the elaborate details set out in the rest of the Act; so the comparison with the face of an application under Order XXI, rule 100, is not appropriate.

OPINION.

WALLIS, C. J.—British Courts in India appear from the outset to have considered the right of the father or other persons entitled to the custody of a minor to be a civil right and enforceable as such by suit in a Civil Court. That this was a well-known kind of suit appears from the Guardians and Wards Act, IX of 1861, which recited that it was expedient to amend the law for hearing suits relative to the custody and guardianship of minors, and provided that applications might be made by petition to the principal Civil Court of original jurisdiction in the District by which such application, if preferred in the form of a regular suit, would be cognizable.

It was first held in Calcutta that the right of civil suit was taken away by this Act, *Huro Soondaree Boistobee* v. *Joy Doorga Boistobee* (12). No reasons were given for the decision,

(17) (1857) 119 E. R. 1217 at p. 1219; 7 El. & Bl. 186; 26 L. J. Q. B. 169; 5 Jur. (N. S.) 335; 110 R. R. 551.
(18) 93 E. R. 983; 2 Strange 982.
(19) 44 Ind. Cas. 758; 10 Bur. L. T. 186.
(20) 51 Ind. Cas. 236; 36 M. L. J. 189.

*Page of 38 M.—*Ed.*

and the case was not followed in *Brohmomoyee* v. *Kashi Chunder Sen* (21). In *Krishna* v. *Reade* (11) this Court also held that the right of suit was not taken away by the Act of 1861, and this view is supported to some extent by the Provincial Small Cause Courts Act, 1887, which included in the schedule of suits excluded from the jurisdiction of the Small Cause Court—"Article 37. A suit for the restitution of conjugal rights, for the recovery of a wife, for the custody of a minor or for a divorce." Act IX of 1861 and a large number of enactments relating to the guardianship of minors' property were repealed and re-enacted with modifications by the Guardians and Wards Act, 1890. It did not purport to be a codifying but a consolidating Act, which is a very different thing, and did not, as far as I can see, make any very material alterations in the provisions of Act IX of 1861 as to the guardianship of the person. It was held, however, in *Sham Lal* v. *Bindo* (3) to have been a codifying Act and to have taken away the right of proceeding by regular suit in Civil Courts to recover the custody of minors. A different view was taken in *Sharifa* v. *Mune Khan* (7), where, however, the point was not considered to be free from doubt. Then came the decision of the Privy Council in *Mrs. Annie Besant* v. *Narayaniah* (2). The plaintiff in that case had filed a suit in the District Court of Chingleput against the defendant, Mrs. Besant, who resided within that jurisdiction, for declarations that he was entitled to the guardianship and custody of his two minor sons, and that the defendant was not entitled and was in any case unfit to have the charge and guardianship of the minors, and for a direction to the defendant to hand them over to him or to such person as the Court might think fit. The minors, one of whom was nearly eighteen, were residing and being educated in England at the date of the suit.

The Privy Council held that the suit, which was a suit to recover the custody of the infants, did not lie in the District Court, and observed: "The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890". The question for decision was whether a civil suit not under the Guardians and Wards Act would lie in the Civil Court. The Privy Council held that it would not, and assigned as the sole but sufficient reason for so holding the fact that the District Court had no jurisdiction in the case except under the Guardians and Wards Act. This I feel bound to construe as a ruling that the jurisdiction conferred by the Guardians and Wards Act was exclusive, and that the right of proceeding independently by civil suit no longer existed. The suit having been held incompetent, their Lordships proceeded to consider whether the proceedings could be supported if treated as proceedings under the Guardians and Wards Act, and held they could not, because the minors were not resident in the district where the proceedings were instituted. If the jurisdiction of the District Court to entertain suits of this character not governed by the Guardians and Wards Act had been recognised as still existing to any extent, it would have been necessary to assign reasons for holding that it was inapplicable in the circumstances of the case. The judgment did not do so, but dismissed the suit simply on the ground that the Court had now no jurisdiction except under the Act. If this is the position of the District Court, the position of the District Munsif's Court must be the same. In *Achratlal Jekisendas* v. *Chinanlal Parbhudas* (8) it was no doubt held that the judgment of the Privy Council has not this effect, but no reasons were given for that decision, and I have been unable to find any which are satisfactory to my mind. I would answer the question in the negative.

AYLING, J.—I agree. The judgment of the Privy Council in *Mrs. Annie Besant* v. *Narayaniah* (2) appears to me to be open to no other construction.

SADASIVA AIYAR, J.—I agree and for the same reasons.

Answered in the negative.

M. C. P.

(21) 8 C. 263; 10 C. L. R. 91; 6 Ind. Jur. 359; 4 Ind. Dec. (N. S.) 169.

UMAR BAKHSH *v.* SOHNE KHAN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 152 OF 1915.

February 27, 1919.

Present—Mr. Justice Shadi Lal and
Mr. Justice LeRossignol.

UMAR BAKHSH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SOHNE KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Adoption—Daughter's son, whether can be adopted—Ghorewaha Rajputs *of Garhshankar Tahsil, Hoshiarpur District*—Riwaj-i-am, *entry in, value of.*

A Ghorewaha Rajput of the Garhshankar Tahsil in the Hoshiarpur District is authorised by custom to adopt his daughter's son.

The entry in the *riwaj-i-am* of the Hoshiarpur District prepared at the last Settlement stating that there is no custom of adoption among the Rajputs of the Garhshankar Tahsil, is not a correct statement of the custom on the subject.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 26th October 1914.

Dr. *Shuja-ud-Din*, for the Appellants.

Mr. *Fakir Chand*, for the Respondents.

JUDGMENT.—Sohne Khan, a Ghorewaha Rajput of the Garhshankar Tahsil in the Hoshiarpur District, adopted his daughter's son Ghulam Rasul, who is himself a Ghorewaha Rajput. The learned District Judge, concurring with the Subordinate Judge, has decided in favour of the *factum* and the validity of the adoption; and the sole question, which arises upon the certificate granted by him, is whether a Ghorewaha Rajput is authorized by custom to adopt his daughter's son. The appellants, who are the first cousins of Sohne Khan, place their sole reliance upon an entry in the *riwaj i-am* prepared at the last Settlement, when the Rajputs of Tahsil Garhshankar stated that among them there was no custom authorising adoption. The Settlement Officer, who compiled the *riwaj-i am*, however, expressed his opinion that the denial by the Rajputs of the Garhshankar Tahsil as to the custom of adoption was not borne out by the exceptions quoted, and we find that there were, at any rate, two instances of the adoption of daughter's sons among the Muhammadan Rajputs of Mauza Kathgarh of Tahsil Garhshankar; *vide* Humphrey's Customary Law of the Hoshiarpur District, pages 147 and 186. It is to be observed that a Division Bench of this Court in Civil Appeal No. 1229 of 1910 [*Rahmat Khan* v. *Bisan* (1)], while dealing with an entry in the *riwaj i-am* of Garhshankar Tahsil excluding daughter and daughter's son from inheritance to ancestral estate in the presence of collaterals more distantly related than the 7th degree, expressed an opinion that the *riwaj-i-am* was not entitled to any weight.

So far as the question of the existence of the custom of adoption among the Ghorewaha Rajputs is concerned, we have a direct authority to the effect that such a custom does exist. In *Ajhey Khan* v. *Bhambu Khan* (2) this Court after an exhaustive enquiry came to the conclusion that a Ghorewaha Rajput of Garhshankar Tahsil was authorized by custom to make a gift of his ancestral estate to his sister's grandson whom he had brought up as a son. The judgment refers to instances of adoption among the members of the tribe, and the same remark applies to the judgment in *Moula Baksh* v. *Hame Khan* (3), which relates to the custom of adoption among the Ghorewaha Rajputs of the Jullundur District. These two judgments have never been dissented from; indeed they have been cited with approval in *Karim Bakhsh* v. *Fatta* (4) and *Sultan Bakhsh* v. *Musammat Mahian* (5).

The learned Counsel for the appellants is unable to cite a single instance, judicial or otherwise, in support of the contention that the custom of adoption does not exist among the Ghorewaha Rajputs. In view of the previous rulings of this Court and the instances referred to above, we are unable to accept the entry in the *riwaj-i-am* as a correct statement of the custom on the subject. We accordingly endorse the decision of the Courts below and dismiss the appeal with costs.

Appeal dismissed.

(1) 19 Ind. Cas. 850; 136 P. W. R. 1913; 234 P. L. R. 1913.
(2) 174 P. R. 1883.
(3) 173 P. R. 1883.
(4) 113 P. R. 1891.
(5) 64 P. R. 1894.

MADRAS HIGH COURT.

APPEAL SUIT No. 160 OF 1918.

April 22, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

A. RAMASWAMI PILLAI—CLAIMANT—APPELLANT

versus

THE THASILDAR OF MADURA AND ANOTHER—PETITIONERS—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 54—Appeal to High Court from award—Limitation Act (IX of 1908), Sch. I, Art. 156, scope of—"Appeal under Code of Civil Procedure," meaning of.

Article 156 of Schedule I to the Limitation Act applies to appeals preferred to the High Court under section 54 of the Land Acquisition Act. [p. 407, col. 2.]

The expression 'an appeal under the Civil Procedure Code' is not restricted to an appeal the right to prefer which is conferred by the Code of Civil Procedure. It means an appeal the procedure with respect to which from its inception is governed by the Civil Procedure Code. [p. 406, col. 2.]

Scope of Article 156 of Schedule I to the Limitation Act explained. [p. 406, col. 2; p. 407, col. 1.]

Appeal against the award of the District Court, Madura dated the 31st December 1915, in Original Petitions Nos. 353 of 1914 and 211 of 1915.

FACTS appear from the judgment.

Mr. *A. Krishnaswamy Aiyar* (with him Messrs. *M. S. Mohidin, K. S. Jayarama Aiyar* and *B. Panchapagesa Sastri*), for the Appellants.—The right of appeal in the present case is one conferred by section 54 of the Land Acquisition Act and not otherwise. See *Rangoon Botatoung Company Limited* v. *Collector, Rangoon* (1), *Special Officer, Salsette Building Sites* v. *Dasabhai Bezanji* (2), *Mulambath Kunhammad* v. *Acharath Parakat* (3), *Manavikraman Tirumalpad* v. *Collector of Nilgiris* (4) Article 156 applies only to appeals "under" the Civil Procedure Code, that is, where the right of appeal is conferred by the Code. Section 96 of the Civil Procedure Code confers rights of appeals from "decrees." The adjudication in question in this appeal is only an award and not "a decree or judgment or order." See *Secretary of State for India* v. *Chelikani Rama Rao* (5). Section 54 incorporates certain provisions only of the Code. See *Manavikraman Tirumalpad* v. *Collector of Nilgiris* (4). The word "under" means "conferred by." Compare Articles 1, 34, 33, 35 and 179 of the Limitation Act.

As regards rights of appeal under various Acts of the Legislature, compare Provincial Insolvency Act, section 46; Madras Estates Land Act, sections 191, 192; Probate and Administration Act, sections 86, 83; Indian Companies Act, section 202; Divorce Act, section 55; Presidency Towns Insolvency Act, section 8; Bombay Act IV of 1888, section 3; Bengal Act XVIII of 1911, section 6.

The Advocate General, Mr. *S. Srinivasa Aiyangar* (with him the Government Pleader), for the Respondent.—The word "under" means only "preferred under." The right of appeal is a substantive right and may be conferred by various enactments, but the procedure regulating such appeals when preferred is what is referred to in Article 156. The conditions of Order XLI, rule 1, are all satisfied in the present case and the procedure in appeal has been held to be that given in the Code and in the rules to be framed by the High Court under the Code.

[ABDUR RAHIM, J.—Section 55 of the Land Acquisition Act gives rule-making powers which are perhaps intended to be utilised for the purposes.]

That is obviously for a different purpose. The section refers to officers, etc. Section 54 has been fully construed in *Manavikraman Tirumalpad* v. *Collector of Nilgiris* (4). For the purpose of an appeal to the High Court, that decision concedes a regular appeal governed by the Code, but not for any further litigation.

Article 156, therefore, applies. See *Aga Mahomed Hamadani* v. *Cohen* (6). Compare section 3 of the Limitation Act which speaks of "appeals preferred." See also section 29.

(1) 16 Ind. Cas. 188; 40 C. 21; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 6 L. B. R. 150; 39 I. A. 197 (P. C.).

(2) 20 Ind. Cas. 763; 17 C. W. N. 421 (P. C.).

(3) 38 Ind. Cas. 373; 31 M. L. J. 827; 5 L. W. 472.

(4) 49 Ind. Cas. 27; 41 M. 948; 8 L. W. 261; 24 M. L. T. 155; 35 M. L. J. 110; (1918) M. W. N. 540.

(5) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007 25 C. L. J. 69; 43 I. A. 192 (P.C.).

(6) 13 C. 221; 6 Ind. Dec. (N. S.) 646.

Under the Probate and Administration Act a right of appeal is given, but the procedure regulating the appeal is that given in the Code. See also the Indian Succession Act.

Mr. *A. Krishnaswamy Aiyar*, in rely.—The terms of section 54 of the Land Acquisition Act are sufficiently comprehensive and must be carried into effect. A decision under the Act is not a decree nor is it executable as a decree. It must be executed in conformity with section 54 alone. The Bombay Improvement Act contains express provisions.

Under the Probate and Administration Act as also under the Indian Succession Act, every matter that is contested is a suit and every adjudication is a decree within the meaning of the Civil Procedure Code. So there is a difference.

JUDGMENT.—This is an appeal from an award of the District Judge of Madura in certain land acquisition proceedings, and the preliminary question is whether Article 156 of the Limitation Act applies. The Court-fees were paid on the memo. of appeal one year and 149 days out of time, and if Article 156 applies, the appeal would be barred. The question is of first impression and cannot be said to be quite free from difficulty. The Land Acquisition Act gives a right to appeal by section 54, which lays down, "subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, an appeal shall lie to the High Court from the award or from any part of the award of the Court in any proceedings under that Act." There is no special period of limitation provided in the Land Acquisition Act, nor is there any allusion, unless it be by implication of this very section, to the Limitation Act. Article 156 of the Limitation Act provides a period of 90 days for 'appeal under the Code of Civil Procedure, 1908, to a High Court, except in the cases provided for by Article 151 and Article 153,' the time to run from 'the date of decree or order appealed from.' The argument on behalf of the appellant is that you must read the 1st column of the article as meaning that the appeals provided for here are those the right to which is conferred by the Code of Civil Procedure, and it is contended that this interpretation is strengthened by the language of column 3. There is no direct authority on the point. There is, however, a ruling of the Calcutta High Court in *Aga Mahomed Hamadani* v. *Cohen* (6), the reasoning of the decision in which seems to apply to the present question. There the objection was raised with reference to an appeal provided for under the Burma Courts Act, XVII of 1875. Section 49 of that Act provided for an appeal to the High Court of Calcutta in cases where the amount of value of the subject-matter exceeded Rs. 3,000 and was less than Rs. 10,000. Wilson and Porter, JJ., interpreted the words 'appeals under the Code of Civil Procedure' in Article 156 of the Limitation Act, as meaning appeals the procedure in respect of which is governed by the Civil Procedure Code. They say: "The Limitation Act, Schedule II, Article 156, when it speaks of the Civil Procedure Code, is, on the face of it, speaking of a Code which relates to procedure and does not ordinarily deal with substantive rights; and the natural meaning of an appeal under the Civil Procedure Code appears to us to be an appeal governed by the Code of Civil Procedure so far as procedure is concerned." It seems to us that this is the correct interpretation of Article 156. There seems to be no good reason for saying that an appeal under the Civil Procedure Code means only an appeal the right to prefer which is conferred by the Code itself. On the other hand, it would not be straining the language of the article too much to hold that an appeal the procedure with respect to which from its inception to its disposal is governed by the Civil Procedure Code, may rightly be spoken of as an appeal under the Code: this interpretation seems to us to be strengthened by the reference in Article 156 itself to Article 151 of the same Schedule. Article 151 provides for appeals from a decree or order of the High Court in the exercise of its original jurisdiction. Now though the right to appeal from such decrees or orders is not given by the Code of Civil Procedure, but by the Letters Patent, yet Article 156 speaks of such appeals as appeals under the Civil Procedure Code. That also tends to show that what is meant by the Legislature is appeals the hearing and disposal of which is governed by the rules of procedure laid down in the Civil Procedure Code,

As regards column 3 there can be no doubt, after the decision of the Privy Council in *Rangoon Botatoung Company Limited* v. *Collector, Rangoon* (1), that an award under the Land Acquisition Act is not a decree passed in the ordinary jurisdiction of a Civil Court. But their Lordships themselves point out in that case that appeals from awards as provided for in section 54 of the Land Acquisition Act are governed as to their procedure from the date of the filing of the appeal to its disposal by the rules provided for in the Civil Procedure Code, and in a Letters Patent Appeal in this Court in *Manavikraman Tirumalpad* v. *Collector of Nilgiris* (4) it has been held that section 98 of the Civil Procedure Code applies. Though the award of the Land Acquisition Judge is not a decree or order for purposes of further appeal from the decision of the High Court in appeal, nevertheless the procedure laid down in the Civil Procedure Code with reference to appeals from original decrees which is also made applicable to appeals from orders by rule 2 of Order XLIII, Civil Procedure Code, governs appeals under section 54 of the Land Acquisition Act, although in the rules the word "decree" is used. It is to be pointed out that the provisions of the Civil Procedure Code regarding procedure to be followed in appeals from original decrees are incorporated in the Land Acquisition Act by virtue of section 54. If the 1st column of Article 156 includes, as we hold, appeals provided for by section 54 of the Land Acquisition Act, there is really no difficulty created by the use of the words "decree or order" in the 3rd column. Then we think it is rightly pointed out in *Dropadi* v. *Hira Lal* (7) that there are several Acts, for example, the Succession Act, the Probate and Administration Act and the Land Acquisition Act, which make the Code of Civil Procedure applicable to the proceedings under the Act, and give a right of appeal to the High Court, but do not prescribe any period of limitation for the appeal. It has always been assumed, probably rightly, that such appeals are under the Code of Civil Procedure governed by what is now Article 156 of Schedule I to the Limitation Act and by the general provisions of the Act also.

(7) 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 3.

Our attention has been drawn by Mr. A. Krishnaswami Aiyar to certain especial Acts, such as the Calcutta Improvement Act and the Bombay Improvement Act, in which special rules of limitation are provided for. That, to our mind, does not affect the question. It might have been perhaps better if the Legislature enacting the Land Acquisition Act had also provided some special provision or made an express and direct reference to the provisions of the Limitation Act. But that is another question.

We hold upon a proper construction of Article 156 that it applies to appeals provided for by section 54 of the Land Acquisition Act.

This appeal must be dismissed with costs.

Appeal dismissed.

M.C.P.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 819 OF 1918.

February 18, 1919.

Present:—Mr. Justice Abdul Raoof.

JIWANA—DEFENDANT—PETITIONER

versus

MALAK CHAND—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 23—Money paid under agreement opposed to public policy, whether can be recovered.

A person who has paid money under an agreement which is void as opposed to public policy may recover back the money so paid while the agreement is still unperformed. [p. 408, cols. 1 & 2.]

Defendant promised to marry his daughter to the plaintiff and on the faith of that promise the plaintiff paid a sum of money to the defendant. Subsequently the defendant refused to carry out the agreement and the plaintiff brought a suit to recover the amount paid by him to the defendant:

Held, that the plaintiff was entitled to recover the sum advanced by him inasmuch as the agreement, although void under section 23 of the Contract Act, had not been performed. [p. 408, col. 2.]

Revision from the decree of the Senior Subordinate Judge, Shahpur at Sargodha, dated the 13th May 1918.

Dr. *Nand Lal*, for the Petitioner.

Mr. *C. L. Gulati*, for the Respondent.

JUDGMENT.—The plaintiff brought a suit for the recovery of Rs. 300, with interest, on the allegation that on the 14th December 1911 the defendant borrowed the sum under his signature in the plaintiff's *bahi*. Various pleas were raised by the

defendant by way of defence to the suit. It has been found by both the Courts below that the defendant had promised to marry his daughter to the plaintiff and the plaintiff had made an advance of Rs. 300 on the faith of that promise. The Court of first instance passed a decree for the principal sum Rs. 300 only and did not allow any interest or costs to the plaintiff. Both the parties appealed to the lower Appellate Court. Defendant's appeal was dismissed and the plaintiff's appeal was partly decreed, the Appellate Court holding that the plaintiff was entitled to costs also. The present petition for revision has been filed by the defendant, and it has been argued that the suit was not maintainable inasmuch as the contract to give the daughter in marriage was an illegal contract, and no suit could be based upon that contract. Section 23 of the Indian Contract Act is relied upon. The suit on the face of it is not one for the enforcement of any illegal agreement. It is a suit merely for the non-performance of the promise on the part of the defendant. In support of his argument the learned Counsel for the appellant relied upon *Hira* v. *Jowala Das* (1) and contended that inasmuch as the contract was illegal, the present suit was not maintainable. That was not what was held in that case. The learned Judge who decided that case based his judgment on the finding that a betrothal had taken place and that the promised girl had died before she could be married. He was of opinion that the agreement had partly been performed. The concluding words of his judgment are:—

"Holding then that plaintiff advanced the money claimed to defendant as consideration for an illegal promise which was performed either in whole or in part, according to the view taken, I decide that the plaintiff is entitled to no relief and dismiss the appeal."

This decision was in full accord with the observation made by Plowden, J., in the case of *Kahna* v. *Kahn Singh* (2). That eminent Judge observed thus at page 295:—

"I have no difficulty, however, in holding that a person who has paid money under an agreement which is void as opposed to public policy, may recover back the money so paid while the agreement is still unperformed; although he cannot do so afterwards."

The decision of Mr. LeRossignol is in full accord with this opinion of Mr. Justice Plowden.

In the present case the defendant admitted that he had married his daughter to another man, and, therefore, he had disabled himself from performing the contract altogether. The plaintiff was, therefore, entitled to sue for the money advanced The judgment of the Court below is, therefore, correct. The learned Counsel has, however, argued that the suit was barred by three years' limitation. There is no force in this contention. In the first place, the point does not appear to have been pressed in the lower Appellate Court. A plea to this effect was taken in the memorandum of appeal filed in the Court below, but it was evidently never pressed. There is no indication in the judgment of the lower Appellate Court that any argument was addressed on the plea of limitation before that Court. I find that there was good reason for the plea not being pressed. The defendant was examined in this case and he deposed that he married his daughter to another man on the 16th Maghar Sambat 1972. This date corresponded to the 1st December 1915. The present suit was filed on the 7th October 1916. It was, therefore, within time from the date of the breach of the contract.

The application for revision must be dismissed and it is dismissed with costs.

Appeal dismissed.

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(1) 27 Ind. Cas. 1008; 27 P. L. R. 1915; 224 P. W. R. 1915.

(2) 106 P. R, 1879.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No 2 0 OF 1918 AND CIVIL REVISION PETITION No. 634 OF 1918.

February 25, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

DATTADA BHIMARAJU—RESPONDENT—COUNTER-PETITIONER—APPELLANT

versus

KASIBOTLA SREERAMA SASTRULU—APPELLANT—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 42, 102

DATTADA BHIMARAJU v. KASIBOTLA SREERAMA SASTRULU.

—Execution of decree—Decree of Small Cause Court transferred to ordinary Court, effect of—Order in execution, whether appealable—Appeal, second, whether lies.

Where a decree made by a Court exercising Small Cause Court jurisdiction is transferred for execution to a Court exercising ordinary original jurisdiction, the decree by force of its transmission acquires, for the purposes of execution, all the rights which a decree passed by a Court of ordinary original jurisdiction would have. An order made in execution of such a decree is appealable, but there is no second appeal [p. 410, cols. 1 & 2.]

Appeal and petition against the order of the Court of the Subordinate Judge, Kistna at Ellore, dated the 5th August 1918, in Appeal Suit No. 683 of 1917, preferred against the order of the Court of the District Munsif, Ellore, dated the 26th September 1917, in Execution Petition No. 361 of 1917, in Small Cause Suit No. 245 of 1904, on the file of the Cocanada Sub-Court.

FACTS appear from the judgment.

Mr. *P. Somasundaram*, for the Appellant.—The order was not appealable, as the order was passed in execution of a small cause decree.

Mr. *V. Suryanarayana*, for the Respondent.—Though the decree was a small cause decree, the Court executing the decree can use all the powers it possesses otherwise than as a Small Cause Court. The question whether a regular appeal will lie depends upon the character of the tribunal, and not upon the nature of the claim. *Perumal* v. *Venkatarama* (1). Further, section 42 of the Civil Procedure Code allows the executing Court all the powers which it would have had if it had itself passed the decree, which would necessarily have been an original decree in the present case. In any case, execution can issue as from an original decree. *Perumal* v. *Venkatarama* (1). See also *Lareti* v. *Hazarilal* (2) which follows *Peary Lal Singh* v. *Radha Nath Singh* (3) and *Adhar Chandra Gope* v. *Pulin Behary Saha* (4). Also see *Atwari* v. *Maiku Lal* (5) and *Adhar Chandra Gope* v. *Pulin Behary Saha* (4).

Mr. *P. Somasundaram*, in reply.—Section 20 of Act XI of 1865, on which *Perumal* v. *Venkatarama* (1) is based, is omitted in Act IX of 1887. So *Perumal* v. *Venkatarama* (1) is no longer authority under the present Act.

Section 42, Civil Procedure Code, must be read with the provisions of the Small Cause Courts Act. The certificate is granted only in respect of what the Small Cause Court cannot do. The order of arrest is one within the competence of the Small Cause Court. And, therefore, it should not be assumed that the District Munsif's Court at Ellore was acting in any larger capacity in passing the order than was permissible to the Subordinate Judge who passed the decree. The right to appeal is a substantive right. Such a right cannot be implied when the transfer is obviously not inclusive of execution by arrest.

JUDGMENT.

SESHAGIRI AIYAR, J.—This matter arises in execution. The Subordinate Judge of Cocanada exercising Small Cause Court Jurisdiction passed a decree on the 14th of July 1905. It was transferred for execution to the District Munsif of Ellore on the Regular Side. This was on the 20th of October 1908. The last application was on the 24th of April 1917. On it an order to attach immoveable property was made on the 16th of August 1917 *ex parte* by the District Munsif. It was set aside on the application of the judgment-debtor on the 26th of September 1917. On the very same day, an oral application was made to arrest the judgment-debtor. The District Munsif was asked to allow the decree-holder to amend the execution application by inserting the prayer for arrest. He declined to accede to the request and dismissed the petition altogether. An appeal was made to the Sub-Court against that order. The Subordinate Judge considered that the amendment should have been allowed. He, therefore, set aside the order and remanded the petition for disposal on the merits. The judgment-debtor has preferred this second appeal. A preliminary objection is taken on behalf of the respondent that no second appeal lies. I think the contention is well founded.

I felt some doubts during the course of the hearing whether any appeal lay to the Sub-Court from the order of the District Munsif refusing to issue the warrant of arrest. On further consideration I have come to the

(1) 11 M. 130 at p. 132; 4 Ind. Dec. (N. S.) 90.
(2) 33 Ind. Cas. 523; 14 A. L. J. 415.
(3) 11 C. W. N. 861.
(4) 27 Ind. Cas. 10; 30 Ind. Cas. 694; 20 C. L. J. 129; 19 C. W. N. 1085.
(5) 1 Ind. Cas. 553; 31 A. 1; 5 A. L. J. 612; A. W. N. (1908) 254.

conclusion that the first appeal was properly presented, and that no second appeal lies. It is clear that under section 7 (*a*) (*iii*) of the Code of Civil Procedure a Court of Small Causes can have no power to execute decrees against immoveable property. Its power to issue a warrant of arrest or to attach moveable properties is not affected by this sub clause. The decree-holder in this case, as he was desirous of getting the immoveable property of the judgment-debtor attached, had the decree transferred to the Court of the District Munsif of Ellore. By section 42 of the Civil Procedure Code, in consequence of the transfer, the decree, though passed by a Judge exercising Small Cause Court Jurisdiction, becomes impressed with rights incident to a decree passed by the District Munsif. The words "as if it had been passed by itself" in the first sentence of the section show that the decree by force of its transmission acquires all the rights which a decree passed by the District Munsif exercising original jurisdiction would have for purposes of execution. The 3rd sentence of section 42 makes it clear that the orders in execution are subject to the same right of appeal as orders passed by the District Munsif exercising original jurisdiction. Mr. Somasundaram for the appellant suggested that the clause "shall be subject to the same rules in respect of appeal" only refers to the procedure to be adopted and does not confer a right of appeal. This construction would make the sentence meaningless. I am clear that by virtue of the fact that the Munsif passed orders in execution in respect of a decree passed by the Small Cause Court, his orders became subject to appeal. The only difficulty which I find in giving full effect to this view relates to section 104, clause (*h*), of the Code of Civil Procedure. That section enumerates the various orders which are appealable under the Code. Clause (1) (*h*) says: "an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree." Reading it literally this clause would mean that no appeal is provided against an order in execution directing arrest or detention of a judgment debtor. But I do not think that is the true construction of the clause. The exemption of order of arrest or detention in execution of a decree is due to the fact that such orders are covered by section 47 of the Code of Civil Procedure. Under section 2, clause (2) the expression "decree" includes the determination of any question within section 47. Therefore, inasmuch as the order exempted by clause (*h*) acquires the superior force of a decree, it was thought desirable by the Legislature to exempt it in section 104. Moreover, clause (2) of section 104 provides that there shall not be a second appeal against the orders made appealable under clause (1). If the exemption in favour of arrest or detention in execution of a decree were not in clause (1) (*h*), it would follow that even where such orders are passed in execution of a decree of a regular Court for more than Rs. 500, no second appeal would lie from such an order. This would make section 104 inconsistent with section 47, and section 2 (2). Therefore, the object of exemption in section 104, clause (1) (*h*) is not to make such orders unappealable but only to point attention to the fact that they are not orders of the same class mentioned in the other sub clauses. I am, therefore, of opinion that an appeal lies to the Sub-Court against the order of the District Munsif. This view is supported by a decision of this Court in *Perumal* v. *Venkataraman* (1). Although that case was decided with reference to the old Small Cause Courts Act, it seems to me that the conclusion is equally applicable to proceedings under Act IX of 1887. In *Peary Lal Singh* v. *Radha Nath Singh* (3) the same view was taken.

If an appeal lies, then the question is whether a second appeal is competent. That must be answered in the negative, having regard to section 102 of the Code of Civil Procedure. Under the old Code it was held in *Lala Khandha Pershad* v. *Lala Lal Behary Lal* (6), *Harakh* v. *Ram Sarup* (7) and *Peary Lal Singh* v. *Radha Nath Singh* (3) that no second appeal lies in execution proceedings relating to Small Cause Court decrees. The language of section 102 is an exact reproduction of section 586 of the old Code. See also *Mavula Ammal* v. *Mavula Maracior* (8). For these reasons I am of opinion that the preliminary objection must be allowed and

(6) 25 C. 872; 13 Ind. Dec. (N. S.) 569.
(7) 12 A. 579; A. W. N. (1890) 206; 6 Ind. Dec. (N. S.) 1115.
(8) 30 M. 212; 17 M. L. J. 376.

the appeal should be dismissed with costs. I agree as to the order passed by my learned brother in the Civil Revision Petition.

OLDFIELD, J.—I agree with my learned brother's judgment; but I desire to add that the argument based on section 42, Civil Procedure Code, depends on the interpretation of the word "rules" therein as not conferring any substantive right of appeal, but referring only to the rules mentioned in sections 121—128. It is a sufficient answer to this that section 42 merely reproduces section 228 of the former Code, in which no such rules could have been in question.

The appeal against order must be dismissed with costs. The civil revision petition, which is also before us, must be dismissed, because no question under section 115 of the Code of Civil Procedure is shown to arise. No order as to costs in the Civil Revision Petition.

M. C. P.

Appeal and Petition dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 670 OF 1913.

February 28, 1919.

Present:—Mr. Justice Martineau.

SHIV DEV SINGH—PETITIONER

versus

JAI RAM AND ANOTHER—RESPONDENTS.

Custom—Mortgage by father—Son, whether has interest in redemption—Mortgage, suit for sale on—Son, whether entitled to be impleaded—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.

Under Hindu Law a son is a co-parcener, an owner of the ancestral property along with his father and other members of the family. Under Customary Law a son has no right of ownership in his father's lifetime. He has only a reversionary interest in the property and a right to protect that interest by interfering to prevent unnecessary alienations. This limited interest that he possesses is not such an interest as is contemplated by Order XXXIV, rule 1, of the Civil Procedure Code. Therefore, where a mortgagee brings a suit to enforce the mortgage, the mortgagor's son is not entitled to be made a party to the suit.

Revision from the order of the Subordinate Judge, 1st Class, Lahore, dated the 18th July 1918.

Mr. *Sewa Ram Singh*, for the Petitioner.

Mr. *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—The plaintiff has brought a suit for the sale of property mortgaged by the defendant. The latter's son applies to this Court for revision of an order of the Subordinate Judge refusing to make him a party to the suit.

Order XXXIV, rule 1, Civil Procedure Code, requires that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage, and it is contended for the applicant that he has an interest in the mortgage security.

Rulings based on Hindu Law are not in point, as the applicant is admittedly governed by custom. Under the Hindu Law the son is a co parcener, an owner of the ancestral property along with his father and other members of the joint family. Under the Customary Law the son has no right of ownership in his father's lifetime. He has only a reversionary interest in the property, and a right to protect that interest by interfering to prevent unnecessary alienations. I do not think that the limited interest that he possesses is such an interest as is contemplated by Order XXXIV, rule 1, and I hold, therefore, that the applicant is not a necessary party in the suit.

I dismiss this application with costs.

Revision dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 580 OF 1917 WITH RULE No. 344 OF 1917.

May 29, 1919.

Present:—Mr. Justice Newbould.

RAMLAL GOTHI—DEFENDANT—APPELLANT

versus

ROY CHOWDHURY SATISH CHANDRA MUSTAFI AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 105—Civil Procedure Code (Act V of 1908), s. 115—Order assessing fair and equitable rent—Jurisdiction—Revision—High Court, interference by.

Where a Court has jurisdiction under section 105 of the Bengal Tenancy Act to assess fair and equitable rent, the High Court will not interfere in revision with an order made by the Court fixing a

fair and equitable rent on the ground that the rent fixed is not fair or equitable.

Appeal against the decree of the Special Judge, Jalpaiguri, dated the 18th November 1916, affirming that of the Assistant Settlement Officer of that place, dated the 23rd August 1915.

FACTS appear from the judgment.

Babu *Atul Chandra Gupta* (with him Babu *Jitendra Nath Sen Gupta*), for the Appellant. —This appeal is on behalf of the defendant in a proceeding under section 105 of the Bengal Tenancy Act. The point is that without recording any evidence the learned Settlement Officer settled the rent *ex parte* what he thought to be fair and equitable. In the absence of any evidence to rebut the presumption arising from the entry in the Record of Rights, the Settlement Officer has no jurisdiction to settle any rent which in his opinion appears to be fair and equitable. Refers to section 105 of the Bengal Tenancy Act and the rules framed by the Government of Eastern Bengal and Assam under section 189 of the Bengal Tenancy Act for the guidance of Settlement Officers in settling fair and equitable rent. When no evidence was given by the plaintiff to rebut the presumption arising from the entry in the finally published Record of Rights, the entry should be taken as correct. As the existing rent should, under the Statute, be presumed to be fair and equitable unless the contrary is shown, the Settlement Officer is bound to record evidence.

[NEWBOULD, J.—Can I interfere under section 115, Civil Procedure Code?]

If your Lordship thinks that the appeal is incompetent your Lordship can interfere under section 115, Civil Procedure Code, when the decree is passed without jurisdiction. Refers to *Bissessur Dass* v. *Johann Smidt* (1).

Babu *Nagendro Nath Ghose*, for the Respondents.—The defendant in his written statement does not dispute the figures on which the fair and equitable rent was claimed. So under Order VIII, rule 5, Civil Procedure Code, the defendant practically admits the plaintiff's case and the Court was competent to decide upon the admission made in the pleadings without any further evidence. Upon the provisions of section 7 of the Bengal Tenancy Act and upon the statements made in the plaint which were not denied by the defendant in his written statement, the Settlement Officer had jurisdiction to settle fair and equitable rent. There is no question of error of jurisdiction involved in this case which would justify your Lordship's interference under section 115, Civil Procedure Code. Even if a wrong view of law has been taken by the Appellate Court, that cannot be revised under section 115, Civil Procedure Code.

Babu *Atul Chandra Gupta* briefly replied.

JUDGMENT.—This is an appeal and also a Rule against an order under section 105 of the Bengal Tenancy Act fixing a fair and equitable rent. The only point urged is that the lower Courts acted without jurisdiction in assessing the fair and equitable rent without taking any evidence. It appears, however, that the defendants, although they did not appear at the hearing, filed a statement in which the figures on which fair and equitable rent was assessed were not disputed. These figures were sufficient material for the Assistant Settlement Officer and the Special Judge to come to a finding. Whether that finding is correct and whether the rent assessed is fair and equitable, is a question into which this Court cannot go, if the lower Courts have jurisdiction; and I hold that they had jurisdiction.

Accordingly this appeal must be dismissed and this Rule discharged with costs. No separate Pleader's fee is allowed in the Rule.

Appeal dismissed;
Rule discharged.

(1) 10 C. W. N. 14.

MADRAS HIGH COURT.

CIVIL APPEAL No. 163 OF 1918.

January 23, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

PONNUSWAMI PILLAI AND OTHERS—DEFENDANTS NOS. 1 TO 3—APPELLANTS

versus

SUBRAMANIA PILLAI AND OTHERS—PLAINTIFFS AND DEFENDANT NO. 4—RESPONDENTS.

Hindu Law—Minor—Sale of minor's property by

PONNUSWAMI PILLAI v. SUBRAMANIA PILLAI.

mother, validity of—Civil Procedure Code (Act V of 1908), s. 11—Decree against minor, whether res judicata*—Guardian* ad litem, *negligence of—Evidence Act (I of 1872), ss. 115, 116—Estoppel—Minor whether estopped—Landlord and tenant—Minor taking lease of property sold, effect of.*

Under the Hindu Law the female natural guardian of a minor is not justified in disposing of the property of the minor merely because she wishes to live with her relatives so as to obtain their help in managing the ancestral properties. The fact that her relatives and those of the minor advise her to do this would not make any difference. [p. 413, col. 2; p. 414, col. 1.]

Where the guardian *ad litem* of a minor is guilty of negligence in conducting the defence on behalf of the minor, a decree obtained by the plaintiff would not bind the minor, nor would it operate as *res judicata* in a subsequent suit brought by the minor. [p. 415, col. 1.]

Although in matters of pure contract or transfer of property a minor cannot be held to be estopped by his conduct within the meaning of section 115 of the Evidence Act, yet when he enters into possession of property on a lease obtained on his behalf by his guardian, he cannot be allowed to set up his title to the property as a bar to a suit in ejectment on the expiry of the lease. [p. 415, cols. 1 & 2.]

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 94 of 1916.

JUDGMENT.

ABDUR RAHIM, J.—The suit is to set aside a sale of the plaintiffs' properties by their guardians during their minority. The 2nd plaintiff is still a minor and is represented in the suit by the 1st plaintiff as next friend. They are cousins, being sons of two brothers, the survivor of whom, Ayyavu Pillai, died sometime in 1908. The mothers of the plaintiffs acted as their guardians and sold all the ancestral properties, including their dwelling house, for Rs. 11,000 odd by Exhibit X (*a*) to the 1st defendant, the father of defendants Nos. 2 and 3, who are the appellants before us.

Mr. T. Rangachariar, the learned Pleader for the appellants, contended that though he could not prove that there was absolute necessity for the sale of the lands in the ordinary sense of the word, still the sale was justified as this was the most prudent thing to do in the circumstances in which the plaintiffs and the mothers were placed. The mothers' relations lived in a different village and they had no male relation in the village of their deceased husbands to help them in managing the property. Therefore, the sale which was effected in consultation and in accordance with the advice of their relations should, in the light of these facts, be upheld as a prudent transaction for the benefit of the minors.

The sale could not be upheld on the ground of necessity as out of the Rs. 11,000 odd, Rs. 500, alleged to have been paid on the date of the agreement, was never paid and Rs. 6,000 was allowed to remain with the vendee on the security of the properties sold; that is to say, only Rs. 5,000 odd out of the entire amount was required, if the case of the appellants is true on this point, to pay certain ancestral debts. Of this sum Rs. 2,725, was paid by the vendee to a mortgagee under Exhibit III. That is not disputed, but the payment of the balance, *i.e.*, of a sum of Rs. 2,425, alleged to have been paid by the purchaser to the vendors for discharge of the decree-debt in Original Suit No. 352 of 1900 on the file of the District Munsif's Court of Valangiman, is disputed except to the extent of Rs. 400, which the plaintiffs admit having been received and paid in satisfaction of what was due under the decree above mentioned. But, as pointed out by the learned Subordinate Judge, the income of the property was more than sufficient to pay off the entire liabilities after meeting the necessary household expenses. The debt under the mortgage was not immediately payable and there could not be said to have existed any pressing necessity, or any necessity at all, for the sale of the properties. At the most, it would have been sufficient to sell a portion of the properties in order to meet the liabilities. Mr. T. Rangachariar very fairly in face of these facts was not prepared to contend that the sale was justified by any necessity.

And I do not think that, in the absence of necessity, the sale would be valid under the Hindu Law. It is not clear on the evidence, as the Subordinate Judge points out, that the mothers of the plaintiffs were really anxious or felt themselves obliged to migrate from the village For after the sale they took a lease of the dwelling house from the vendees. There is no authority for saying that, under the Hindu Law, if the female natural guardian of a minor wishes to live with her relatives so as to obtain their help in managing the ancestral pro-

perties, she would be justified in disposing of them and the fact that her or the minor's relatives advised her to that effect would not make any difference. The decision in *Vembu Iyer* v. *Srinivasa Iyenngar* (1) relied upon by Mr. T. Rangachariar does not lay down any such proposition.

The next point argued relates to the payment of Rs. 2,425, and the finding of the Subordinate Judge that of this sum only Rs. 400 was in fact proved to have been paid to the guardians of the plaintiffs has been challenged. The decree in the suit of 1900 was for Rs. 1,800 odd and the case of the defendants is that, while they undertook to discharge the mortgage under which Rs. 2,725 was due, they paid the amount now in question to the vendors themselves to pay the decree debt. On carefully considering the evidence one must say that the matter cannot be said to be free from obscurity. The onus, however, of proving the payment lies on the defendants. The deed of sale, Exhibit X (*a*), recites that the money was paid to the vendors at the time of the sale. But the 1st defendant himself admits that nothing was paid at the date of sale but that the payment was made afterwards. The evidence of the 1st defendant is that he paid the money to one Govinda Padayachi asking him to go and settle everything. Govinda Padayachi says that he never received this money but that the money was paid by the 1st defendant's Kanukupillai, one Ramachandra Rao, not to the vendors but to Ramalingam Pillai, a relation of the vendors, who was acting for them in the negotiations for sale. Neither Ramachandra Rao nor Ramalingam Pillai is examined, and Govinda Padayachi says that he does not know if Ramalinga Pillai actually paid the morey to the ladies. The payment to Ramalinga Pillai, even if true, would not be a good discharge, for it is not alleged that he held any power-of-attorney from the plaintiffs' guardians and the sale deed was executed under the signatures of the guardians themselves. The decree-holder is the 1st witness on the defendants' side; and he supports entirely the case of the plaintiffs on this point, which is to the effect that on Ayyavu Pillai's death only Rs. 900 was due to him and that out of this sum Rs. 500 was paid by the plaintiffs' guardians before the execution of the sale and that the balance of Rs. 400 was paid after the sale and that on receiving that amount he passed the receipt, Exhibit I, on 7th June 1909. The receipt, however, purports to be for Rs. 2,735, as having been received on that date. Ponnambala Pillai has to say that that recital is not true, but he is not able to give any satisfactory explanation why this false recital was made in Exhibit I. At the same time it is to be noted that the receipt is for Rs. 2,735, while the sum mentioned as payable in the deed of sale, which was executed only 3 days previously, was Rs. 2,425 not merely for the decree debt but also for debts due on some promissory notes. We do not know what amount, if any, was due on promissory notes and no such promissory notes have been adduced in evidence. The defendants also rely on Exhibit II, a certified copy of an execution petition, filed by Ponnambala Pillai on the 11th September 1908. That was the 1st petition in execution, and it states that no payment has been made towards the decree amount which with interest amounted on that day to Rs. 2,800 odd. The petition was presented on the very last day before the expiry of the time allowed by law, but was returned and never presented again. The Subordinate Judge rightly suggests that this was not likely to have happened if considerable payments had not been made towards the decree amount although not certified to the executing Court. Exhibit A, which is a post card written by the decree-holder to his Vakil's clerk, distinctly states that payments had been made. The plaintiffs have also produced Exhibit E, which purports to be a draft of the execution petition as at first made and it sets out a number of payments. The Vakil's Gumasta who wrote both Exhibit E and the original of Exhibit II has been examined to explain how in Exhibit II no mention was made of any payments and why it was returned. The explanation shortly is that, as his master was not sure of the dates and the details of all the payments, he asked him not to enter any payment at all, and Ponnambala Pillai supports this story. It is difficult to say that this explanation is quite convincing. On the other hand, the evidence on

(1) 17 Ind. Cas. 609; 23 M. L. J. 638; 12 M. L. T. 547.

the defendants' side as to the payment of Rs. 2,425 to the guardians of the plaintiffs is extremely unsatisfactory. It is possible, as surmised by the Subordinate Judge, that some of the men who hung about these females received more than Rs. 400 from the vendee ostensibly for the payment of Ponnambala Pillai's decree. But I am unable to hold that the conclusion of the Subordinate Judge that only Rs. 400 was actually received by the plaintiffs' guardians is not on the whole justified by the evidence as it stands.

The next point argued on behalf of the appellants is with reference to the dwelling house. The house is one of the properties sold under Exhibit X (a). But after the sale, as already mentioned, the plaintiffs' guardians took a lease of the house from the 1st defendant. On the expiry of the lease the defendants instituted a suit for ejectment, Original Suit No. 100 of 1911 in the District Munsif's Court of Valangiman, obtained a decree and in execution recovered the house from the plaintiffs. The question is, does that decree operate as *res judicata* so far as the house is concerned? The minors were represented in that suit by a guardian *ad litem* appointed by Court, and the guardian was satisfied with putting the plaintiffs to the proof of their case and did not plead that the sale was not binding on the minors as it was not for a necessary purpose. If the guardian *ad litem* had taken the least trouble to ascertain the facts relating to the sale, the deed of sale itself would have shown that the sale could not have been justified. In that sense the guardian *ad litem* was clearly guilty of negligence in conducting the defence on behalf of the minors and the decree, therefore, does not bind them. Further I think there is force in the argument of Mr. A. Krishnaswami Aiyar, the learned Vakil for the respondents, that no question of title to the property could arise in that suit. The guardians of the minors having been admitted into possession of the house on a lease granted by the 1st defendant, it was not open to them or to the minors to impeach the title of their lessor. It may be a sound general proposition that a minor cannot, in matters of pure contract or transfer of property, be held to be estopped by his conduct within the meaning of section 115 of the Evidence Act, as for instance when he has made a misrepresentation as regards his age. But I do not see how minors who entered into possession of certain property on a lease obtained on their behalf by their guardians can be allowed to set up their title to the property as a bar to a suit in ejectment on the expiry of the lease. I am not prepared to hold without authority and none has been cited that to such cases, section 116 of the Evidence Act has no application. I, therefore, hold that the decree in the suit for ejectment does not operate as *res judicata*.

The last question argued by the appellants' Vakil relates to that portion of the judgment which provides that the plaintiffs are entitled to mesne profits from the defendants from the date of the sale. The learned Subordinate Judge holds that as there was no legal necessity for the sale, the 1st defendant must be taken to have acted without good faith in buying the property. And in this connection we have been referred to a recent decision of the Privy Council in *Banwari Lal* v. *Mahesh* (2), in which it may be mentioned, no one appeared before their Lordships on behalf of the respondents. That was a suit to set aside a sale by a Hindu father, while in the present case the alienation was made by guardians of minors. Their Lordships held in the above case that the decree for possession being conditional on payment of a certain sum of money by the minors, no mesne profits could be claimed from the vendee although the sale was set aside. The whole question is dealt with in one sentence from which I do not gather that their Lordships meant to lay down a universal or absolute proposition that in every case in which a sale is set aside and the plaintiff is directed to refund any portion of the consideration money, the vendee is not liable to account for mesne profits irrespective of the nature of the transaction and however large the profits which he may have received compared with the interest on the amount which was actually paid by him as consideration for

(2) 43 Ind. Cas. 540; 45 I. A. 284 (P.C.); 21 C. C. 228; 41 A. 63; 23 C. W. N. 577; 6 C. L. J. 168; (1919) M. W. N. 490.

the sale. In *Bhirgee Nath* v. *Narsingh Tewari* (3), also relied on by the appellants, all that the learned Judge really meant to lay down was that where a sale was set aside on equitable ground or on grounds of a similar nature, it is in the discretion of the Court whether to direct the vendee to account for the mesne profits or not and that is how the ruling is understood in the case in *Ganesa Aiyar* v. *Amirthasami Odayar* (4). That, however, is a very different proposition from the hard and fast rule contended for by the appellants.

In the result the appeal will be dismissed with costs.

SPENCER, J.—I agree.

M. C. P.

Appeal dimissed.

(3) 35 Ind. Cas. 475; 39 A. 61; 14 A. L. J. 1161.

(4) 44 Ind. Cas, 605; (1918) M. W. N. 892 at p. 896; 23 M. L. T. 245.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2757 OF 1918.

March 10, 1919.

Present :—Mr. Justice Martineau.

BHAG MAL-SADDU RAM—PLAINTIFF—APPELLANT

versus

WALIA—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 45, scope of - Debt due to several persons—Decree obtained by one creditor in respect of his share—Suit by others for balance, maintainability of.

Section 45 of the Contract Act does not provide that when one of several joint creditors has been paid his share of the debt and has thus ceased to be a creditor, the remaining creditors cannot maintain a suit for the balance of the debt. [p. 417, col. 1.]

The words "as between him and them" in section 45 of the Contract Act signify that as between the debtor and the original body of creditors the right to claim payment would rest with that body, but if by part payment the number of creditors is reduced, the right to claim payment will be a right arising as between the debtor and the remaining creditors. [p. 417, col. 1.]

On dissolution of a partnership one-fifth of a debt due to the partnership from the defendant fell to the share of one of the partners, *K*. The latter sued the defendant for recovery of his share of the debt, impleading also as defendants his former partners who refused to join as plaintiffs, and obtained a decree. Subsequently the other partners sued the defendant for recovery of the remaining four-fifths of the debt:

Held, that the suit was not barred under the provisions of section 45 of the Contract Act. [p. 417, col. 2.]

Second appeal from the decree of the District Judge, Lyallpur, dated the 13th May 1918.

Mr. *Badri Nath Kapur*, for the Appellant.

Mr. *Ram Chand Manchanda*, for the Respondent.

JUDGMENT.—The defendant Walia owed money to the firm of Bhag Mal-Saddu Ram. The partnership was dissolved, and in the partition 1/5th of the debt due from Walia fell to the share of one of the partners, Khan Chand. The latter sued Walia for 1/5th of the debt, impleading also as defendants his former partners, who refused to join as plaintiffs. Walia pleaded that a suit by one of the partners for 1/5th of the debt was not maintainable, but the Court decided against him and gave Khan Chand a decree. The present suit has been brought by Khan Chand's former partners for the remaining 4/5ths of the debt. The Munsif passed a decree in their favour, but the District Judge on appeal has dismissed the suit, holding that under section 45 of the Contract Act the right to claim performance of the contract rests with all the persons who were members of the firm jointly, and that a partner cannot after dissolution sue to recover a part of the debt as individually due to him.

The plaintiffs have appealed to this Court.

In the memorandum of appeal the ground taken is that the District Judge has erred in holding that section 45 of the Contract Act bars the suit, because the respondent waived his right to raise the objection by not raising it in the former suit. The reason given is wrong, as the respondent did as a matter of fact object in the former suit that the claim for a portion of the debt was not maintainable. The appeal should not, however, fail if the learned District Judge's view is in fact erroneous, even though the appellants have given a wrong reason for contending that it is erroneous.

The respondent's case is that as there was only one debt due to the firm, the members of the firm cannot, after the firm has been dissolved, split up the cause of action and bring separate suits for

their shares of the debt. The answer to this contention is that the appellants are not seeking to split up the cause of action, but that it has already been split up by the decree given in Khan Chand's suit, for which they are not responsible. The Court having decided in that case, rightly or wrongly, that Khan Chand was entitled to a decree for 1/5th of the debt the appellants had no option but to sue for 4/5ths or lose their money altogether. It would clearly be inequitable that their claim should be dismissed, not for any fault of theirs, but on account of the action taken by Khan Chand. It is true that they might have availed themselves of the opportunity of joining Khan Chand as plaintiffs in the former suit, but if the respondent's contention were correct, the present suit would not have been maintainable even if the appellants had not been impleaded as defendants in the former case. One of several joint creditors might collude with the debtor and obtain a decree against him for a small portion of the debt on his admission, with the result, if the argument now advanced were sound, that the other creditors would be absolutely debarred from recovering the balance. Section 45 of the Contract Act does not enable a debtor to evade his liability in this manner. It provides that when a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives. Assuming that this section makes it necessary that where a debt is due to several persons jointly all should join in a suit brought for its recovery, it is nevertheless not a legitimate inference that when one of the original creditors has been paid his share and thus ceased to be a creditor, the remaining creditors cannot maintain a suit for the balance of the debt. The words "as between him and them" are not without significance. As between the debtor and the original body of creditors the right to claim payment would rest with that body, but if by part payment the number of creditors is reduced, the right to claim payment will be a right arising as between the debtor and the remaining creditors. The decree obtained by Khan Chand puts the parties in the same position in which they would have been if the defendant had entered into a fresh contract, paying 1/5th of the debt to Khan Chand and agreeing that the plaintiffs should become his creditors for the remainder.

The suit is, therefore, maintainable, and I accordingly accept the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court, under Order XLI, rule 23, Civil Procedure Code, for disposal on the merits. Stamp on the appeal in this Court to be refunded. Other costs to be costs in the case.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEALS NOS. 170, 272, 273 OF 1918 AND 370 OF 1917.
CIVIL REVISION PETITION NO. 1211 OF 1917.
July 15, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr Justice Odgers.

A. T. S. P. ATHAPPA CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMANATHAN CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 23—Inherent power, nature and scope of—Appeal Appellate Court, powers of—Remand, when can be ordered—"Preliminary point," meaning of.

Section 151 of the Civil Procedure Code contemplates the exercise of powers *ex debito justitiæ* which are not conferred by the rules of the Code. But where a power is given expressly, the inherent power of the Court ought to be very cautiously indented upon. [p. 419, col. 1.]

An Appellate Court has inherent power to make a remand under conditions other than those mentioned in Order XLI, rule 23, of the Civil Procedure Code [p. 419, col.].

The words "preliminary point" in Order XLI, rule 23, of the Civil Procedure Code, connote a determination not affecting the merits of the case. [p. 419, col. .]

The reversal of a judgment with a direction to admit evidence improperly excluded, is not a disposal on a preliminary point [p. 419, col. 2.]

Appeals against the orders of the Court of the Temporary Subordinate Judge,

Sivaganga, and of the District Court, Ramnad at Madura, in Appeal Suits Nos. 1 of 1918, 275 and 277 of 1917 respectively, preferred against the decree of the Court of the Principal District Munsif, Sivaganga, in Original Suit No. 504 of 1913, and that of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Original Suits No. 72 of 1915, and No. 15 of 1916 and appeal and civil revision petition preferred against the order of the Temporary Subordinate Judge, Ellore, in Appeal Suit No. 110 of 1916, preferred against the decree of the Court of the Additional District Munsif, Ellore, in Original Suit No. 784 of 1912.

FACTS appear from the judgment.

Mr. *A. Krishnaswamy Aiyar*, for the Appellant.—The Code of Civil Procedure is exhaustive on what it specifically deals with. Order XLI, rule 23, regulates remands, and so every order of remand must necessarily fall within its scope and is appealable. The words "preliminary point" have, therefore, been construed by the Courts to be very comprehensive; not in the sense of some point collateral to the merits, but of some point preliminary to a general investigation of the merits. See *Vemula Jambulaya* v. *Iskala Rayamma* (1), *Ramachandra Joishi* v. *Hazi Kassim* (2), *Kuppelan* v. *Kunjuvalli* (3).

Section 107, Civil Procedure Code, is merely enumerative of the general powers of the Appellate Court as "prescribed" *i.e.*, "prescribed by rules." It does not, therefore, confer any power of remand outside Order XLI, rule 23. There must be a disposal on a preliminary point, which again must have relation to the merits of the case.

[SESHAGIRI AIYAR, J.—No qualification appears to have been placed on section 562 of the old Code as construed in *Ramachandra Joishi* v. *Hazi Kassim* (2) and other cases.]

In all such cases, the Courts have always enlarged the meaning of "preliminary point." The construction of section 107 in *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Limited* (4) is not warranted by the language of the Code.

See also *Muthiah Chettiar* v. *Bawa Sahib* (5), *Susibhushan Mookerjee* v. *Radhanath Bose* (6).

In the face of the specific provision in Order XL, a power inherent in the Court ought not to be inferred from the general language of section 107, Civil Procedure Code.

Even assuming that there is such an inherent power of remand, it cannot be assumed, in the absence of express words in the order, that the Court has resorted to it. For the Court must explain why that extreme course is resorted to.

See *Baseemati Debi* v. *Tarit Basani Dassi* (7).

Finally, in the present case the disposal was on a preliminary point which precluded an investigation of the merits, the plea having been a settlement of accounts.

Mr. *V. Kothandaramayya*, for the Respondents, replied generally.

JUDGMENT.—This and two other appeals were argued this morning at some length. Most of the points arising for decision are common to all the three appeals and have been very elaborately argued by Mr. A. Krishnasawmi Aiyar for the appellant in Civil Miscellaneous Appeal No. 170 of 1918. The lower Appellate Court remands each of the appeals for re-trial and appeals purporting to be under Order XLIII, rule 1 (*a*), have been preferred to this Court. It was held in Civil Miscellaneous Appeal No. 243 of 1918 that, where the order of remand was made not on a preliminary point, no appeal lies against it. Mr. A Krishnasawmi Aiyer conceded that, if an order can be predicated as not falling within Order XLI, rule 23, and if it is to be held that the Court has inherent power of remand apart from the said rule, there is no right of appeal. Further, this point is concluded by authority.

The main argument of the learned Vakil related to the inherent power of the Court to make a remand other than under the conditions mentioned in rule 23 of Order XLI. We are prepared to agree with him that section 107 of the Code in terms only refers to Order XLI, rule 23.

(1) 15 Ind. Cas. 859; 36 M. 492; (1912) M. W. N. 1000; 24 M. L. J. 512.

(2) 16 M. 207; 5 Ind. Dec. (N. S.) 852.

(3) 9 Ind. Cas. 780; 9 M. L. T. 373; (1911) 1 M. W. N. 199.

(4) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49.

(5) 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 969.

(6) 25 Ind. Cas. 267; 20 C. L. J. 453; 19 C. W. N. 835.

(7) 44 Ind. Cas. 416.

CHHAJJU v. DALLU.

But section 107 of the Code does not contain any provision, as was found in the Code of 1882, section 564, limiting the right of remand only to conditions prescribed by the Code. The enactment of section 151 suggests that the Legislature contemplated the exercise of powers *ex debito justitiæ* which were not specifically conferred by the rules. This is the view taken by a Full Bench of the Calcutta High Court consisting of five Judges *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank Limited* (4)]. The same view was taken in *Vemula Jambalaya* v. *Iskala Rajamma* (1) and in *Kuppelan* v. *Kunjuvalli* (3). We see no reason for not following these decisions. It is true that where a power is given expressly, Courts should not exercise their inherent power, which ought to be very cautiously indented upon. But this argument is not against possessing the power but is only against its improper use; we must overrule this contention.

Mr. A Krishnasawmi Aiyer next contended that, if nothing more appears on the face of the judgment than a bare order of remand, the lower Court must be taken to have acted wrongly in exercising the power under Order XLI, rule 23, rather than attribute to it the intention to exercise its inherent power. As a corollary to this argument he contended that if a wrong order is passed under the section, the right of appeal is not taken away. The corollary will be right only if the original contention is sound. Rightly or wrongly for some years, Courts in this Presidency have been informed by the High Court that they have an inherent power of remand. *Vide Ramachandra Joishi* v. *Hasi Kassim* (2) *Kuppelan* v. *Kunjuvalli* (3) and *Vemula Jambalaya* v. *Iskala Rajamma* (1). There is no reason for imputing to the lower Courts ignorance of these decisions and for suggesting that the power was wrongly exercised under Order XLI, rule 23.

Another argument of the learned Vakil is that the word "preliminary" in Order XLI, rule 23, should receive a liberal construction. We agree with the definition of that word given by Muthuswami Aiyar, J., in *Ramachandra Joishi* v. *Hasi Kassim* (2). *Prima facie* the expression connotes a determination not affecting the merits of the case. This view is strengthened by the enumeration of cases relating to preliminary points in pages 416 and 417 of the Annual Practice, 19 9.

The last argument was that the view of the lower Appellate Court that a settlement of accounts as agent is not binding on the party as a partner is a preliminary point; we do not agree with this proposition. It is a piece of evidence, the admissibility of which was decided by the Appellate Court in a particular manner. It cannot be said that this point is collateral to the merits of the case.

In the next appeal No. 272 of 1918 there is much to be said in favour of Mr. K. V. Krishnasawmi Aiyer's argument that the remand was wholly unnecessary. If we were hearing the appeal, we would not have applied the procedure adopted by the Appellate Court, but it cannot be said that a reversal of the judgment with direction to admit evidence said to have been improperly excluded is a disposal on a preliminary point.

Mr Ramadoss's appeal No. 370 of 1917 is clearly not one in which there has been a remand on a preliminary point. Civil Revision Petition No. 1211 of 1917 is dismissed without costs.

For these reasons, we must dismiss all the three appeals with costs.

M. C. P.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2413 OF 1915.

March 31, 1919.

Present:—Mr. Justice Scott-Smith and Mr. Justice Broadway.

CHHAJJU AND OTHERS—DEFENDANTS—APPELLANTS

versus

DALLU AND ANOTHER—PLAINTIFFS—RESPONDENTS

Punjab Land Revenue Act (XVII of 1887), ss. 116, 117, 158, cl xvii Jurisdiction of Civil and Revenue Courts -Declaration that partition shall not affect plaintiff's interest, suit for, whether cognisable by Civil Court—Question of title.

Where certain persons sue for a declaration that a partition of common land in a village effected by

the Revenue Authorities should be declared inoperative so far as their interests are concerned, and the claim is based on the ground that the measure of right adopted by the Revenue Authorities was inaccurate, the question of the measure of right is one of title within the meaning of sections 116, 117 and 158, clause (xviii), of the Punjab Land Revenue Act, and the suit is, therefore, cognisable by a Civil Court.

Second appeal from the order of the District Judge, Karnal, dated the 3rd May 1915.

Messrs. *Beni Pershad Khosla* and *Gobind Ram*, for the Appellants.

Mr. *Gullu Ram*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was instituted by the plaintiffs respondents, and in it they sought for a declaration that a certain partition of common land in village Gianpura, which had been effected by the Revenue Authorities, should be declared inoperative so far as their interests were concerned. The primary Court held that the suit was one cognizable by the Revenue Courts alone and for that reason dismissed it. On appeal the lower Appellate Court in a very short order held that the suit was one cognizable by the Civil Courts and directed that the suit should proceed and be disposed of on its merits. Against this order of the learned District Judge the defendants appellants have preferred this appeal, and we have heard Mr. Beni Pershad Khosla on their behalf and Mr. Gullu Ram for the plaintiffs respondents.

The point for determination is whether the Civil or Revenue Courts have jurisdiction to try the suit. Partition has been effected in accordance with the *khewat* of the Settlement of 1880, and the plaintiffs-respondents' claim is that the partition should have been according to the *khewat* of the Settlement of 1909. The *khewats* in question are different and the measure of right in each case varies. The question of the measure of right is clearly one of title within the meaning of sections 116 and 117 of the Punjab Land Revenue Act, as was held in *Fazaldad Khan* v. *Ata Muhammad* (1). The suit was, therefore, cognizable by and within the jurisdiction of the Civil Courts. Mr. Beni Pershad urged, however, that the fact that the partition had actually been completed ousted the jurisdiction of the Civil Courts. We are unable to accede to this contention, which is opposed to *Bachan Singh* v. *Madhan Singh* (2) and *Anwar* v. *Allah Yar* (3).

In our opinion the view taken by the learned District Judge is correct and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 46 P. L. R. 1906; 99 P. R. 1905.

(2) 61 P. R. 1897 (F. B.).

(3) 16 Ind. Cas. 937; 28 P. R. 1913; 10 P. L. R. 1913; 275 P. W. R. 1912.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 548 OF 1917.

April 24, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, Kt.

JIDDA JAN BIBI WIDOW OF *Sheikh* AZIM—DEFENDANT No. 1—APPELLANT

versus

Sheikh BAKTAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Heba-bil-ewaz—*Failure to prove consideration, effect of—Party failing to prove consideration, whether can claim under simple* heba—*Pleadings and proof.*

A *heba-bil-ewaz*, which is a gift for consideration, has incidents very different from those of a simple gift *heba*). Therefore, if a party claiming under a deed of *heba-bil-ewaz* fails to prove the passing of consideration for the *heba*, the *heba* cannot be treated as valid as a simple gift without consideration and accompanied by delivery of possession. [p. 421, cols. 1 & 2.]

Appeal against the decree of the Officiating Subordinate Judge, 1st Court, Mymensingh, dated the 6th May 1916, modifying that of the Munsif, 4th Court at Netrakona, dated the 3rd September 1914.

FACTS appear from the judgment.

Babu *Birendro Kumar De*, for the Appellant.—The Court of appeal below has erred in allowing the plaintiff respondent to plead for the first time in appeal that the document is a *hebab-il ewaz*, and that it is invalid for want of consideration. In the pleadings, issues and judgment of the Court of first instance the document was treated

as a *heba*, pure and simple. When the plaintiff did not adduce any evidence to show that there was no passing of consideration, the lower Appellate Court was not justified in treating the document as a *heba-bil-ewaz*. My submission is that when the point was not raised in the primary Court, the case should be sent back to the lower Court for a finding on the point after taking evidence.

My next point is, that even assuming that it is not a gift for consideration, it would still operate as a valid gift, pure and simple, for although a deed may purport to be a *heba-bil-ewaz*, it may still operate as a *heba*, pure and simple. *Rahimjan Bibi* v. *Imanjan Bibi* (1).

Babu *Annadi Charan Karkun*, for the Respondents, was not called upon.

JUDGMENT.

SHAMSUL HUDA, J.—The defendant No. 1 is the appellant before us. The appeal is confined to the properties referred to in the schedules Nos. 1 and 3 in the plaint. The plaintiffs claimed a share in these properties as the residuary heirs of one Azim. The defendant No. 1 is the widow of Azim, and she contested the plaintiffs' claim by alleging that Azim had executed a deed of *heba-bil ewaz* in her favour in lieu of dower and a *tasbi*. The first Court considered that the consideration alleged in the *heba-bil-ewaz* did actually pass On appeal, the learned Subordinate Judge has taken a different view of the facts. He holds that the claim for dower, which was one of the considerations for the *heba* as well as the giving of the *tasbi* in exchange have not been proved and has accordingly decreed the plaintiffs' suit. It has been urged before us on the authority of the case of *Rahimjan Bibi* v. *Imanjan Bibi* (1) that, even if the passing of the consideration is not proved, the *heba* is still valid as a simple gift without consideration. I do not think that that case is in point. There the pleadings were not clear and the case was remanded for a distinct finding as to whether the consideration had passed or whether possession was given. In this case, the defendant No. 1 explicitly relied upon the document as a gift for a consideration which has incidents very different from those of a simple gift. That was the case that was tried in the first Court and that was the case that was tried in the lower Appellate Court. I do not think the defendant No. 1 can be allowed to change her case at this stage and to claim a decree on the basis of a simple *heba* accompanied by delivery of possession. So far as the claim on the basis of the *heba-bil-ewaz* is concerned, on the findings the document must be held to be invalid. A question was also raised that the plaintiffs did not attack the *heba-bil ewaz* on the ground that no consideration had passed. There seems to be no basis for this contention. The plaint clearly states, amongst others, that the document is collusive, illegal and void of consideration; and it is clear from the judgment of the first Court that the attention of that Court was drawn to this question, namely, whether the consideration had or had not passed. It cannot be said that the defendants were taken by surprise.

The appeal, in my opinion, fails and must be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

(1) 15 Ind. Cas. 698; 17 C. L. J. 173.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2562 of 1918.

March 14, 1919.

Present:—Sir Henry Rattigan, KT., Chief Judge.

LABHU RAM—DEFENDANT—APPELLANT

versus

PURAN CHAND—PLAINTIFF—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 37—Fraudulent preference, what is—Payment made to creditor on eve of bankruptcy—Presumption—Burden of proof.

An Insolvency Court is justified in holding that a payment to a creditor made by a person, who at the time of such payment is unable to pay his debts, must be taken as a payment with a view to prefer that creditor, if it is established that the payment is made of the debtor's own accord not in the ordinary course of business, and without any sort of pressure being brought to bear upon him [p. 423, col. 1.]

In any event if a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that

payment with the dominant view of giving a preference to that creditor over his other creditors. [p. 423, col. 1.]

The fact that the debtor was insolvent when he made the payment, and knew that he was insolvent, causes the onus of proof to shift, and it is for the creditor to whom the payment has been made to show that the payment was not made with a view to prefer him. [p. 423, cols. 1 & 2.]

Miscellaneous first appeal from the order of the District Judge, Ludhiana, dated the 19th June 1918.

Mr. *Amin Chand*, for the Appellant.

Mr. *Jaggan Nath*, for the Respondent.

JUDGMENT.—The question which I have to decide is whether a payment of Rs. 500 made to the appellant Labbu Ram on the 11th of December 1916 by Umrao Singh was "a payment by a person unable to pay his debts" in favour of a creditor with a view of giving that creditor a preference over other creditors, and as such void and fraudulent within the meaning of section 37 of the Provincial Insolvency Act of 1907? The payment was (as stated) made on the 11th of December 1916 and on the 17th January 1917 Rai Sahib Lala Murli Dhar, a creditor, presented an application under section 6 of the Act for the adjudication of Umrao Singh as an insolvent. The payment was thus made within three months of the date on which the petition was presented, and on the 28th of May 1917 Umrao Singh was adjudged an insolvent upon the said petition. It is abundantly clear from the evidence on the record that Umrao Singh was in very straitened and embarrassed circumstances for some considerable time prior to December 1916 and unable to pay his creditors in full. It is also established that he owes a very large sum of money to numerous creditors. In these circumstances the Receiver appointed by the Court has applied for the avoidance of the payment to Labbu Ram and prays that the latter should be ordered to refund the money paid to him to the Receiver. This application is made under section 37 of the Act, and the District Judge has held that the payment amounted to a clear case of fraudulent preference, and he accordingly directed Labbu Ram to refund the sum of Rs. 500 to the Receiver for *pro rata* distribution among all the creditors including himself. From this order Labbu Ram has appealed to this Court and I have heard arguments at length by Counsel on his behalf and on behalf of the respondent Receiver.

The law upon the question before me is stated as follows in Halsbury's Laws of England, Volume 2, paragraph 471:—

"In order that a transaction may be set aside as a fraudulent preference, it is necessary to prove that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors. This need not be the primary result aimed at. It is sufficient that it should be the object aimed at in bringing about the primary result. If the transaction can properly be referred to some other motive than that of giving the creditor paid a preference over the other creditors, the payment is not fraudulent and void, for it is from the intention on the part of the debtor to act in fraud of the law, that is, to prevent the distribution of the bankrupt's property rateably among all his creditors, that the invalidity of the transaction arises.

"In ascertaining whether the giving of a preference, that is, putting the creditor in a better position relatively to the other creditors than that in which he would be placed by the bankruptcy law, was the dominant view in the debtor's mind, the proper test to be applied is—Was the act done voluntarily?—a question, the solution of which depends primarily on the inquiry, From which party did the proposition originate? A voluntary disposition is an act moving from the debtor; a voluntary payment is a payment simply by the act and will of the party making it; if there is anything to interfere with or control this will, then it is not a voluntary payment. The question always is, did the thing move from the debtor or from the creditor? If it moves entirely from the debtor in the sense that it was his spontaneous act, uninfluenced by any circumstances which tend to rebut the presumption that the bankrupt made a distinction among his creditors, then the transaction will be held to be a fraudulent preference. On the other hand, if the proposal for the payment or disposition of the property comes entirely from the creditor and is not collusive, the transaction will stand.

"That the transaction was not the spontaneous act of the debtor can be established by proving that it was the result of pressure brought to bear on the debtor, either

by a creditor in the ordinary sense or by a surety. The pressure must be real; the debtor must have been under some genuine apprehension; it must have been operative on his mind, and the dominant influence affecting it: the transaction must have been entered into by reason of it, and it must not have been fraudulent. * * * * * * * * * *

"In every case the state of mind of the debtor is the paramount consideration. The intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns; if that intention be shown not to have existed, it is of no importance that the creditor had knowledge of the debtor's insolvency or that the debt was not due; nor for this purpose is it true that the debtor must be taken to have intended the natural consequences of his act."

Speaking generally, I think the authorities support the view that the words "with a view of giving such creditor a preference over the other creditors" bear the same meaning that the word "voluntarily" was construed to have in the old Bankruptcy Act in England see as to this Mellish, L. J. in *Bolland, Ex parte, Cherry, In re* (1)] and that a Court is justified in holding that the payment to a creditor made by a person, who at the time of such payment is unable to pay his debts, must be taken as a payment with a view to prefer that creditor, if it is established that the payment is made of the debtor's own accord not in the ordinary course of business, and without any sort of pressure being brought to bear upon him. And in any event, as observed by Vaughan Williams, L. J., in *Lake, In re, Dyer, Ex parte* (2), "if a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors." The same learned Lord Justice remarked in another case [*Eaton & Co., In re, Viney, Ex parte* (3)] that "the fact" that the debtors were insolvent when "they made the payment, and knew that they were insolvent, causes the onus of proof to shift, and it is for the respondent to show that the payment was not made with a view to prefer him"

The law on the subject being as stated above, the question arises whether in the present case the payment to Labhu Ram was fraudulent and void within the meaning of section 37 of the Act. As I have already pointed out, Umrao Singh was at the time hopelessly bankrupt, and according to Labhu Ram himself the payment was made by Umrao Singh of his own accord and without any sort of pressure being put upon him. In these circumstances it was for Labhu Ram to prove that the payment did not fall within the purview of section 37 of the Act, and this, I must hold, he has failed to establish.

I accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) (1871) 7 Ch. Ap. 24 at p. 27; 25 L. T. 646; 20 W. R. 136.

(2) (1901) 1 K. B. 710 at p. 717; 70 L. J. K. B. 390; 84 L. T. 420; 49 W. R. 291; Manson 145; 17 T. L. R. 296.

(3) (1897) 2 Q. B. 16 at p. 17; 66 L. J. Q. B. 491; 4 Manson 111.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2311 OF 1917.

November 15, 1918.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

REVD. GABRIELNATHASWAMI —DEFENDANT No. 1—APPELLANT

versus

VALLIAMMAI AMMAL AND OTHERS—PLAINTIFFS AND DEFENDANT No. 2—RESPONDENTS.

Hindu Law—Marriage—Asura *form—Presumption* —Parisam, *whether bride price—Custom of community.*

The payment of *parisam* at the time of marriage as between Hindus does not necessarily constitute it as bride price or render the marriage one in the Asura form. The real test is whether in the community or among the parties the payment of *parisam* is tacitly understood as being substantially a payment for taking the girl in marriage [p. 424, col.]

If any money paid by the bridegroom is utilised for the benefit of the bride, it should not be treated as bride price [p. 424, col .]

Ordinarily, the presumption is, whatever may be the caste to which the parties belong, that a marriage should be regarded as being in the Brahma form, unless it can be shown that it was in the Asura form. [p. 424, col. 2.]

GABRIELNATHASWAMI v. VALLIAMMAL AMMAL.

Second appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 555 of 1916, preferred against the decree of the Court of the Temporary Additional District Munsif, Tinnevelly, in Original Suit No. 147 of 1916.

FACTS appear from the judgment.

Messrs. *A. Krishaswami Aiyar* and *E. Vinyaka Row*, for the Appellant.—The lower Court has erred in holding that because there was a payment of *parisam* at the time of marriage, it was a bride price and the marriage was of necessity in the *asura* form. The *parisam* is an ordinary present. There is no evidence that, in this case, it was a bride price. See *Authikesavulu Chetty* v. *Ramanujam Chetty* (1).

Ordinarily, in the absence of evidence to the contrary, the presumption, under Hindu Law, is that a marriage was in the *brahma* form.

Mr. *N. Kunjithapatham Aiyar*, for the Respondents.—The finding of the lower Courts is correct. *Parisam* ordinarily denotes bride price

JUDGMENT.—The suit is by the widow and daughter of the brother's son of two sisters to recover the property of their aunts. The defendant claims to have obtained a conveyance of it from the reversioner of the husband of one of the aunts. The District Munsif was of opinion that the defendant's vendor was not a reversioner. He also came to the conclusion that the two aunts were married in the Asura form of marriage and that the plaintiff was the preferential heir. The two Courts have assumed that if the bride's parents received what is known as *parisu panam*, it must be deemed that the girls were married in the Asura form and not in the Brahma form. Apparently the Pleaders who appeared in the case as well as the two judicial officers took it for granted that the *parisu panam* meant bride price. There is nothing in the evidence adduced in the case to show that the money paid to the parents at the time of the marriage as *parisu panam* was the consideration for giving the girl in marriage. There is no authoritative definition of the term "*parisam*". In Winslow's Dictionary it is translated as "donation, fee, present, etc., by the bridegroom to the bride before proceeding to the house, for marriage, as jewels, apparel, money, rice, fruits, etc." It may be that *parisam* is a relic of what in the old days was regarded as the price for the bride. The evidence of the caste men or of the community has not been taken to ascertain the origin of this custom or the reason for its prevalence in the community. It was held in *Authikesavulu Chetty* v. *Ramanujam Chetty* (1) that a small present given to the bride's parents should not be regarded as bride's price. The real test is whether in the community or among the parties the payment of *parisam* was tacitly understood as being substantially a payment for taking the girl in marriage. That will depend generally upon the evidence in the case. Unfortunately, in this case having regard to the attitude of all parties the real question has not been considered. We may draw attention to certain well understood principles of Hindu Law on this subject. In Manu Chapter 3, section 44 it is indicated that the payment of bride price is opposed to all Shastras; further on we read that if any money paid by the bridegroom is utilised for the benefit of the bride, that should not be regarded as bride price.

Ordinarily the presumption is that whatever may be the caste to which the parties belong, a marriage should be regarded as being in the Brahma form unless it can be shown that it was in the Asura form. *Authikesavulu Chetty* v. *Ramanujam Chetty* (1), *Ohuni Lal* v *Suraj Ram* (2), *Hira* v. *Hansji Pema* (3) and *Muthu Aiyar* v. *Chidambara Aiyar* (4) lay down this proposition. In this state of the authorities we think it desirable that further evidence should be taken on the question. Having regard to the circumstance that in the Courts below the 1st defendant did not ask for a specific issue on the question, we would have refused to start this enquiry but for the fact that our decision on this question may be regarded as laying down that wherever *parisam* is paid the marriage should be regarded as being in the Asura form. This is a serious proposition which,

(1) 3 Ind. Cas. 541; 32 M. 514; 19 M. L. J. 656; 6 M. L. T. 183.

(2) 3 Ind. Cas. 765; 33 B. 433; 11 Bom. L. R. 758.
(3) 7 Ind. Cas. 949; 37 B. 29; 14 Bom. L. R. 1052.
(4) 3 M. L. J. 201.

if it is to be laid down, must be done after taking the evidence of the community to which the parties belong. At the same time we are of opinion that as this enquiry has been necessitated by the failure of the defendant to get the proper issues settled, he must pay the costs of this enqiry in any event as well as the costs in the lower Appellate Court. We shall, therefore, ask the lower Appellate Court to return findings upon the following questions: (*a*). In the community to which the parties belong is the payment of *pirisam* equivalent to the payment of bride price? (*b*). Did the parties in the particular case regard the payment of *pirisam* as bride price? The lower Court can take fresh evidence and should come to a conclusion on it in the light of the observations we have above made. It is also necessary to ask for a finding on the evidence already on record upon two questions which have not been decided by the District Judge, namely, (*c*). Whether the 1st defendant's vendor was the nearest reversioner to the husbands of the two sisters? and (*d*) Are there any reversioners nearer than the plaintiffs?

Finding should be submitted in three months, seven days will be allowed for objections.

Issues remitted.

M. C. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2443 OF 1918.

March 19, 1919.

Present:—Mr. Justice Martineau.

ARUR SINGH—DEFENDANT—APPELLANT

versus

PARTAB SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment, whether must be express—Bond making mention of other bond, whether acknowledgment.

An acknowledgment of liability under section 19 of the Limitation Act need not be express, but may be implied.

A bond executed by the defendant made mention of there being a separate bond for a certain sum executed by him in favour of the plaintiff:

Held, that this statement implied that money was due to the plaintiff separately on the other bond and that, therefore, it amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act. [p. 426, col. 1.]

Second appeal from the decree of the District Judge, Lahore, dated the 6th May 1918.

Mr. *Gobind Ram*, for the Appellant.

Mr. *Tirath Ram*, for the Respondents.

JUDGMENT.—The plaintiffs sue for money due on two bonds, dated the 2nd November 1908 and the 23rd July 1914, and have been given a decree. The questions are only whether the suit on the first bond is within time by reason of an acknowledgment contained in the second one and whether consideration passed for the first bond.

The bond of 1914 makes mention of there being a separate bond for Rs. 430 15 0 (*i. e.*, the bond of the 2nd November 1908). This clearly implies that money was due to the plaintiff separately on the other bond. The learned District Judge holds that an acknowledgment of liability need not be express, but may be implied, and this view is supported by the statement of the law given on page 104 of Rustomji's Law of Limitation, 2nd Edition, by *Gopalrao* v. *Harilal* (1) and by *Maniram Seth* v. *Seth Rupchand* (2), in which it was held by the Privy Council (on page 1057) that an acknowledgment of liability by one of the parties to pay his debt to a certain person might be deduced from his written admission of having had open and current accounts with that person. I agree, therefore, with the lower Appellate Court that the suit is within time.

As regards consideration it is argued for the appellants that the statement made by Sant Singh, the original plaintiff, on which reliance has been placed by the lower Appellate Court, cannot be treated as evidence as the deponent died before he could be cross-examined, and that the diary referred to in his statement must also be left out of account. Assuming that this is so, still it appears from the judgment of the learned District Judge that he regarded the remaining evidence alone as sufficient proof of the passing of considera-

(1) 9 Bom L. R. 715 at p. 718.

(2) 33 C. 1047 at p. 1057 (P. C.); 4 C. L. J. 94; 8 Bom. L. R 501; 10 C. W. N 847; 1 M. L. T. 191; 3 A. L. J. 525; 16 M. L. J. 303; 2 N. L. R. 139; 33 I. A. 165.

tion. He said that the admission of the debt contained in the bond of 1914 was good evidence that consideration had passed, and that the evidence of Dial Singh and other persons, coinciding with the admission, could not be swept aside. The exclusion of Sant Singh's statement and of his diary would not, therefore, be a sufficient reason for interfering with the lower Appellate Court's decision.

I accordingly dismiss the appeal with costs

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 517 OF 1918.

May 29, 1919.

Present:—Mr. Justice Newbould.

DUKHIT RAM MALI AND ANOTHER—PLAINTIFFS NOS. 1 AND 3—APPELLANTS

versus

Sheikh NEWAJ ALI—PRINCIPAL DEFENDANT AND OTHERS—RESPONDENTS.

Hindu Law—Partition—Widow, whether can get absolute right to estate of husband on partition with sons.

On partition between her sons, a Hindu widow can, by special agreement or arrangement with the sons, get an absolute right to that portion of the estate of her husband which is allowed to her. [p. 427, col. 2.]

Debi Mangal Prosad Singh v. *Mahadeo Prasad Singh*, 14 Ind. Cas. 1000; 34 A. 234 (P. C.); 16 C. W. N. 409; 9 A. L. J. 263; 11 M. L. T. 217; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121, followed.

Appeal against the decree of the Additional Subordinate Judge, Mymensingh, dated the 27th November 1917, reversing that of the Munsif, 1st Court at Bajitpur, dated the 27th November 1916.

FACTS appear from the judgment.

Babu *Annada Charan Karkun*, for the Appellants.—This appeal is on behalf of the plaintiffs and it arises out of a suit for recovery of certain lands on declaration of plaintiff's right thereto. The Court of first instance decreed the suit, and the decision has been reversed by the lower Appellate Court.

The question for decision is, what is the nature of the interest acquired by the mother under the Dayabhaga School of Hindu Law in property obtained by her on partition amongst her sons, *i. e.*, whether she gets an absolute interest or a mere life-interest therein? It is now well-settled that under the Dayabhaga School of Hindu Law, on partition between the sons the mother is entitled to take a share in lieu of her maintenance, and she gets only a life interest therein. See Mayne on Hindu Law and Usage, 8th Edition, section 621, at page 866. The principle laid down in *Hridoy Kant Bhattacherjee* v. *Behari Lal Mookerjee* (1) also supports my contention. So the share which the mother in this case got on partition between the sons must revert to the sons on the death of the mother. The defence was that the land was acquired with funds of the joint family consisting of the mother and the sons. But under the Dayabhaga School of Hindu Law the mother cannot be a member of a joint family. The learned Subordinate Judge, in reversing the decision of the primary Court, has come to no finding as to whether the property in suit was acquired with funds belonging to the brothers or with the funds belonging to the mother and the brothers and unless the latter is proved, the mother cannot have an absolute interest in it. The mere fact that the property was acquired when the sons and the mother were living jointly does not give the mother an absolute interest in the property, because the mother is no member of the joint family in the sense in which the expression is used in the Dayabhaga School of Hindu Law.

Babu *Gopal Chandra Das*, for the Respondents.—The proposition of law that the mother is entitled to a life-interest in the share obtained by her on partition between the sons is no doubt well settled. But that proposition will not have any application in this case. It appears that plaintiff No. 1 claims by right of inheritance from his mother, and plaintiffs Nos. 2 and 3 claim by right of inheritance from their grandmother, and they rely mainly upon the arrangement or contract made between the mother and the sons. Here what was partitioned was not the ancestral

(1) 11 C. W. N. 289.

property of the sons but property acquired by the mother and the sons jointly, so that the mother got an absolute interest in the share received by her Refers to Mayne's Hindu Law, 8th Edition page 868. Even the mother can by agreement of the parties get an absolute interest in her share. See *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2). The lower Appellate Court has decided rightly that the mother in this case got an absolute interest in her share. The question before your Lordships is one of fact, *viz.*, whether the mother had a mere life estate or an absolute interest, and it has been found that the mother got an absolute interest in her share, and that finding is conclusive.

The appellants before your Lordship are the plaintiffs Nos. 1 and 3 and not the other plaintiffs, and the appeal should be limited to the extent of their shares only.

Babu *Annada Charan Karkun* briefly replied.

JUDGMENT.—This appeal arises out of a suit for recovery of a two thirds share in a certain land on the declaration of the plaintiffs' *jote* right thereto. The plaintiff No. 1, defendant No. 2 and the father of the plaintiffs Nos. 2 to 5 are three brothers, sons of Ram Manikya and his widow Kishori. The plaintiffs claim the land on the allegation that Kishori had only a Hindu woman's interest in that land, which would devolve on the three brothers on her death. The defendants Nos. 1 and 3 claim as purchasers of Kishori's interest, alleging that she had absolute interest in that land. It appears that the three brothers, who were formerly joint, divided their property and the property in suit was given to Kishori. The plaintiffs, who are appellants before me, rely on the principle of Hindu Law that the property obtained by a widow on partition of the family estate would devolve on her death on the next heirs of her husband. This proposition of Hindu Law is not disputed on behalf of the respondents. What is contended is, firstly, that it does not apply to the present case, where admittedly the property in suit is no part of the ancestral estate and never belonged to Kishori's husband. Secondly, it is contended that even if this proposition applies, a special agreement can be made with the heirs to give the widow an absolute right, and it is found by the lower Appellate Court that on partition the widow did get an absolute right. That by agreement a widow on partition with her sons can get an absolute right appears from the Privy Council case of *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2). Also the finding of the learned Subordinate Judge is "I do not believe the plaintiffs' evidence which says that she got a fourth share for her maintenance," and then relating certain circumstances he goes on to say "under the circumstances I believe that the said Kishori had absolute right to the land and that the plaintiffs' case that she had only a life estate has not been established." These findings are equivalent to a finding that there was an arrangement by which the widow got an absolute right. Having regard to the pleadings of the parties under the circumstances referred to in the judgment, there were materials on which the lower Appellate Court could come to this finding. I can see no reason which would justify me in reversing this finding on second appeal.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(2) 14 Ind. Cas. 100; 13 C. W. N. 409; 9 A. L. 263; 11 M. L. T. 217; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 34 A. 234; 39 I. A. 121 (P. C.).

PUNJAB CHIEF COURT.

CIVIL REVISION No. 564 OF 1918.

February 18, 1919.

Present :—Mr. Justice Chevis.

CHUNI LAL—PLAINTIFF—APPELLANT

versus

ROSHAN LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. VII, r. 11 (b) Court Fees Act (VII of 1870), s. 12—Order requiring plaintiff to make up deficient Court-fee on plaint—Revision, whether maintainable—Procedure.

Where a Court calls on a plaintiff to make up the Court-fee on his plaint and the plaintiff contends

that the fee already paid is sufficient, the High Court will not interfere with the order in revision. It is for the plaintiff to make up his mind whether he will comply with the Court's order or not If he does not comply, his plaint will be rejected. Then unless the trial Court's order is final under section 12 of the Court Fees Act, the plaintiff will have a right of appeal If the order is final, neither an appeal nor revision will be competent.

Revision from the order of the Subordinate Judge, 1st Class, Lahore, dated the 18th June 1918.

Mr. *Tirath Ram*, for the Petitioner.

JUDGMENT.—This is an application for revision of an order calling on plaintiff to make up Court-fee on his plaint. Plaintiff's contention is that the fee already filed is sufficient.

I do not consider that I should interfere on revision. It is for plaintiff to make up his mind whether he will comply with the Court's order or not If he does not comply, then his plaint will be rejected. Then, unless it is a case of the first Court's order as to the amount of stamp required being final by virtue of section 12 of the Court Fees Act, the plaintiff will have a right of appeal. If the first Court's decision on the point is final, then of course no Appellate Court can upset it, and I do not consider that a decision which is declared by law to be final should be attacked in revision any more than in appeal.

Revision dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 93 OF 1917.

April 23, 1919.

Present :—Mr. Justice Oldfield, Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

POLICHERLA VEERARAGHAVA REDDI—APPELLANT

versus

CHERLA SUBBA REDDI (DIED) AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 882), s 52—Lis pendens, doctrine of, scope of—Appeal—Alienation pending appeal—Alienee, joinder of, as party—Compromise between original parties, whether binds alienee—Civil Procedure Code (Act V of 1908), O. XXII, rr. 10, 11, O. XXIII, r 3.

Under Order XXII, rules 10 and 11, of the Civil Procedure Code a transferee *pendente lite* is entitled to come on record and to conduct all proceedings from the date he is added as a party, though he is bound by all orders passed up to that date and cannot raise defences not open to his transferer. A mortgagee *pendente lite* is within the rules. [p. 430, col. 2; p. 433, col. 1: p. 434, col. 2.]

An alienee *pendente lite* is not bound by a compromise between the original parties to which he is not a party. The moment he is impleaded, the only detraction of rights to which he subjects himself is the result of the litigation which has been openly and in his presence tried and decided upon, and what could have been done by way of adjustment or compromise, if he is not before the Court, should not be allowed to interfere with his claim for a fair trial and a decision on the merits [p. 433, col. 1; p. 434, col. 2; p. 434, col. 2; p 435, col. 1.]

Per *Seshagiri Aiyar, J* - The principle of *lis pendens* enunciated in section 52 of the Transfer of Property Act owes its origin to the maxim that, where the subject in dispute owing to contest passes into the custody of the judiciary, parties to it are under an obligation not to withdraw it from the protection of the Judge. [p. 432, col 1.]

Appeal, under clause 15 of the Letters Patent, against the decision of the Honourable the Chief Justice, in C. M. P. No. 2734 of 1915, reported as 43 Ind. Cas. 502, in Appeal No. 201 of 1910, preferred to the High Court against the decree of the District Court, Nellore, in Original Suit No. 6 of 1907.

FACTS.—The mortgagee of the suit properties brought the present suit on his mortgage, pending which the mortgagor alienated the properties to the present appellant by way of mortgage. Subsequently, the parties to the suit compromised the matter. At this stage, the alienee applied to be made a party and the existing parties thereafter applied to have the compromise made a rule of Court. Their Lordships the Chief Justice and Srinivasa Aiyangar, J., differed as to whether the alienee could be allowed to question the compromise. The learned Chief Justice held that he could not. Srinivasa Aiyangar, J., held *contra*. Hence this Letters Patent Appeal.

Mr. *A. Krishnaswamy Aiyar*, for the Appellant.—There is a distinction between a compromise as a mere act of parties and one which has been converted into a decree of Court. The former cannot bind, and the latter binds an alienee *pendente lite*

except that where the compromise is registered, a question of priority may arise. So when an alienee makes himself a party before the compromise is made a rule of Court, section 52 of the Transfer of Property Act does not apply and he can rightly impugn the compromise and continue proceedings in his own behalf. See, as to an assignee's right of appeal, *Sitaramaswamy* v. *Dulla Lakshmi Narasamma* (1) and *Rai Charan Mandal* v. *Biswanath Mandal* (2).

[OLDFIELD, J.—To allow your plea amounts to a permission to evade the doctrine of *lis pendens.*]

But there is no injustice to anybody. On the other hand, if the alienee does not make himself a party and a decree is passed, the decree will bind him. The principle is enunciated in *Tarakant Bunnerjee* v. *Puddomoney Dossee* (3).

The English law is not different except on the question of notice. See *Bellamy* v. *Sabine* (4)

[KUMARASWAMI SASTRI, J.—Section 52 does not compel the Court to pass a decree.]

That is so. "Any decree that may be passed" are the words.

See also *Haradhun Chuckerbutty* v. *Protap Narain Chowdhry* (5) and *Manpal* v. *Sahib Ram* (6). (The latter case does not apply). Section 52 does not introduce any new law of *lis pendens.* See *Faiyaz Husain Khan* v. *Prag Narain* (7) and *Bishop of Winchester* v. *Paine* (8). It is only the parties to a suit that are bound by the decree therein.

[SESHAGIRI AIYAR, J.—In England a purchaser *pendente lite* will not be entitled to redeem. Section 91 of the Transfer of Property Act does not provide expressly.]

See also 47 American Cyclopedia 349.

Mr. *A. Viswanatha Aiyar*, for the Respondents.—Though the document of compromise was executed only after the alienation, the actual compromise was arrived at long before the alienation. The decree was on the compromise as between the parties to the suit and hence did not include the 4th defendant (the alienee).

The alienee has not got an independent right of hearing. For that would amount to going beyond the decree and the compromise.

[KUMARASWAMI SASTRI, J.—The alienee is interested in impugning the compromise, why should he not be allowed to do so?]

Section 52 does not make any such concession, and the section applies in the absence of fraud, or collusion or of want of *bona fides.*

[KUMARASWAMI SASTRI, J.—But every litigant has an inherent right to be heard on the merits of his case.]

Only provided that those merits are not traceable to or dependent upon the merits of another's case.

There is no distinction in principle between compromises and decrees in so far as both determine the litigation. See *Annamalai Chettiar* v. *Malayandi Appaya Naik* (9).

[Mr. *Krishnasami Aiyar.*—A decree is nonetheless a decree though it originates in a compromise. That is *Annamalai Chettiar* v. *Malayandi Appaya Naik* (9).]

[SESHAGIRI AIYAR, J.—Suppose the present plaintiff makes the alienee a party, can the latter impugn the compromise?]

But he is only a purchaser *pendente lite.* How can his character as such be altered?

[OLDFIELD, J.—Order XXII, rule 10, makes him an interested party.]

But that rule applies only where one man walks out and another comes in. A purchaser *pendente lite* takes subject to the result of the suit, however it may end. See *Annamalai Chettiar* v. *Malayandi Appaya Naik* (9).

JUDGMENT.

OLDFIELD, J.—The material facts, as they came before this Court at the hearing and as we accept them, are that plaintiff sued 1st defendant and others on a mortgage and, having failed in the Court of first instance, appealed in 1910. Pending disposal of the

(1) 43 Ind Cas. 840; 41 M. 510; 8 L. W. 21.

(2) 26 Ind. Cas. 410; 20 C. L. J. 107.

(3) 10 M. I. A. 475; 5 W. R. 63 (P. C.); 2 Sar. P. C. J. 184; 1 Suth. P. C. J. 631; 19 E. R. 1052.

(4) (1857) 44 E. R. 842; 26 L. J. Ch. 797; 3 Jur. (N. S.) 943; 6 W. R. 1; 1 De G. & J. 566; 118 R. R. 228.

(5) 14 W. R. 401.

(6) 27 A. 541; A. W. N. (1905) 94; 2 A. L. J. 428.

(7) 29 A. 339; 9 Bom. L. R. 656; 11 C. W. N. 531; 4 A. L. J. 344; 5 C. L. J. 533; 17 M. L. J. 283; 34 I. 102; 10 O. C. 314 (P. C.).

(8) (1805) 32 E. R. 1062; 11 Ves. (Jr.) 194; 8 R. R. 131.

(9) 29 M. 426 (F. B.); 1 M. L. T. 145; 16 M. L. J. 372.

appeal, two mortgages on the property in suit were given by 1st defendant to 4th respondent, the present appellant, in June and November 1914. Meanwhile negotiations for a compromise had gone on between 1st defendant and plaintiff; but it is sufficient without reference to the exact stage they had reached, when the mortgages were given, to say that they resulted in a compromise on 22nd December 1914, which was reported to the Court on 16th September 1915, and which awarded to plaintiff as against 1st defendant the full relief asked for. Fourth respondent had, however, in consequence of his acquisition of an interest in the suit properties been made a party to the appeal on 11th February 1915. The question we have to decide is whether he is concluded by 1st defendant's action or is entitled to contest the appeal on its merits.

There are no English or Indian decisions, which can be applied to these facts directly. For in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (9), although a Full Bench of this Court held that the doctrine of *lis pendens* was not the less applicable, because the litigation ended, as it must do here between plaintiff and 1st defendant, in a compromise, the present case differs, because in it the alienee has been made a party, whilst the litigation is still pending; and *Manpal* v. *Sahib Ram* (6) was decided in favour of the alienee *pendente lite* on the ground that he was impleaded at the plaintiff's instance and an issue was raised between them at the trial, whereas here the joinder of 4th respondent was opposed by plaintiff and there have been no proceedings since it.

The case most closely in point is *Tarakant Banerjee* v. *Pudomoney Dossee* (3), in which it was held that a person, who acquired title pending the litigation and whose application to be impleaded was refused on the objection of a party, was not concluded by the decision reached before he could appeal against that refusal or institute a suit as supplemental to the one, in which he sought to intervene. The learned Chief Justice has distinguished the principle then applied by the Judicial Committee on the grounds that the alienee claimed, not as 4th respondent here has done, to be added as a party, but to be substituted for his alienors and that section 52 of the Transfer of Property Act had not then been enacted. But with all respect, although 4th respondent no doubt in terms applied to be added as a party, his application was in substance to be substituted as one for 1st defendant in respect of the portion of the latter's interest, which had devolved upon him; and as regards section 52 the decision of the Judicial Committee is in point, not with direct reference to the general doctrine of *lis pendens* enunciated in it, but as indicating the effect on the application of that doctrine, which an order, such as 4th respondent has obtained in the present case and such as would have been passed in England even before the English Order XVII, rule 3, was enacted, would have had. It is on the meaning and legal consequences of such an order that our decision must depend.

The order in 4th respondent's favour was passed by Tyabji, J., in the exercise of his discretion in the usual course under Order XXII, rule 10. It was not appealed against or, so far as appears, attacked before the Division Bench; and, although some objection to it has been mooted in argument before us, we have no reason, in the absence of any ground of appeal relating to it, for refusing to give it effect. As regards the effect, which it should receive, plaintiff's position is not clear. For his argument is, as I understand it, that 4th respondent, having been impleaded, is nevertheless not to be heard on the merits of the appeal. If so, the order he has obtained will be deprived of meaning. For an order under Order XXII, rule 10, is statedly one permitting the continuance of the proceeding against the person in question, subject presumably to his enjoyment of the rights of procedure, ordinarily available to a person in his position. The doctrine of *lis pendens* is, as explained in *Bellamy* v. *Sabine* (4), founded, not on any implied notice to the world of the pending litigation or other substantive consideration, but on the practical ground that in the absence of such a doctrine there would be no certainty that the litigation would ever come to an end; and there is, therefore, no objection to reading Order XXII, rule 10, as enabling the Court in the exercise of its discretion to exclude from the operation of the doctrine cases, in which that mischief need

not be apprehended. In *Chunni Lal* v. *Abdul Ali Khan* (10) Bannerjee, J., no doubt said with reference to the position of a respondent impleaded under the provision formerly corresponding with Order XXII, rule 10, that "as he took the assignment *pendente lite* the doctrine of *lis pendens* applied to his case." But his meaning appears from the immediately succeeding sentence, "section 372 was consequently applicable and appellant was not competent to raise any plea which his assignors could not have put forward," to have been that he would be restricted to such pleas, not that he could not plead at all or that his right to plead was still to be determined. In *Ahmedbhoy* v. *Vulleebhoy* (11) the facts were similar to those before us except that a suit, not an appeal, was in question, and that in applying to be made a party the alienee relied, not like 4th respondent here, on his alienor's intention to compromise, but on facts indicating his intention to collude with the plaintiff; and the alienee was, after an exhaustive review of the English and Indian Law, made a party, statedly in order that he might put forward the defences open to his alienor. No case consistent with plaintiff's contentions had been shown us; and in these circumstances I concur with Srinivasa Aiyangar, J., and direct that the appeal be posted for further hearing on the merits.

SESHAGIRI AIYAR, J.—Both the learned Judges who heard the appeal have agreed upon the facts and although it is open to us to go behind their judgments, I am satisfied that the findings come to by them are amply borne out by the evidence given in the case. Therefore, the facts on which the question of law has to be decided may be stated as follows. The 1st defendant executed to the 4th respondent two mortgages in June and November 1914. The plaintiff's mortgage was long anterior to the 4th respondent's mortgage. It was on the 28th of February 1895. The suit was brought upon this mortgage in February 1907. The judgment of the lower Court was given in March 1910. An appeal was preferred to this Court in August of the same year. During the pendency of the appeal the mortgages to the 4th respondent were executed. Thereupon he applied to the High Court to be made a party respondent to the appeal; and this application was granted in February 1915. The plaintiff presented an application on the 16th of September 1915 that a compromise entered into between him and the 1st defendant in December 1914 should be accepted and that a decree should be passed in terms of it. This was resisted by the 4th respondent on various grounds. Issues were sent down by the learned Judges for finding whether the alleged deed of compromise was in fact executed, whether the terms were settled prior to the alienation in favour of the 4th respondent, and whether the compromise was the result of fraud or collusion intended to defeat the rights of the 4th respondent. The District Judge found that the Razinamah was executed on 22nd December 1914, that although there were negotiations for the compromise for some time the final terms were settled only on that date, and that there was no fraud or collusion between the 1st defendant and the 4th respondent. These findings were accepted by the learned Chief Justice and Srinivasa Aiyangar, J. But they differed on the question whether the 4th respondent was bound by the terms of the compromise.

In the arguments before us on behalf of the respondent there was unconsciously a confusion of ideas. The main contention was that, as, if the 4th respondent were not a party to the appeal, he would have been bound by the result of the litigation, it follows that he must be deemed to have accepted the mortgages subject to the possibility of the 1st defendant and the 4th respondent entering into a compromise, and that, therefore, although he may have been a party to the litigation, he was bound by the terms of the compromise in the same way as if he had not been made a party at all. As I said before, there are two ideas involved in this contention which should be kept distinct. In the first place, there is the protection of law or the disability arising therefrom owing to the fact that a property which is the subject of litigation has been privately dealt with. That protection or disability is provided for by section 52 of the Transfer of Property

(10) 23 A. 331.
(11) 8 B. 323; 8 Ind. Jur. 680; 4 Ind. Dec. (N. S.) 589.

Act. There is a distinct right which is independent of the theory of *lis pendens* which a party to a suit has. That right is that where a party is before the Court and is interested in the subject matter of the litigation, his rights should not be affected by any adjustment or compromise to which he is not a party. If these two distinct principles are borne in mind, the solution of the problem may not be difficult. I will first deal with section 52 of the Transfer of Property Act. I do not wish to embark upon any lengthy historical review of the principle of *lis pendens*. But I may be permitted to point out that the rules owes its origin to the maxim of Roman Law "*Rem de qua controversia prohib mur in acrum dedicare*, which I understand to mean that where the subject in dispute owing to contest passes into the custody of the judiciary, parties to it are under an obligation not to withdraw it from the protection of the Judge. From this initial principle the law of *lis pendens* has been developed in the jurisprudence of the various countries.

In England by 28 Edw. I, Ch. II, a purchase *pendente lite* was declared champertous and was held void. Subsequently it was held mostly by the intervention of the Equity Courts that the transaction, however repugnant to law, was not void altogether, but was enforceable subject to the result of the litigation pending in the Court. The historical judgment in *Bellamy* v *Sabine* (4) is now the basis of the principle of *lis pendens* in England. Lord Cranworth, the Lord Chancellor, said in that case: "It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation rights to the property in dispute so as to prejudice the opposite party . . . . . The necessities of mankind require that the decision of the Court...shall be binding, not only on the litigating parties but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of pending proceedings." In order to avoid the possibility of fraud it was held that to attract the principle of *lis pendens* there must be active controversy in the litigation that is pending. This principle has been recognised in section 52 of the Transfer of Property Act. The meaning of the expression "contentious proceeding" has given rise to a conflict of views. It was ultimately held in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (9) that if the suit was contentious in its inception, this character of contentiousness was not taken away by the fact that the parties subsequently entered into a compromise. This must be treated as an exception to the general rule. The result of the legislation and of the authorities is that if the purchaser is not a party to the suit, he will be bound by a litigation which was in its inception contentious, whatever may be the process by which the ultimate conclusion is reached, whether by obtaining after active contest a decision by the Judge or by a compromise outside Court and its recognition by the Judge. That is all that is implied in or expressed by section 52 of the Transfer of Property Act and by *Annamalai Chettiar* v. *Malayandi Appaya Naik* (9).

Now comes the question how far this principle is to be modified where the purchaser is a party to the litigation. In Bennett on Lis Pendens all the authorities relating to the impleading of the purchaser as a party have been fully considered. He has come to the conclusion that a purchaser is not a necessary party. He goes further and says that Courts should not allow the purchaser to be made a party to the pending suit. This pronouncement appears to me to go too far. There are some cases in which it was held the suit will be defective for want of proper parties if after notice of a purchase *pendente lite* the plaintiff does not make the purchaser a party. However that may be, in this country the matter is set at rest by Order XXII, rule 10, of the Code of Civil Procedure. Under that rule "in cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved." It was held in *Muhammad Musihullah Khan* v. *Jarao Bai* (12) that a mortgage *pendente lite* is within this rule. It has also been held in this Court [*vide Sitaramaswamy* v. *Dulla Lakshmi Narasimma* (1)] that the purchaser

(12) 27 Ind. Cas. 771; 37 A. 226; 13 A. L. J. 307;

pendente lite has the right of preferring an appeal against a decision adverse to his assignor. No doubt Courts should exercise great caution in permitting a purchaser of this kind to become a party. Unless it is satisfied that the transferor is likely to act in violation of the rights of the transferee, the records of the Court should not be burdened by the pleadings of the purchaser, and the proceedings should not be lengthened by enabling such a purchaser to intermeddle with the suit already pending. But when once the order has been made permitting the purchaser to come in, it seems to me that the subject matter of the dispute in which he is interested should not be decided upon to his prejudice without hearing him. That is a right which as suitor he possesses by virtue of his being a party to the litigation. Order XXIII, rule 3, provides for the compromise of a suit It presupposes that all the parties interested have entered into the compromise. If any one of them stands out, it is a well recognised principle of jurisprudence that the compromise between the other parties should not in the least derogate from his rights. It follows from these provisions of the Code of Civil Procedure that although a purchaser *pendente lite* takes the transfer subject to the result of the litigation, and if he is not impleaded as a party he will be bound by any lawful compromise or adjustment which may be entered into between the plaintiff and his transferor, the moment that he becomes a defendant, the only detraction of right to which he subjects himself is the result of the litigation which has been openly and in his presence tried and decided upon. Once he is in the array of parties, what could have been done by way of compromise or adjustment if he is not before the Court should not be allowed to interfere with his claim for a fair trial and a decision on the merits.

It was not seriously disputed that if there was a private adjustment outside the Court which is not reported to it, that would not bind the purchaser *pendente lite*. Therefore, what gives force to the adjustment is the sanction of the Court, and the question, therefore, resolves itself into this. Can a Court sanction a compromise so as to affect the rights of one of the parties before it, although it may be a lawful agreement between the other parties? My answer is in the negative. It was said that the finding that there was no fraud or collusion is conclusive against the rights of the 4th respondent. I am unable to follow this reasoning. If there was fraud or collusion, even though the purchaser is not a party, he can impeach the compromise in a fresh suit, and how is his position bettered by intervening at an earlier stage to protest his rights? Further, the prejudice to the purchaser would not necessarily be consequent upon fraud or collusion. The transferor and the plaintiff may honestly believe that a certain amount is due. They may not embark upon a complicated enquiry into the question of limitation. They may not desire to go behind what is apparent on the face of the record and may agree honestly to fix the amount that is payable by one party to other. But the purchaser *pendente lite* has a larger right. He can litigate the question whether the amount claimed in the suit was really due, whether it was barred by limitation and whether it is a binding debt. Therefore, the mere fact that there has been no fraud or collusion does not settle the rights of the purchaser *pendente lite*. There are observations in *Rai Charan Mandal* v. *Biswanath Mandal*(2)to the effect that the purchaser would be affected only if he does not choose to make himself a party. *Haradhun Chuckerbutty* v. *Protap Narain Chowdhry* (5) is to the same effect. In *Tarakant Bannerjee* v. *Puadomony Dossee* (3) there are *dicta* at page 457 which very strongly support the view that the rights of a person who can and does intervene should not be affected by any adjustment or agreement between the other parties. I am, therefore, of opinion that the compromise, although it may be binding upon the 1st defendant, cannot affect the right of the 4th respondent to claim a judicial decision on the question.

It was said that this would lead to inconsistent decrees being passed in respect of the same subject matter. I feel no difficulty on this point. Any decree to which the 1st defendant subjects himself will *prima facie* be personal and would affect property only in so far as the 4th respondent's interests are not prejudiced. I agree in the order proposed by my learned brother regarding re-hearing.

POLICHERLA VEERARAGHAVA REDDI v. CHERLA SUBBA REDDI.

KUMARASWAMI SASTRI, J.—This appeal arises out of a difference of opinion between the Chief Justice and Mr. Justice Sreenivasa Iyengar as to the right of an alienee *pendente lite* who has been brought on record as a party under the provisions of Order XXII, rules 10 and 11 of the Civil Procedure Code, to object to the recording of a compromise entered into between the original parties to the suit after the alienation in his favour and to the passing of a decree in terms thereof. The facts are fully set out in the judgment of Sreenivasa Aiyangar, J., and the appeal has been argued on the basis of the findings arrived at by the District Judge and accepted by the learned Judges who first heard the appeal.

A Full Bench of this Court in *Annamalai Chettiar* v. *Malayandi Appaya Naik* (9) has held that an alienee *pendente lite* who is not brought on record will be bound by a decree passed on a *bona fide* compromise arrived at between the parties, but there is, so far as I am aware, no decision where the rights of an alienee *pendente lite* who is a party to the suit to object to the compromise have been decided.

Section 52 of the Transfer of Property Act, which codifies the law as to *lis pendens*, enacts that immoveable property, the right to which is directly and specifically in question in a suit or proceeding, cannot during its active prosecution be transferred or otherwise dealt with by a party, so as to affect the rights of any other party thereto under any decree or order which may be made therein except with the leave of the Court.

To bring into operation section 52 there should be a decree. A compromise arrived at between the parties to a suit is like any other contract or agreement only binding and enforceable as between the parties thereto or their privies. Ordinarily a person who has parted with his interest in property cannot by any contract or by any dealing with the interest he has parted with affect the right of the alienee. If the compromise is not embodied in a decree, it cannot be said that an alienee *pendente lite* is bound by it. Is he entitled, if on record, to object to the Court passing a decree which would confer validity on a transaction not otherwise binding on him? I think the answer to the question must be sought, not with reference to the doctrine of *lis pendens* which assumes a decree to attract to itself the provisions of section 52, but to the provisions of the Civil Procedure Code as regards the right of parties to a suit.

There can be little doubt that a transferee *pendente lite* is entitled to come on record and to conduct all proceedings from the date he is added as a party, though he would be bound by all orders passed up to that date and could not raise a defence not open to his transferor. Order XXII, rules 10 and 11, are based on the principle that a person having an interest in the suit should be a party, so that he may have an opportunity of proving his case and supporting his title and also to prevent any chances of fraud or collusion on the part of his transferor, who often after the alienation in his favour retains little or no interest in the subject-matter of the litigation. As observed by their Lordships of the Privy Council in *Tarakant Banerjee* v. *Puddomoney Dossee* (3), "the law allows a party interested to intervene in the suit that right should not be rigorously dealt with." The danger of secret collusion referred to by their Lordships is as real to-day as it was when the case was decided in 1866. *Ahmedbhoy* v. *Vulleebhoy* (1) is also an authority in point. It is no answer to the request of the alienee to be added to say that the alienation was pending suit as Order XXII, rule 10, expressly refers to acquisition of interest *pendente lite*. Except under special circumstances, I do not think the Court ought to refuse to join an alienee as a party under Order XXII, rule 10.

When an alienee has been so added, he gets all the rights of a party to a suit. I can see nothing in the Code which reduces him to a mere figurehead bound by all the acts of the original parties because his alienation was pending the suit. If for example his transferee remains *ex parte*, can it be said that he cannot let in evidence or prosecute or defend the suit because it has been held that an alienee *pendente lite* is bound by an *ex parte* decree passed in the suit? Order XXIII, rule 3, contemplates a compromise or adjustment between all the parties to the suit, and it is difficult to see how the Court can pass a decree on a compromise to which a party to the suit was not a party without such person's consent, unless it can be held that a compromise as a compromise

between the original parties is binding on an alienee pending suit. To do so would be to extend the doctrine of *lis pendens* to agreements between the original parties to a suit which may at some future date enable them to get a decree in terms thereof. I can find no authority for doing so.

There may be cases where the other party has had no notice of the alienation *pendente lite* and has *bona fide* compromised the suit and put himself in a disadvantageous position, owing to the alienee not having taken steps either to give him notice of his alienation or to bring himself on record with due diligence. In such cases the alienee may be estopped or prevented from objecting to a decree being passed. These cases are outside any of the provisions of the Civil Procedure Code as Order XXIII, rule 2, does not prevent a Court from passing a decree in terms of a compromise to which one of the parties to the suit is not a party, if such a compromise will be otherwise binding or if the party objecting has estopped himself from disputing its binding nature on him. No such pleas have been raised by the respondent. There is, therefore, no apparent hardship in his being required to prove his case.

I agree with the conclusion arrived at by my learned brothers Oldfield and Seshagiri Aiyar, JJ., and concur in the order passed by them.

M. C P.

Appeal allowed;
Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1923 OF 1918.

March 24, 1919.

Present :—Mr. Justice Scott-Smith.

SANUN RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALLAH BAKHSH AND ANOTHER—PLAINTIFFS,
GHULAM MUHAMMAD—DEFENDANT—RESPONDENTS.

*Custom—Guardianship—Alienation—Brother, adult, whether authorised to alienate minor brother's property—Muhammadans of Muzaffargarh District—*Riwaj-i-am, *entry in, value of.*

Among Muhammadans of Muzaffargarh District, on the death of a father the guardianship of the person and property of his minor children devolves on his eldest son, if adult. Such guardian is entitled to alienate the property of the minor for payment of the debts of the minor's father, for the marriage or maintenance of the minor or for an object directly advantageous to the minor [p. 436, col 1.]

A *riwaj-i-am* is a public record prepared by a public officer in discharge of his duties and under Government rules, and, therefore, statements contained in a *riwaj-i-am*, which is not imperfectly compiled, form a strong piece of evidence in support of the custom affirmed therein, even when they are unsupported by instances, provided they are not opposed to the general custom of the country. [p. 436, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Multan, dated the 20th July 1916.

Mr. *Govind Das*, for the Appellants.

Mr. *Hargopal*, for the Respondents.

JUDGMENT.—In the suit out of which the present appeal arises the plaintiffs sued for possession of certain land alienated by their brother Ghulam Muhammad during their minority for Rs. 638, on the ground that the vendor was not a legal guardian and that the alienation was not for their benefit. The first Court dismissed the suit, holding that Ghulam Muhammad was a lawful guardian and that the alienation was for valid necessity. In arriving at this conclusion it relied upon an entry in the *riwaj i am* applicable to all Mussulmans of the district, to the effect that on the death of the father guardianship of the person and property of the minor children devolves on the eldest brother, if adult, and upon a further provision in the same *riwaj i am* that a guardian may sell or mortgage property for the benefit of his ward. Sheikh Amir Ali, who heard the appeal, was of opinion that the entry in the *riwaj-i-am*, which was unsupported by instances, was insufficient to prove the existence of the custom put forward by the defendants and accepting the appeal, decreed the plaintiffs' claim with costs throughout. He did not give any finding as to whether there was any necessity for the alienation or whether the minors had derived any benefit therefrom.

The present appeal has been filed upon a certificate granted by the present District Judge, and the question for decision is whether any custom exists contrary to the plaintiffs' personal law in virtue of which

their brother as the lawful guardian of the minors had authority to alienate their land for a necessary purpose. Bhagat Govind Das in arguing the case for the appellants relies upon the Customary Law of the Muzaffargarh District compiled by Pandit Hari Kishen Kaul, Settlement Collector, in 1903. The section dealing with guardianship and minority and with the powers of guardians will be found at pages 24 to 25 of the compilation. The answer to question 2 given at page 25 is as follows: "All Mussalmans state: On the death of the father, the guardianship of the person and the property of the minor children devolves on the eldest brother, if adult." The answer to question 4 given at page 26 is: "A guardian may mortgage or sell the moveable or immoveable property for payment of debts of his ward's father, for the marriage or maintenance of the ward or for an object directly advantageous to the ward." There is no exception given in respect of either of these answers, all tribes concurring in them. The author's preface shows that this volume of Customary Law was compiled with great care and the author himself states that the Code may be taken as an authoritative statement of the customs of the various tribes in the Muzaffargarh District. No doubt, there are certain rulings of this Court which lay down that any entry in a *riwaj-i-am* unsupported by instances is not of itself very strong evidence in proof of a custom. Counsel for the appellants, however, refers to *Beg* v. *Allah Ditta* (1) in which their Lordships held that the entry in the *riwaj i-am* in favour of the succession of a daughter's son whose father was a *khana damad*, in preference to collaterals was a strong piece of evidence in support of such custom which it lay upon the plaintiff's collaterals to rebut. The entry in the *riwaj-i-am* produced in that case was also unsupported by instances, but their Lordships of the Privy Council pointed out that it was a public record prepared by a public officer in discharge of his duties and under Government rules, and that the statements contained in it formed a strong piece of evidence in support of custom. This judgment was considered by a Division Bench of this Court in the case reported as *Wazira* v. *Maryan* (2), wherein it was held, following *Chhuttan* v. *Hazari Lal* (3), that statements in a *riwaj-i-am* when opposed to general custom can carry very little weight unless supported by instances and that consequently the entries in the *riwaj i am* of the Gujranwala District in favour of the special custom relied on by the plaintiff's collaterals unsupported by instances were insufficient to establish that custom, such *riwaj-i-am* having, moreover, been imperfectly compiled. Now in the present case it cannot be said that the *riwaj-i-am* was imperfectly compiled. Moreover, according to custom generally prevailing in the Punjab a guardian in the case of Hindus and Sikhs can alienate his ward's property for a necessary purpose. It can hardly be said that the custom alleged in the present case is one contrary to the ideas as generally prevalent amongst agriculturists in this province. The custom is certainly contrary to the personal law of Muhammadans, but following the Privy Council ruling *Beg* v. *Allah Ditta* (1) I must hold that the entries in the Muzaffargarh *riwaj-i-am* set forth above are strong evidence in proof of the existence of the alleged custom and are quite sufficient to shift the *onus* on to the plaintiffs. The plaintiffs have no doubt produced a judicial decision dated the 25th of June 1912 which is in their favour, but it is only one by a Munsif in which it was held that it had not been proved to the effect that a brother was guardian by custom. The Munsif in that case referred to the fact that the entry in the *riwaj-i-am* was unsupported by instances. The oral evidence produced by the parties is not of much importance, and I hold that the *onus* has been shifted on to the plaintiffs and that they have not discharged it.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court remand the case thereto for re-decision of the appeal. It will be necessary for it to come to a finding on the question of necessity. Stamp in this Court will be refunded and other costs will be costs in the case.

Appeal accepted.

(1) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L J. 175; 44 I. A. 89 (P. C.).

(2) 42 Ind. Cas. 358; 84 P. R. 1917; 151 P. W. R. 1917; 3 P. L. R. 1918.

(3) 30 Ind. Cas. 22; 7 P. R. 1916; 123 P. W. R. 1915; 46 P. L. R. 1916.

MADRAS HIGH COURT.
FULL BENCH.

APPEAL AGAINST APPELLATE ORDER NO. 106 OF 1917.

April 25, 1919.

Present:—Sir John Wallis, KT., Chief Justice, Justice Sir William Ayling, KT. and Mr. Justice Sadasiva Aiyar.

THATTANTAVITA *alias* THATTANTE KANDOM VEETU PARAMBIL PARKUM CHATHOTH VACHALI ROHINI AND OTHERS—COUNTER PETITIONER NO. 2 AND HER LEGAL REPRESENTATIVES —APPELLANTS

versus

PUTHALATHAU KANDI KOMBI ALIASSAN AND OTHERS—PETITIONERS NOS. 1 TO 8, COUNTER-PETITIONER NO. 1 AND LEGAL REPRESENTATIVES OF DECEASED RESPONDENT NO. 7—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 165, 181 —*Application by judgment-debtor for restoration of property in excess of that decreed—Limitation.*

An application by a judgment-debtor for the restoration of immoveable property in excess of what has been decreed is governed by Article 181 and not by Article 165 of Schedule I to the Limitation Act. [p. 440, col. 2.]

Ratnam Ayyar v. *Krishna Doss Vital Doss*, 21 M. 494; 8 M. L. J. 75; 7 Ind Dec. (N. S.) 706, overruled.

Abdul Karim v. *Islamunnissa Bibi*, 34 Ind. Cas. 231; 14 A. L. J. 401; 38 A. 339, followed.

Appeal against the order of the Court of the Temporary Subordinate Judge, Tellicherry, dated the 5th March 1917, in Appeal Suit No. 596 of 19 6, preferred against the order of the Court of the District Munsif, Nadapuram, dated the 9th August 1915, in Revision Execution Petition No. 516 of 1914, in Original Suit No. 392 of 1913.

This appeal coming on for hearing on the 23rd October 1918, upon perusing the petition of appeal, the orders of the lower Courts and the material papers in the case, and upon hearing the arguments of Mr. *C. Madhavan Nair*, for the Appellants, and of Mr. *K. P. M. Menon*, for 1st to 6th and 8th Respondents, and the 9th and 10th Respondents not appearing in person or by Pleader, and the case having stood over for consideration till the 31st of October 1918, the Court (Ayling and Krishnan, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

AYLING, J. - This is of the nature of a second appeal against an order of the District Munsif of Nadapuram directing restoration to respondents Nos. 1 to 8 of certain property, which he held to have been wrongly delivered to appellant under a decree of his Court.

The sole question before us now is whether respondents' application was time-barred: and this turns on whether Article 165 of Schedule I, Limitation Act, is applicable to the case.

Respondents were defendants in the original suit and judgment-debtors under the decree, and we are asked by their Counsel to hold that Article 165 only applies to applications by other persons under Order XXI, rule 100, and not to petitions by judgment debtors under section 47, Civil Procedure Code.

On this point there is a conflict of rulings. In *Abdul Karim* v. *Islamunnissa Bibi* (1) the learned Judges held in a carefully considered judgment that applications of this kind by judgment-debtors were governed by Article 181, and not Article 165. In this view I fully concur: as also in the reasoning which supports it. On the other hand a Bench of this Court has held in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) that Article 165 applies; the judgment is, in this respect, of the briefest and assigns no reasons.

With all respect I think this view is wrong: but as it has never been overruled and is reported in the regular series, I do not feel justified in refusing to follow it without a reference to a Full Bench.

I would, therefore, refer to a Full Bench the question of whether Article 165 of Schedule I, Limitation Act, is applicable to applications by a judgment debtor for restoration of immoveable property in excess of what has been decreed.

KRISHNAN, J.—This appeal against appellate order arises from an application by 1 to 8 respondents against the appellant, under section 47 of the Code of Civil Procedure, for recovering, with mesne profits, possession of certain properties alleged to have been wrongfully taken possession of

(1) 34 Ind. Cas. 231; 38 A. 339; 14 A. L. J. 401.
(2) 21 M. 494; 8 M. L. J. 75; 7 Ind. Dec. (N. S.) 706.

by him in execution of the decree in Original Suit No. 762 of 1909 from their lessee, the 9th respondent who was the 15th defendant in the case. Respondents Nos. 1 to 8 are the legal representatives of one Ahmed Kutti who was the 10th defendant in the suit. They had first put forward their present claim as a suit, Original Suit No. 392 of 1913, but on objection being taken by the appellant it was converted into an application under section 47, as they are the representatives of the 10th defendant in Original Suit No. 762 of 1909.

Both the lower Courts have held that they are entitled to the reliefs claimed by them, as the decree in Original Suit No. 762 of 1909 did not include the properties in question, and have directed the properties to be re delivered to them with mesne profits at Rs. 20 a year. Appellant's plea that the respondents' application was time-barred under Article 165 of the Limitation Act, having been made nearly 2 years and 11 months after possession was taken by him, was overruled; the lower Courts holding that the 3 years' rule of limitation applied, apparently under Article 181, though they do not say so expressly.

The appellant has again raised before us the same question of limitation. His learned Counsel contends that Article 165 applies and relies upon the observation in the case in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2), where the learned Judges say: "There can be no doubt, as held by the lower Appellate Court, that Article 165, Schedule II, Indian Limitation Act, is applicable to a case where the applicant is a party bound by the decree as well as where he is a stranger [see *Vythilinga Muppanar* v. *Seethalakshmi Ammal* (3), Appeal against. Appellate OrderNo.25 of 1839 (unreported)]." That observation is no doubt directly in the appellants' favour, but the question was recently considered by the Allahabad High Court in *Abdul Karim* v. *Islamunnissa Bibi* (1) where the learned Judges held, dissenting from the view taken in the Madras case, that Article 165 did not apply to an application by a judgment debtor for restoration of immoveable property seized by the decree holder in excess of what had been decreed; but Article 181 applied.

With all respect to the learned Judges in the Madras cases I am inclined to think that the view expressed in the Allahabad case is correct and should be adopted. I fully agree with the reasons given by the learned Judges in that case and I need not repeat them. I would, however, add that if Article 165 should be read as applicable to an application like the present one under section 47, it would be equally justifiable to apply it to a defendant who claims to recover by way of restitution proceedings immoveable property taken by the decree-holder from him; for he would also be a person dispossessed of immoveable property applying under the Code of Civil Procedure, and disputing the right of the decree holder to be put into possession. It has, however, always been held that Article 181 is applicable to such a case. Furthermore, as Article 165 cannot by its terms apply to the recovery of moveable property or of money taken by the decree-holder in excess of what he is entitled to under the decree, the application of Article 165 to the recovery of immoveable property so taken, will lead to the extraordinary position that in the case of the latter the judgment debtor will only have 30 days, whereas in the case of the former he will have 3 years, a result that the Legislature can hardly have intended.

The wording of Article 165 and its position in conjunction with Articles 166 and 167 would seem to indicate that it is properly applicable only to applications under Order XXI, rule 100 of the Code of Civil Procedure. I may also observe that when, as in the present case, a person dispossesses another of property not included in the decree, it seems doubtful if the latter can be considered to be "a decree-holder" *qua* that property within the meaning of the article.

In *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) there is no discussion of the question before us, as the learned Judges merely follow the unreported case. It would also seem, as pointed out in *Abdul Karim* v. *Islamunnissa Bibi* (1), that the observation in it is in reality an *obiter dictum*, as the Judges were dealing with the case of a minor, to whom they held no limitation applied. On examining

(3) 1 M. L. J. 42.

the unreported case in Appeal Against Appellate Order No. 25 of 1889 [*Vythilinga Muppanar* v. *Seethalakshmi Ammal* (3)] I find it is no doubt a decision in point. But the judgment in it is based entirely on the absence of the words "other than a judgment debtor" in the article. This is no doubt at first sight an important point, but I am inclined to think that it does not affect the consideration in favour of the opposite view. It is only if the article can be applied to the case of a judgment-debtor, that the omission will be material. But, if, as I think, the article applies only to applications under rule 100, it was unnecessary and even incorrect to introduce an exception in favour of judgment-debtors into it when the rule is sufficient to exclude them as it does. The form of the article is thus quite consistent with my view.

I, therefore, agree to the reference to the Full Bench proposed by my learned brother.

This appeal came on for hearing on the 7th April 1919 in pursuance of the above order of Reference to a Full Bench.

Mr. *C. Madhavan Nair*, for the Appellants.—Article 165, Limitation Act, applies. See *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2). The time limit is 30 days. See also *Vythilinga Muppanar* v. *Seethalakshmi Ammal* (3). The Allahabad High Court takes a different view and holds Article 181 applicable. See *Abdul Karim* v. *Islamunnissa Bibi* (1). But *Tej Singh* v. *Chabeli Ram* (4) follows *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) and so is overruled by *Abdul Karim* v. *Islamunnissa Bibi* (1).

See also *Muthiah Chettiar* v. *Bawa Sahib* (5), *Pasumarti Payidanna* v. *Ganti Lakshminarasamma* (6) and *Mahomed Hossin* v. *Kokil Singh* (7), where the principle is reiterated.

[WALLIS, C. J.—The wording of Order XXI, rule 100, is such as would restrict it to only properties covered by the decree. *Abdul Karim* v. *Islamunnissa Bibi* (1) necessitates a suit in the place of an application.]

(4) 24 A. 342; A. W. N (1902) 84.
(5) 26 Ind. Cas. 46 27 M L. J. 605; 1 L. W. 939.
(6) 29 Ind. Cas. 314; 38 M. 1076 at p. 1085; 28 M. L. J. 525.
(7) 17 C. 91; 9 C. L. R. 53; 8 Ind. Dec, (N. S.) 609.

Ratnam Ayyar v. *Krishna Doss Vital Doss* (2) has been followed here recently in Civil Miscellaneous Second Appeal No. 65 of 1918.

Mr. *K. P. M. Menon*, for the Respondents.—Article 165 refers to applications under the rules and so does not refer to applications which fall within the purview of section 47, Civil Procedure Code. The application in question is essentially one under section 47, as between the parties to the suit and so Article 165 cannot cover the case. Further, this article was appended to the section corresponding to Order XXI, rule 100, in the Code of 1859, whence it has been transposed to the Limitation Acts of 1871 and 1877. What is said in *Vythilinga Muppanar* v. *Seethalakshmi Ammal* (3) is that unless the Articles 165 and 167 are made specifically to refer to the judgment debtor, there will seem to be some tautology in their framing. So that decision only puts it that the judgment-debtor is not within the purview of these articles as at present worded.

Mr. *C. Madhavan Nair*, in reply.—The Limitation Act was re-enacted in 1908 and if the Legislature was of opinion that *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) gave out wrong law, that would have been remedied. The Legislature has deliberately omitted to do so. Compare the wording of Article 166 which has been held to have a very wide application.

OPINION.

WALLIS, C. J.—The period of limitation prescribed by Articles 165 and 168 may be traced back to sections 230 and 269 of the Code of Civil Procedure, 1859, which dealt only with obstructions by, and dispossessions of, persons other than the defendant. The provision in section 230 was re-enacted as Article 158 (now 165) of the Limitation Act of 1871, as follows: "Under the Code of Civil Procedure by a person dispossessed of immoveable property and disputing the right of the decree holder to be put into possession." This, in my opinion, must be read as meaning "disputing the right of the decree-holder to be put into possession under the decree." That question had been decided against the defendant in the suit itself, and it was not open to him to raise it again in execution. This shows that Article

158 was intended to apply only to a case covered by section 230 of the Code, where a person other than the defendant had been dispossessed, and that is in accordance with the ordinary presumption that no substantial alteration is intended when a particular provision is transferred from one Statute to another. Article 158 of the Act of 1871 did not provide for applications by a decree-holder who had been resisted by third persons in taking possession under the decree, whereas Article 160 (now 167) dealt with complaints in the case of Court sales both by the purchaser and by persons dispossessed by him (section 269 of the Code of 1859). In the Act of 1877, Article 158 was reproduced as Article 165 and amended by inserting after decree-holder the words "or purchaser at a sale in execution of a decree," and Article 167 was amended by extending it to complaints of obstruction by decree-holders as well as by purchasers (a case not dealt with by the Act of 1871), and by making it applicable to applications complaining of dispossession, not only by auction-purchasers, but also by decree-holders. Both these cases were, however, covered by Article 165 as amended, and the latter portion of this article was, therefore, not reproduced in Article 167 of the Act of 1908. In Appeal Against Appellate Order No. 25 of 1889 [*Vythilinga Muppanar* v. *Seethalakshmi Ammal*(3)], which was followed in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2), the learned Judges relied on the fact that Articles 165 and 167 do not in terms exclude the judgment debtor, but their attention was not called to the fact that the articles were transferred from the Code of 1859 where the restriction was to be found. They further observed that "unless the articles referred severally to judgment-debtors as well as to third parties, there would be tautology." There was, however, tautology in the Act of 1877 in either view, and in the Act of 1908, Article 167 was amended so as to remove it. There is in my opinion nothing in these changes to show any intention of widening the scope of the article so as to make it applicable to defendants.

The decision in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) having stood so long unquestioned in this Court and elsewhere I have felt great doubt as to whether we should not continue to follow it, having regard to the nature of the points decided, on the principle of *stare decisis*. The Legislature has, however, itself restricted the scope of Article 165 by restricting in the Code of 1908 applications by third parties under Order XXI, rule 100, to applications with reference to property covered by the decree or sale in pursuance thereof, and the fact that this procedure is not now applicable to complaints by third parties of dispossession of property not covered by such decree or sale appears to me to afford an additional reason for excluding from the scope of the article similar complaints by defendants who, as I am satisfied, were never intended to be covered by it. I think, moreover, that the rights of defendants are sufficiently restricted by their being required to apply under section 47 within the period limited by Article 181. Agreeing with the decision in *Abdul Karim* v. *Islamunnissa Bibi* (1) I would overrule *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2) and answer the question in the negative.

AYLING, J.—I agree.

SADASIVA AIYAR, J.—In this case, I shared with my Lord (if I may respectfully say so) the hesitation he felt in overruling the old decision in *Ratnam Ayyar* v. *Krishna Doss Vital Doss* (2). But I am convinced after reading his opinion that that decision is erroneous. As cases of wrong delivery of judgment-debtors' property in excess of that decreed are rare and as it is very unlikely that many titles could have been created arising from alienations of such property by decree holders to purchasers who believed the title to have been perfected by the default of judgment-debtors to file their applications within the shorter period of limitation till now prevailing, and as most of even those titles would have been perfected by the lapse of 3 years since the dates of such alienations, I agree in the answer proposed by my Lord.

M. C. P.

Reference answered.

HAUR KAUR *v.* MUNNI LAL.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 25 OF 1919.

March 24, 1919.

Present:—Mr. Justice Abdul Raoof.

Musammat HAUR KAUR—PLAINTIFF—PETITIONER

versus

MUNNI LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIII, r. 5 (d)—Application for leave to sue in forma pauperis *—Court, power of, to decide question of limitation—Revision—High Court, power of interference of.*

Where an application is made for leave to sue *in forma pauperis*, the Court making an enquiry into the alleged pauperism of the applicant has power to decide the question of limitation and decide whether the plaintiff has or has not a subsisting cause of action.

The High Court has no power to interfere in revision with the decision of a Court which had jurisdiction to deal with the matter.

Civil revision from the order of the Subordinate Judge, 1st Class, Amritsar, dated the 5th October 1918.

Mr. *Harbhagwan Das*, for the Petitioner.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The order under revision was passed under clause (*d*) of rule 5, Order XXXIII of the Code of Civil Procedure. The learned Subordinate Judge held that although the petitioner was a pauper, she had no subsisting cause of action, her suit being barred by limitation. For a decision on this point the learned Subordinate Judge took into consideration such materials as were on the record before him. He took into consideration the statements in the petition of plaint and the deposition of the plaintiff made in Court. The Counsel for the petitioner has urged before me that the learned Subordinate Judge had no power to deal with the question of limitation because that was a question which related to the merits of the case. This contention is opposed to decided cases. It has been held that the Court has power to decide the question of limitation and decide whether the plaintiff has or has not a subsisting cause of action. This question was decided by a Full Bench of the Allahabad High Court in the case of *Chattar pal Singh* v. *Raja Ram* (1). Having regard to this decision, it cannot be said that the learned Subordinate Judge had no jurisdiction to decide the case in the manner he did. According to the rulings of their Lordships of the Privy Council, this Court has no power to interfere with the decision of a Court which had jurisdiction to deal with the matter. The view taken by the learned Subordinate Judge may be erroneous on the question of limitation, but I have no power to interfere with it.

Under these circumstances the application for revision fails and I dismiss it with costs.

Revision dismissed.

(1) 7 A. 661 (F. B.); A. W. N. (1885) 156; 4 Ind. Dec. (N.s.) 854.

DHANI RAM *v.* ABDUL KARIM.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 18 OF 1919.

June 10, 1919.

Present:—Mr. Ashworth, A. J. C.

DHANI RAM—PLAINTIFF—APPELLANT

versus

ABDUL KARIM—DEFENDANT—RESPONDENT.

Public highway—Dedication, proof of.

In order to establish a public right of way by proof of user alone, it is necessary to show that such a way leads from one public terminus to another. The right of way may, however, be held proved in a road leading merely to a private place of interest if it is shown that the owner has allowed the public to spend money in improving the road, in which case dedication may be inferred. [p. 442, col. 2.]

Appeal against the decree of the Subordinate Judge, Barabanki, dated the 28th October 1918, reversing that of the Munsif, Fatehpur, dated the 30th June 1918.

Mr. *B. N. Chakbast*, for the Appellant.

JUDGMENT.—In this case the plaintiff-appellant sues the defendant respondent for a declaration that the latter was not entitled to block up a certain door on the east of his (the plaintiff's) house by stacking wood on the immediate space outside and also asks for an injunction. The suit was based on the allegation that the land immediately outside the door was a portion of a plot No. 822 in the Settlement Map of the *abadi*, which plot was described as *parti nazul* land, and that the plaintiff had acquired a right

of way thereover by easement by reason of sixty years' user. The right of way was denied by the defendant who, however, in his written statement admitted that the land immediately outside the door (described by him as *gosha* No. 1 of plot No. 822) was public property. On these pleadings obviously the only question which arose was whether the plaintiff had a right of way by easement over *gosha* No. 1 of plot No. 822, which was admittedly Government land. The learned Munsif, however, allowed the plaintiff to make a verbal addition to his cause of action without amending the plaint. This addition was that plot No. 822 was not merely Government land but was a public highway or *rasta*—a plea which was obviously inconsistent with the claim to an easement. He then framed two issues. One was whether the plaintiff had a right to use the land of *gosha* No. 1 of plot 822 on the ground that it was a public highway, and the other was whether he had a right to use the land on the ground of his having acquired an easement of right of way over it. He decided the first of these two issues in favour of the plaintiff and held in consequence that it was not necessary to decide the second issue. In appeal the learned Subordinate Judge of Barabanki found that the evidence did not prove that *gosha* No. 1 of plot No. 822 was a public highway and remanded the case for decision on the question of easement. This order of remand has been appealed from, on the ground that the Subordinate Judge was not justified in holding *gosha* No. 1 of plot No. 822 not to be a public highway merely because it did not lead from one public plot to another and that he had wrongly interpreted the *khasra* of the old Settlement. This *khasra* described the land in question as *parti gali amad roft*, that is, "forsaken land used as a lane for going to and fro," which the learned Subordinate Judge held did not necessarily mean that it was a public highway. To support the proposition that a public way need not lead from one public plot to another appellant's Counsel quotes *Fazal Haq* v. *Maha Chand* (1). This ruling merely holds that a person who has acquired by purchase from the Municipality a piece of land which was formerly a public thoroughfare, cannot stop the drain of another person which used to flow on to the piece of land. It appears to have no relevance to this case. At the same time there is no doubt that the statement of the law in Peacock's Easements, Second Edition, page 235, on which the learned Subordinate Judge relied, is out of date. It is there stated that a public road must lead from one public place to another public place and that there cannot be a right for the public to go to a place where the public have no right to be. The rulings relied on by Peacock are English rulings which have been superseded. At page 11 of Volume 16 of Halsbury's Laws of England in a note it is stated as follows:—"It was at one time strenuously contended that a way which was not a thoroughfare but only a *cul de sac* could not be a highway, but such a contention can no longer be supported." In the same volume later on at pages 39 and 40 it is stated that the law at present is that, in order to establish a public right of way *by proof of user alone*, it is necessary to show that such a way leads from one public terminus to another. The right of way may, however, be held proved in a road leading merely to a private place of interest if it is shown that the owner has allowed the public to spend money in improving the road, in which case dedication may be inferred. In the present case the evidence shows that the land in question was used by the public for approaching a factory of sugar. It is not, however, shown that any money was ever spent on this approach by the public. The decision, therefore, of the learned Subordinate Judge was correct and this appeal is rejected under Order XLI, rule 11.

Appeal rejected.

(1) 1 A. 557; 2 Ind. Jur. 790; 1 Ind. Dec. (N. S.) 386.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 3134 OF 1918.

March 25, 1919.

Present:—Mr. Justice Abdul Raoof.

PARMA RAM—JUDGMENT DEBTOR—APPELLANT

versus

LEHNA SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2 (3)—Execution of decree—Payment out of Court—Executing Court, whether can investigate fact of payment.

It is not open to an executing Court to investigate in execution proceedings the fact of receipt of the decretal amount or of an adjustment of the decree out of Court. By reason of the special provision of the law contained in Order XXI, rule 2 (3) of the Civil Procedure Code, the determination of this question has been taken out of the purview of section 47 of the Code of Civil Procedure. [p. 444, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Multan, dated the 21st August 1918.

Mr. *Hargopal*, for the Appellant.

Mr. *Durga Das*, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree. The facts are simple. One Lehna Singh obtained a decree for an aggregate sum of Rs. 1,671-11-5 on the 7th of October 1915 against the appellant Parma Ram. The first application for execution was made on the 17th of January 1916. Certain property was attached in execution of that decree. On the 20th of December 1917 the present application was made, when the decree-holder admitted part payment of the decree to the extent of Rs. 1,240 and applied for the execution of the decree for the recovery of the sum of Rs. 431-11-5 including costs of the execution. Notice was issued to the judgment-debtor, and he appeared on the 25th of January 1918 and produced a receipt dated the 21st of February 1916 for a sum of Rs. 1,677 executed by the decree-holder Lehna Singh in his favour, alleging that the whole amount of the decree had been paid out of Court and the matter had been adjusted between him and the decree holder. The Court executing the decree, namely, the Subordinate Judge of Multan, recognised this alleged payment and relying upon the receipt that was produced in Court, held that the matter had been adjusted between the parties and that it was not open to the decree-holder to go behind it and claim any sum under the decree.

The decree-holder preferred an appeal from the order of the Subordinate Judge. The lower Appellate Court has taken a different view. It has held that looking to the clear provision of the law contained in clause (3) of rule 2, Order XXI, the Court executing the decree could not have recognised the payment or the adjustment relied upon by the judgment debtor. The learned Judge of the lower Appellate Court has written a very careful and exhaustive judgment. He has looked into all the cases relied upon by the Pleaders of the respective parties and has come to the conclusion that the authorities in favour of the proposition, that it is not open to an executing Court to recognise a payment or adjustment not certified according to the rules laid down under the Code, are numerous. There are only two cases decided by the Bombay High Court which to a certain extent go against this proposition. Taking this view the learned Judge of the Court below set aside the order of the Court of first instance and held that the decree-holder was entitled to execute this decree.

The judgment-debtor has come up in second appeal to this Court, and the learned Pleader who has appeared in support of the appeal has for the most part relied upon the decisions of the Bombay High Court reported as *Trimbak Ramkrishna* v. *Hari Laxman* (1) and *Hansa Godhoji* v. *Bhawa Jagaji* (2). He has argued that the view taken by the learned Judge of the Court below on the question of limitation relating to an application under clause (2) of rule 2 is entirely erroneous, inasmuch as it was only by way of a defence that the question of the adjustment and payment was brought forward before the Court. He has, however, argued that the objection of the judgment debtor may be looked upon as an application required under clause (2) of rule 2. These arguments are contradictory. If his objections are to be treated as an application informing the Court that an adjustment had taken place under clause (2) of rule 2, then it certainly is governed by Article 174 of the Limitation Act. It is

(1) 7 Ind. Cas. 940; 34 B. 575; 12 Bom. L. R. 686.
(2) 33 Ind Cas. 232; 40 B. 343; 18 Bom. L. R. 22.

needless for me to go into the matter in any detail. The question is not one of first impression but is covered by a number of authorities of different High Courts. In the case reported as *Mathar Dravia* v. *Subramania Pillai* (3) the matter has been fully considered by the Madras High Court. The same Court in *Alathoor Badrudeen* v. *Gulam Mohideen* (4) held a similar view and dissented from the ruling reported as *Trimback Ramkrishna* v. *Hari Laxman* (1), to which I have already referred. The learned Counsel for the decree-holder has also relied upon a very recent decision of the Calcutta High Court reported as *Jogendra Prosad* v. *Asutosh Goswami* (5). It is very clearly laid down there that it is not open to an executing Court to investigate the fact of receipt of the decretal amount or of the adjustment of the decree out of Court in the execution proceedings. The learned Judges in that case also clearly decided the question that by reason of the special provision of the law the determination of this question had been taken out of the purview of section 47 of the Code of Civil Procedure.

In my opinion the view taken by the learned Judge of the Court below was correct, and I must dismiss the appeal which I do hereby with costs.

Appeal dismissed.

(3) 40 Ind. Cas. 889; 5 L. W. 644.
(4) 12 Ind. Cas. 562; 36 M. 357; 24 M. L. J. 541; 10 M. L. T. 396; (1911) 2 M. W. N. 473.
(5) 37 Ind. Cas. 733; 24 C. L. J. 462.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 162B OF 1918.

January 23, 1919.

Present :—Mr. Heald, A. J. C.

MAUNG GAW YA—APPLICANT

versus

MAUNG TALOK AND ANOTHER—RESPONDENTS.

Mortgage, usufructuary—Redemption—Mortgagee, whether entitled to growing crops.

In Burma an ordinary usufructuary mortgagee or his tenant is entitled to all the crops sown or planted by him on the land which were growing thereon at the time of redemption and to free ingress and egress to gather and carry them provided that such crops were grown or planted before the person who grew them had notice of the intended redemption. [p. 449, col. 2; p. 450, col. 1.]

Application for revision of the judgment and decree of the District Court, Yamethin, passed in Civil Appeal No. 21 of 1918, dated the 16th May 1918.

Mr. *D. Mukerjee*, for the Applicant.

Mr. *Mitter*, for the Respondents.

JUDGMENT.—About 1888 one Maung Shan, father of Ye Gyaw and Maung Talok, mortgaged the land in suit with possession to Shwe Sin, father-in-law of Nyo Mya. Shwe Sin died and in 1904 his son-in-law Nyo Mya again mortgaged the land to Po Hnit, who put Gaw Ya into possession as his tenant for the cultivating season of 1915 16. On the 22nd of May 1915 Maung Talok and his sister-in-law Ma Kaing, who was the widow of Ye Gyaw, sued Nyo Mya and Po Hnit for redemption and obtained a decree. They redeemed the land from Po Hnit under the decree and mortgaged it with possession to Tun E. Tun E took possession of the land, but according to Gaw Ya agreed to let him have the half share of the crops then growing on the land which he would have been entitled to enjoy under his agreement with Po Hnit. Instead, however, of allowing Gaw Ya to get half the crops, Tun E, according to the plaint, reaped and kept all the crops himself. Gaw Ya, therefore, sued Tun E to recover Rs. 82-8-0 as being the value of half the crops, Rs. 19-8-0 as being the value of the seed which he had sown, and Rs. 6-14-0 paid by Tun E as land revenue which, under the agreement which Gaw Ya alleged to have been made with Tun E, was payable by Gaw Ya. Tun E replied that he never promised to give Gaw Ya half the outturn and did not even know that Gaw Ya had grown any crops on the land. He denied that the yield of the land amounted to 165 baskets and said that he worked it himself as usufructuary mortgagee. It is to be noted that he did not at first deny that he had taken the crops.

On these pleadings the Court framed issues as to whether Gaw Ya worked the land as Po Hnit's tenant, whether Tun E agreed to give Gaw Ya half the produce, and what the yield of the land was.

Gaw Ya gave evidence on his own behalf. He deposed that he was Po Hnit's tenant on an agreement that he was to pay Po Hnit half the produce as rent and that he was to supply the seed grain and Po Hnit was to pay the revenue. He had actually sowed 13 baskets of seed grain and planted about half the area of the land under that agreement, when Maung Talok and Ma Kaing redeemed the land from Po Hnit and mortgaged it to Tun E. He, therefore, approached Tun E with a proposal that he should continue to work the land as Tun E's tenant on the same terms. Tun E refused to agree to this but did agree to pay the value of the seed grain already sown and half the cost of transplanting already incurred and to pay half the revenue, on condition apparently that he received half the crops grown on the land which had already been planted. Before the crops were reaped, Gaw Ya had them estimated and they were computed at 165 baskets. Tun E refused to accept that estimate and suggested that they should employ six reapers each and each take half the actual crop. Gaw Ya agreed to this but Tun E reaped the whole crop. Gaw Ya protested and Tun E said that it was not he but Maung Talok who had taken the crops. Gaw Ya then protested to Maung Talok, who said that, being owner of the land, he was on redemption entitled to the crops then growing thereon.

On this statement the Court ordered Maung Talok to be joined as a defendant.

Maung Talok was joined and filed a written statement, alleging that by reason of his redemption of the land both Po Hnit and his tenant Gaw Ya lost any rights they previously had in the land and the growing crops. He admitted that he reaped the crops but said that he did so under instructions from Ma Kaing, who he claimed ought also to be joined as a defendant. He denied that the crops amounted to more than 45 baskets of paddy and said that it was not true that Gaw Ya had spent Rs. 19 8 0 on seed grain and Rs. 6-8-0 on transplanting, or that the value of paddy was Rs. 100 per 100 baskets.

On this pleading Ma Kaing was also joined as a defendant, and she said that the heirs and legal representatives of Po Hnit (who by that time had died) ought also to be made parties. This suggestion was rightly disregarded by the Court. She said further that she had redeemed the land from Po Hnit and admitted that she had taken possession of the crops which, she said, amounted to only 45 and not 165 baskets. She claimed that because she redeemed the land before the crops were reaped, she became owner of the crops as well as of the land and that Po Hnit and his tenant Gaw Ya had lost any interest they might previously have had in the crops.

On these additional pleadings the only additional issue framed was as to what amount had been spent by Gaw Ya on the cultivation of the land.

The trial Court, after hearing the evidence, came to the conclusion that Gaw Ya succeeded in establishing all the details of his claim against all three defendants, and gave him a decree against them all for Rs. 98-6-0, the full amount claimed, with costs on that amount.

Tun E appealed against that decree, on the grounds that Gaw Ya had failed to establish his claim and that the judgment of the trial Court was contrary to law and against the weight of evidence.

Maung Talok and Ma Kaing also filed a separate appeal, on the grounds (1) that they were not necessary parties, (2) that Ma Kaing was owner of the crops, and (3) that Gaw Ya failed to prove his claims and that, therefore, the judgment of the trial Court was against the weight of evidence.

The lower Appellate Court heard the two appeals together and finding from the records of the mortgage suit that that suit was instituted on the 22nd of May 1915 and that after the decree for redemption had been passed on the 15th of August in that year, it was Po Hnit and not Gaw Ya who applied for postponement of delivery of possession on the ground that the land was under cultivation, came to the conclusion that if Gaw Ya worked the land he did so at his own risk and was not entitled to the crops, and being further of opinion that under the circumstances it was unlikely that Tun E agreed to allow Gaw Ya to enjoy half the crops, dismissed Gaw Ya's suit.

MAUNG GA YA v. MAUNG TALOK.

Gaw Ya now comes to this Court in second appeal, on the ground that the lower Appellate Court was wrong in holding that he had no right to the crops which he had grown at his own expense on land which he held under a lawful tenancy.

I have read the records and heard the learned Advocates representing all the parties.

A preliminary objection has been taken in this Court that no second appeal lies, because the subject-matter of the suit is less than Rs. 500 and the suit is of a nature cognisable by a Court of Small Causes. In reply to this objection Gaw Ya's learned Advocate suggests that the suit would fall within the provisions of Article 31 of the Second Schedule of the Provincial Small Cause Courts Act, which excepts from the cognisance of Small Cause Courts suits for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant. It is clear that that article cannot apply to the present case, because in this case the immoveable property did not belong to the plaintiff and I know of no article in the Schedule to the Provincial Small Cause Courts Act which would except the present suit from the cognisance of a Court of Small Causes. I hold, therefore, that no second appeal lies, such an appeal being expressly barred by the provisions of section 102 of the Code of Civil Procedure and by the proviso to section 13 of the Upper Burma Civil Courts Regulation.

Appellant's learned Advocate then urges that, if no appeal lies, this Court can and ought to deal with the case in revision and that the grounds which have been framed as grounds of appeal would be equally good grounds for an application for revision. I have heard the Advocates on this point and I have decided that I can and ought to treat the memoranda of appeal as if they were applications for revision. I shall, therefore, deal with the case in revision.

It is clear that the fundamental question in controversy between the parties is, "who was entitled to crops which were growing on the mortgaged land at the time when the mortgage was redeemed."

It is ordinarily recognised as contrary to common justice to allow a man to "reap where he has not sown and gather what he has not strewed" or generally to enjoy the fruits of another man's lawful labour. That principle is expressly recognised in sections 51 and 108 of the Transfer of Property Act, which provide that where crops were growing on land when a lease of uncertain duration is determined otherwise than by the fault of the lessee, or when a person, who believed himself to be owner, is ousted from possession by a person who establishes a better title, the person who planted the crops and is ousted from the land is entitled to the crops and is entitled also to free ingress or egress to gather them, annual crops being considered not as part of immoveable property but as ordinarily belonging to the tenant who has grown them. This right to crops, which is known in English Law as the right to emblements, is recognised in English Law on the termination of the tenure of a tenant for life or for another's life and on the termination of a tenancy-at will otherwise than by the fault of the tenant and in certain other cases, but it is not, I understand, recognised in the case of mortgages, because in an English mortgage the mortgagor theoretically conveys away his entire legal estate and although he ordinarily remains in possession, he is in the absence of any covenant to the contrary supposed to be liable to be ejected at any moment without notice and without any claim to rent which may be due or to crops which may be growing on the land at the time when he is ejected. He has in theory conveyed away all his right, title and interest and has nothing left but a bare equity of redemption, that is, an equitable right to have the estate reconveyed to him on payment of the mortgage-debt. The Transfer of Property Act is mainly based on English Law and the fact that right to emblements is not recognised in English Law in respect of mortgages, while it is, recognised in respect of leases of uncertain duration which are determined otherwise than by the fault of the lessee and in respect of persons who under certain circumstances plant crops believing themselves to be owners but are evicted because the land turns out to belong to somebody else, probably accounts for the

recognition of the right to crops in sections 51 and 108 of that Act and for its non-recognition in respect of mortgages. But although there is no recognition of the right to crops in the Transfer of Property Act so far as the redemption of mortgages is concerned, there is, so far as I know, nothing in that or any other law which prevents its application in cases where such application is in accordance with justice, equity and good conscience and *prima facie*, a principle which is recognised as equitable in the case of the determination of a lease of uncertain duration would seem to be equally equitable in the case of a usufructuary mortgage which is similarly of uncertain duration. If crops could be recorded as "separable accessions" coming under the provisions of section 63 of the Transfer of Property Act, there would be no difficulty, but they have never been so regarded and it would seem that just as a right to compensation for improvements made by a mortgagee has been recognised in India in spite of the fact that the Transfer of Property Act makes no express provision for such compensation, so a mortgagee's right to crops might be recognised in spite of the fact that it is not recognised in the Act and is not recognised in England for technical reasons which do not apply to the kinds of mortgagees which are usual in India.

The case-law on the subject is surprisingly meagre. There are two leading cases, which are always cited by the commentators when the question of the right to growing crops on the determination of a mortgage is considered, namely, the old Bombay case of the *Land Mortgage Bank of India* v. *Vishnu Govind Patankar* (1), which was decided over 40 years ago, before the Transfer of Property Act was enacted, and the Madras case of *Ramalinga* v. *Sami Appa* (2), which was decided 30 years ago.

In the Bombay case the mortgagee of certain lands brought them to sale in execution of a mortgage decree against his mortgagor who was in possession and having purchased them himself, was held entitled as against a creditor of the mortgagor to the share of produce due as rent by the mortgagor's tenants whose crops were growing on the land at the time of the sale. I do not think that that decision throws much light on the question of the ownership of the crops on the determination of a mortgage, since under the ordinary rule the crops would belong to the tenants who would be bound to pay the share due as rent to the owner, that is, to the mortgagee who had purchased the land from their original landlord, so that there would be nothing left for the mortgagor which his creditor could possibly attach.

In the Madras case it was held that a mortgagee in possession (not a usufructuary mortgage) who, while there were crops planted by himself growing on the land, brought the mortgaged property to sale under a mortgage decree against his mortgagor could not recover from the auction-purchaser the value of the crops, because what he had brought to sale was not only the interest of the mortgagor but also his own interest as mortgagee, and because at the time of the sale the right to the standing crops was not reserved. It is clear that in such a case the mortgagee could have little if any claim to a right to emblements, since his tenure was determined by his own act, and I do not think that that case can be taken as authority for the proposition that crops growing on lands on the determination of a mortgage do not ordinarily belong to the person who planted them and whose lawful tenure of the lands came to an end by reason of the determination of the mortgage.

In the Allahabad case of *Deo Dat* v. *Ram Autar* (3), which was a case in which lands were mortgaged by conditional sale and a pre-emptor was held entitled to recover them from the mortgagee, the lower Courts entered in the decree a condition that the pre emptor should not be entitled to possession until the mortgagee had gathered the crops which he had sown, but the High Court, applying to the case the rule of section 51 of the Transfer of Property Act, held that the decree should not have postponed the pre-emptor's right to possession but should have provided that the mortgagee was entitled as against the pre-emptor to the crops sown by him and to free ingress or egress to gather and carry them. That case is, however, clearly no authority for the proposition

(1) 2 B. 670; 1 Ind. Dec. (N. S.) 668.
(2) 18 M. 15; 4 Ind. Dec. (N. S.) 720.

(3) 8 A. 502; A. W. N. (1886) 149; 5 Ind. Dec. (N. S.) 230.

that the mortgagee has a right to crops as against a redeeming mortgagor.

There is a more recent Madras case, that of *Narayanan Nambudripad* v. *Krishna Patter* (4), in which it was held that where in a suit to redeem a "Kanom" mortgage the decree directs the mortgagor to deposit the decretal amount within six months from the date of the decree, the mortgagee thus directed to be redeemed must be deemed to hold the mortgaged property under a lease of uncertain duration and is, therefore, entitled under the provisions of section 108 (1) of the Transfer of Property Act to cut and carry away the crops grown by him before the decretal amount was deposited. The decision proceeds on the special circumstances of "Kanom" mortgages, which in addition to being mortgages are said to partake of the nature of leases and, therefore, it could not be generally applied.

In the Lower Burma case of *Aung Baw* v. *Tun Gaung* (5) a mortgagor got a decree for redemption and was put into possession of the mortgaged property under the provisions of section 263 of the Code of Civil Procedure, 1882, while there were crops grown by the mortgagee standing on the land. The mortgagee subsequently applied to the Court for permission to reap the crops which he had sown, and the Court held that he ought to have applied for his right to the crops to be reserved before the decree was passed, and that because he failed to do so, he, being bound by the decree which as passed did not reserve his right to the crops, had lost any right he might have had in respect of the crops. It might reasonably be inferred from that judgment that a mortgagee, whose crops might be growing on the mortgaged land at the time of redemption, could not assert any right to those crops unless that right was established in the redemption suit and recognised in the decree, but it cannot be inferred that the mortgagee, or the mortgagee's tenant who might not be bound by the decree, has no right to the crops.

There is a case in this Court, *Nga Nyan Gyi* v. *Nga Kyaw Nya* (6), in which it was held that the tenant of a usufructuary mortgagee, whose mortgage had been redeemed after the tenancy agreement had been made but before the tenant had planted any crops, was not entitled but virtue of his tenancy agreement to keep the mortgagor out of possession and was liable to damages for having done so. No question of any right to crops arose in that case, but the question whether it is equitable that the mortgagor should be permitted to oust the tenant at any time of the year without letting him gather his crops was considered and was decided in the affirmative, and, therefore, it is necessary to consider that ruling. The grounds of the decision were that a lessor cannot transfer a larger estate than he has himself, and that, if the lessor's interest is dependent on any contingency, the lessee's interest cannot enure beyond the termination of his lessor's interest by the happening of that contingency. The learned Judicial Commissioner said practically what was said in the Bombay case cited above, namely, that the contingency of redemption is one which the mortgagee must reckon with and may provide against, but it seems to me that the only way in which the mortgagee in such a case could, in the absence of an express covenant about the crops which is unusual in this country, safeguard himself against loss would be by refraining from cultivating the land himself or letting it out to a tenant, since if he did either he would run the risk of losing either the crops or their value. The result of this view of the law would, it seems to me, be either that no reasonably cautious mortgagee would cultivate mortgaged lands, or that, if he did cultivate them or have them cultivated, the mortgagor would wait until the crops were ready for harvest and then redeem, getting the crops for nothing, and causing wrongful loss to either the mortgagee or the tenant, to say nothing of the litigation between the mortgagee and his tenant which would be almost certain to result. It has been suggested that the mortgagor in an English mortgage takes that risk without inconvenience, but I do not think that the facts would warrant that assertion. It is true that in theory an English mortgagor is supposed to take the risk of losing any crops he may plant on the land, but in fact he takes practically no such risk because the theory has been modified both by practice

(4) 22 Ind. Cas. 515; 26 M. L. J. 348; 15 M. L. T. 160; (1914) M. W. N. 160.

(5) 3 L. B. R. 129.

(6) 8 Ind. Cas. 466; U. B. R. (1910) I, 14.

and by Statute. The Judicature Act, 1873, for instance, recognised the right of a mortgagor in possession to take rents and profits of the mortgaged land, unless he had notice of the mortgagee's intention to take possession of the property or to enter into receipt of the rents and profits, and the Conveyancing and Law of Property Act, 1881, gave to the person in possession, whether mortgagor or mortgagee, power under certain conditions and in the absence of a covenant to the contrary to make leases binding on the other party to the mortgage. Again the Tenants' Compensation Act, 1890, gave an occupier of mortgaged lands a right to recover from a mortgagee taking possession compensation in respect of crops, so that although the occupier might lose the actual crops he did not lose the entire fruits of his labour. Further the conditions of an English mortgage are entirely different from those of the ordinary usufructuary mortgage in Burma. In an English mortgage the date for redemption is fixed, but in the ordinary mortgage in this country no date for redemption is fixed and the mortgage runs on indefinitely. As the learned Judicial Commissioner said in *Nga Nyan Gyi* v. *Nga Kyaw Nya* (6): "The usufructuary mortgagee of Upper Burma takes the profits towards interest and has no accounts to render. The contract is that he restores the land on payment of the principal mortgage money. A mortgage of this kind, kept alive by further advances, often lasts much longer than 60 years and the mortgaged property is handed down by inheritance in the family of the mortgagee. The mortgagee, therefore, enjoys all the advantages of an owner, except that he must allow redemption if the mortgagor pays the mortgage money within limitation. While he has the land he deals with it practically in the same way as he would deal with land of his own and he very frequently leases it to tenants." The learned Judicial Commissioner also went on to say: "My experience in this Court affords some indication of a custom, at least in parts, by which land is redeemed only at certain seasons of the year so as not to deprive the tenant or mortgagee of the crops," and I may say that my experience is the same and that within the last week I have dealt with a somewhat similar case in which that custom was admitted by both parties. All this seems to me to show that the claim of the mortgagee or his tenant to reap the crop which he has sown has been recognised both judicially and generally as being in accordance with justice, equity and good conscience and that any argument based on the inconvenience of the contrary view, that the mortgagee or his tenant must be held to take the risk of losing his crops, is not met by the assertion that under an English mortgage the mortgagor without inconvenience takes exactly the same risk. The unfairness and inconvenience of the view that the mortgagor on redemption becomes owner of any crops which may be growing on the land at that time was expressly recognised in the Lower Burma case of *Mo Gale* v. *Ma Sa U* (7), where the learned Judge directed that the date fixed for redemption should in the case of cultivated land be fixed so that the party who has sown the crop shall have the benefit of it, and in the Madras case *Ramalinga* v. *Sami Appa* (2)] where the Court said: "It was open to the mortgagee to have asked the Court to postpone the sale so as to enable him to take the standing crop."

Such devices as those suggested in these two cases for safeguarding interests which the Courts recognise as equitable are unsatisfactory and, as the experience of the present case shows, inadequate and I do not think that the view of the law which necessitates them is sound. It is, of course, true as a general rule that when an interest is determined all rights arising in respect of that interest ordinarily come to an end, but what may be called the "residual rights" recognised in sections 51 and 108 of the Transfer of Property Act are equitable exceptions to that rule and if a similar right is recognised in respect of those usufructuary mortgages which are usual in this country and are in my opinion exactly analogous to leases of uncertain duration, such devices become unnecessary.

I have already said that, so far as I am aware, there is no enactment in force in India which prevents such recognition and on grounds of justice, equity and good conscience as well as of practical convenience I consider it expedient that the right of the ordinary usufructuary mortgagee in this

(7) 1 L. B. R. 186.

country or his tenant to the crops growing on the land at the time of redemption should be recognised, provided, of course, that such crops were sown or planted before the person who grew them had notice of the intended redemption. I hold, therefore, that in the present case the tenant Gaw Ya was entitled as against the mortgagors who redeemed, that is against Maung Talok and Ma Kaing, to all the crops planted or sown by him on the land which were growing thereon at the time of redemption and to free ingress and egress to gather and carry them. He admits that he would have to pay half the crops to them as rent and, therefore, he claims only the other half. The fact that the lands were subsequently mortgaged to Tun E would make no difference, because he merely stepped into the shoes of Maung Talok and Ma Kaing, to the extent of the interest which he acquired by the mortgage, and it was they, and not he, who took the crops.

It has been suggested in argument in this Court that the tenancy agreement between Po Hnit and Gaw Ya was made after Maung Talok and Ma Kaing and instituted their mortgage suit and that the doctrine of "*lis pendens*" applies, but there is no evidence to support that argument, and it is, I think, too late in any case to raise it for the first time in this Court.

Maung Talok and Ma Kaing admit that they reaped the crops and as I have held that although they were owners of the land they were not entitled to the crops I am of opinion that Gaw Ya was entitled to recover from them the value of those crops less the value of the half share which would be payable by him as rent.

That being decided, there remain for decision the two questions, (1) what was the amount and value of the crops, and (2) did Gaw Ya establish his claims in respect of the cost of seed, grain and labour.

As for the second of these two questions, I may say at once that Gaw Ya offered no evidence beyond his own bare word and that I consider that insufficient.

As for the first, Gaw Ya's statement that the crops were estimated at 165 baskets of paddy was corroborated by the evidence of Maung Kan, who is said to be headman of the village, and who swore that he was one of the four men who estimated the outturn of the lands planted by Gaw Ya before the crops were reaped and that after visiting the lands they came to the conclusion that the outturn would be 165 baskets. That evidence was not rebutted. None of the respondents gave any evidence on their own behalf and the evidence of their witnesses was of little weight. Maung Tha Dun, who was employed by Tun E to thresh certain paddy, which he says Tun E told him was paddy from the lands in question, deposed that the outturn of the paddy he threshed was only 45 baskets, but there is nothing to show that that was the whole produce of the land in suit and no admissible evidence to show that it came from that land at all. Maung Nge, who is Tun E's brother in law, said merely that he thought that the yield of the land would be about 40 or 45 baskets.

On this evidence I think that the trial Court was justified in accepting 165 baskets as the outturn.

As for the price of paddy neither side gave any evidence, but as Rs. 100 per 100 baskets is the rate usually accepted in the Courts in Upper Burma in the absence of any evidence to the contrary, I see no reason to object to the trial Court's assessment of the value of the produce at that rate.

In view of the fact that Maung Talok and Ma Kaing admit that they took the crops and that Gaw Ya does not deny this, I see no reason why a decree should be given against Tun E.

I, therefore, dismiss Gaw Ya's application so far as Tun E is concerned, but in view of the fact that Tun E has made common cause with Maung Talok and Ma Kaing throughout I direct that he pay his own costs in all Courts.

As against Maung Talok and Ma Kaing, Gaw Ya was entitled to half the value of the crops, that is Rs. 82-8-0, and as in my opinion the Appellate Court acted illegally in finding that he worked the land at his own risk and was not entitled to any crops, I set aside the judgment and decree of the Appellate Court dismissing his suit with costs and vary the decree of the trial Court by giving judgment for Gaw Ya against Maung Talok and Ma Kaing for Rs. 82-8-0 with costs throughout on that amount.

I note that I have not overlooked the fact that Gaw Ya was willing to give credit to Tun E for Rs. 6 14 0 paid by Tun E as land revenue, but I have held that he was not entitled to any decree against Tun E and the decree which I have given him is based not on his alleged subsequent agreement with Tun E but on his original agreement with Po Hnit, under which the land revenue was alleged to be and would naturally be payable by the landlord.

Decree varied.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2637 OF 1917.

February 25, 1919.

Present:—Mr. Justice Abdul Raoof.

WARYAM SINGH—PLAINTIFF—APPELLANT

versus

BASANT SINGH AND OTHERS—DEFENDANTS RESPONDENTS.

Registration Act (XVI of 1908), ss 2 (7), 17, 49—Construction of s. 17—Construction of document—Agreement permitting a person to occupy land, whether lease Registration, whether necessary—"Undertaking to occupy" in s. 2 (7), what is.

Section 17 of the Registration Act must be strictly construed, as taken in connection with section 49 of the Act it imposes serious disqualifications for non-observance of registration Unless a document is clearly brought within the purview of the section, it should not be excluded from being treated as evidence [p 453, cols 1 & 2.]

A mere undertaking to occupy land contained in a document will not make the document compulsorily registrable, unless some interest or right in the thing let is created by the document. [p. 453, col 1.]

Defendant's father obtained possession of a piece of land under a written agreement from the plaintiff for the purpose of building a house on it, on the condition that the plaintiff would have no power to dispossess him during his life, but that on his death in case of a disagreement between his heirs and the plaintiff the latter would have a right to eject them on paying them the price of the materials:

Held, that the agreement was not a lease in any sense, nor was it an undertaking to occupy within the meaning of section 2 (7) of the Registration Act and that inasmuch as it created no interest in the land, it did not require registration under section 17 (*d*) of the Registration Act. [p. 453, col. 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 12th July 1917.

Messrs. *Sleem* and *Dalip Singh*, for the Appellant.

Mr. *Kanwar Narain*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for the possession of a piece of land on the following allegations: Defendants' father Sundar Singh obtained it from the plaintiff for the purpose of building a house on it, on the condition that the plaintiff would have no power to dispossess him during his life, but on his death in case of a disagreement between his heirs and the plaintiff the latter would have a right to eject them on paying them the price of the materials. It was further agreed that in case of a dispute as to the value of the materials the heirs would be at liberty to remove them and vacate the land. The terms of the agreement were reduced to writing and the present dispute relates to the nature and the terms of this deed of agreement. Sundar Singh having died, a disagreement arose between the parties which has given rise to this suit. This document embodying the terms of the agreement was put in evidence and was relied upon by the plaintiff. On the pleas raised in defence one of the issues framed by the Court of first instance was whether the document was admissible in evidence. The document was executed by Sundar Singh, in which he set forth the conditions on which he had agreed to build on the land. It was contended by the defendants that the document came under the definition of a lease and required registration under section 17 (*d*) of the Indian Registration Act. The learned Munsif of Jullundur held that it was merely an agreement and did not amount to a lease and having decided the remaining issues also against the defendants, he gave the plaintiff a decree for the possession of the land in dispute. The defendants were ordered to remove the materials within two months. In the alternative they were given the right to take the price of the materials which was assessed by the Court at Rs. 537-4-6, and give up the house. They were not satisfied with the decision of the Court and preferred an appeal to the lower Appellate Court and raised the following contentions:—

That the agreement was not executed

by their father, that the deed required registration, as (*a*) it was a lease for more than a year, and (*b*) dealt with property worth more than Rs. 100 in value; the plaint did not disclose a cause of action; that the agreement was indefinite as regards its terms, and the price of the materials had been underestimated.

On the question of the admissibility of the document the lower Appellate Court took a different view from that taken by the Court of first instance and held that it required registration and was inadmissible for want of registration In its opinion the document contained "an undertaking to occupy" the land and as such came under the description of a lease as given in section 2 (7) of the Registration Act. The basis of the plaintiff's claim having failed, his suit was dismissed and certain cross-objections which he had filed were also dismissed. The plaintiff has come up in second appeal to this Court and three pleas have been raised in the memorandum of appeal on his behalf, namely, that the District Judge was wrong in holding that the agreement was inadmissible for want of registration, that the document was in any event admissible to prove the permissive possession of the defendants and the terms of such possession and that the plaintiff in any case was entitled to the value of the site.

It has been contended on behalf of the plaintiff that the very terms of the document show that it was merely a license granted to the father of the defendants to build on the land and remain in occupation during his life and that no interest in land was created by the document in his favour. I have examined the terms of the document carefully and I find that there is force in this contention. To start with, on the face of the deed there is no rent reserved nor is there any other consideration agreed upon. The very words of the deed go to show that Sundar Singh obtained permission to keep his house on the land during his life only. He acquired no right of any kind in the land itself. Had it been so there would have been no need of providing about the right of his heirs after his death. They would simply have come in as his representatives and would have been bound by the terms of the deed. The condition as to the price of the materials or as to their removal clearly shows that the parties understood that it was merely a license granted to Sundar Singh for his personal benefit during his lifetime.

The following is the exact translation of the agreement:—

"I, Sundar Singh, son of Gurdit Singh, caste Tarkhan, resident of Mauza Manak Rai, Thana Bhagpur, do hereby declare as follows:—

"I have taken a vacant site (*taur*) in the *abadi* of Manak Rai, bounded on the east by a passage, *i. e.*, a lane and a vacant site belonging to Thal Singh, on the west by the *haveli* of the sons of Nihal Singh, on the south by a passage to the *haveli* of Fateh Singh and on the north by a wall of the *kotha* belonging to Thakar Singh, son of Ram Singh, owned and possessed by Waryam Singh, son of Sant Singh, caste Jat, resident of Mauza Manak Rai, for the purpose of habitation. I agree that I will construct a building in the said vacant site at my own expense. The proprietor shall have nothing to do with the costs incurred thereon. I will remain *abad* in it during my lifetime. The proprietor or his heirs shall not at all be competent to eject me during my lifetime. After my death, if the proprietor or his heirs fall out with my heirs, they shall pay the costs of the materials and effect ejectment. In case a dispute takes place in respect of the cost of the materials, my heirs shall remove the materials and make over the vacant site to the proprietor or his heirs. Hence I have executed this deed of agreement, so that it may serve as an authority.

"Dated the 27th June 1900, corresponding to the 14th of Har Sambat 1957."

Reading the deed according to its plain terms, it is apparent that at least Sundar Singh never contemplated that he was taking a lease of the land.

It was argued in the lower Appellate Court and it is argued also before me that the deed contains merely a unilateral statement by Sundar Singh and its terms are so uncertain that it cannot be treated as a lease. The case of *Beni* v. *Puran*

JHABBU v. ZAHID ALI.

Das (1) is relied upon before me as it was also in the lower Appellate Court. But it is not necessary for me to enter into the discussion whether the decision in that case was correct or incorrect, because I am clearly of opinion in the present case that the agreement can in no sense be said to be a lease. It is contended, however, by the Counsel for the respondent that if the document according to its terms cannot strictly be said to be a lease, it must be taken to be "an undertaking to occupy" and as such to require registration. The real question, however, to decide is: was the undertaking to occupy the site as a lessee or as a mere licensee? In this case there was "an undertaking to occupy" on certain conditions, but not as a lessee as no right or interest in the land was created. I agree in the construction put on the expression by the learned Judges of the Bombay High Court in *Apu Budgavda* v. *Narhari Annajee* (2). The facts of that case, no doubt, were different, but it was decided in that case that a mere undertaking to occupy contained in a document would not make the document compulsorily registrable unless some interest or right in the thing let was created. In that case such right or interest was not created as the terms had not been accepted. In the present case no interest or right has been created, as it has not been shown that it was ever intended by the owner to create such an interest or right. The decision in *Athakutti* v. *Govinda* (3) shows that a mere permission to occupy land on certain terms did not create a lessee. It was held that it was not a case of a tenant but the case of a licensee.

It has been held in this Court that section 17 of the Registration Act should be construed very strictly, as read with section 49 it imposes a serious disability [see the judgment of Rivaz, J., in *Imam Bakhsh Khan* v. *Karim Shah* (4)]. This opinion was adopted by the learned Judges who decided the case of *Sansar Singh* v. *Tiloka* (5). They made the following remark at page 175,* which fully applies to the facts of the present case:—"Further as observed by the same learned Judge at page 63 of the report, section 17 of the Registration Act has to be strictly construed, as taken in connection with section 49 it imposes such serious disqualifications for non observance of registration. Unless the document is clearly brought within the purview of the section, it cannot be excluded from being treated as evidence. If there is doubt, the benefit must be given to it."

Applying this principle to this case, I must hold that the lower Appellate Court was not right in setting aside the judgment and decree of the Court of first instance on the ground that the document relied upon was inadmissible in evidence. I allow the appeal, set aside the decision of the Court below on this preliminary point and remand the case to that Court under Order XLI, rule 23, to be restored to its original number of pending appeals and to be disposed of according to law.

Appeal allowed.

*Page of P. R. 1898—*Ed.*

(1) 27 A. 190; A. W N. (1904) 212.
(2) 3 B. 21; 2 Ind. Dec. (N. S.) 14.
(3) 16 M. 87; 5 Ind Dec. (N. S.) 775.
(4) 16 P. R. 1895.
(5) 51 P. R. 1898.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 72 OF 1919.

June 19, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

JHABBU—PLAINTIFF No. 1—APPLICANT

versus

ZAHID ALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Principal and agent—Agent empowered to conduct suit in any manner—Agreement to abide by special oath entered into by agent, whether binding on principal.

An agent who is empowered to conduct a suit in any manner he may deem fit, even to the extent of withdrawing it or entering into a compromise, must be deemed to possess a power to bind his principal by an agreement to abide by a special oath entered into with the opposite party. [p. 454, col. 2.]

Appeal against the decree of the Subordinate Judge, Unao, dated the 1st March 1919, confirming that of the Munsif, Safipur, dated the 16th December 1918.

Mr. *H. K. Ghose*, for the Applicant.

Mr. *Ali Ausat*, for the Opposite Party.

NABI BAKHSH v. MAULA.

JUDGMENT.—This was a suit for the recovery of the price of bricks and lime alleged to have been sold by the plaintiffs to the defendants. The defendants denied having purchased the same and pleaded that Mazhar Ali, son of defendant No. 1 and brother of defendants Nos. 2 and 3, was a partner of the plaintiffs in the brick kiln and that 31,000 bricks fell to his share, out of which the plaintiffs had supplied only 15,000 and had not given the rest The defendants are the heirs of Mazhar Ali.

On the date fixed for the hearing of the suit, Gur Saran Das, plaintiff No. 2, was present. He agreed to abide by the statements of defendants Nos. 2 and 3 on oath, if made at the Dargah of Makhdum Shah at Safipur. Jhabbu, plaintiff No. 1, was not present on that date; but Gur Saran Das, his general agent, who had power to compromise or withdraw the case or to do any other act in the suit on his behalf, was present. The Court, acting on the statement of Gur Saran Das, appointed a Commissioner to examine defendants Nos. 2 and 3 in the manner suggested. On the 14th December 1918 the defendants Nos. 2 and 3 were examined at the Dargah and stated on oath that no money was due to the plaintiffs on account of bricks or lime and that 16,000 bricks were due to Mazhar Ali deceased on account of his partnership in the kiln. On the same date Jhabbu, plaintiff, is stated to have appeared in Court and presented a petition, repudiating the act of his agent, Gur Saran Das, in agreeing to abide by the oath of the said defendants. It is suggested that the learned Munsif returned the application. The original application said to have been presented to the Munsif was filed with an affidavit in the lower Appellate Court, but that Court makes no reference to it. It is clear, however, that the said defendants had been examined on special oath before the said application was, if it had been, presented and if that was so, it was too late for any of the plaintiffs to withdraw from the agreement, which had been previously entered into and carried out.

It is urged on behalf of Jhabbu that his general agent had no power to bind him. But the copy of the power-of-attorney on the record shows that the general agent had authority to withdraw the suit or enter into a compromise. An agreement to bind the principal by a special oath to be administered to the opposite party, would not place the plaintiff in a worse position than an application to withdraw the claim; and as pointed out in *Wasi ul zaman Khan* v. *Faiza Bibi* (1), an agent who is empowered to conduct a suit in any manner he may deem fit, even to the extent of withdrawing it, must be deemed to have possessed a power to bind his principal by an agreement to abide by a special oath, entered into with the opposite party. The powers conferred in the present instance are much wider than those which were conferred in the case which was dealt with in *Sadashiv Rayaji* v. *Maruti Vithal* (2). A person who appoints an agent with such extensive powers must be prepared to abide by anything which the agent may do on his behalf, and if the agent does anything of which he does not approve he has only himself to blame. His repudiation came too late.

The application is, therefore, dismissed with costs.

Application dismissed.

(1) 32 Ind. Cas 348: 14 A. L. J. 38: 38 A. 131,
(2) 14 B. 455; 7 Ind. Dec (N. S.) 64.

PUNJAB CHIEF COURT
SECOND CIVIL APPEAL No. 121 OF 1918.
March 5, 1919.
Present :—Sir Henry Rattigan, Kt., Chief Judge.
NABI BAKHSH—PLAINTIFF—APPELLANT
versus
MAULA AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 39—Cancellation of instrument on ground of fraud—Fraud not carried out, effect of.

Plaintiff sued for cancellation of a deed of mortgage executed by him in favour of the defendants, alleging that he had been induced to execute the deed by fraud and that there was no consideration for his contract It was found that the transaction was in fact fictitious and that plaintiff and defendants had conspired to concoct the mortgage to the detriment of plaintiff's reversioner;

Held, that inasmuch as the reversioner's rights would come into operation only on the death of

the plaintiff, it could not be said that the purpose of the fraud had been carried into effect, and that, therefore, the plaintiff was entitled to get the deed cancelled.

Second appeal from the decree of the District Judge, Sialkot, dated the 10th October 1917.

Mr. *Jai Gopal Sethi*, for the Appellant.

Mr. *Sham Lal*, for the Respondents.

JUDGMENT.—Plaintiff sued for cancellation of a certain deed of mortgage of land executed by him on the 20th of July 1916 in favour of the defendants, alleging that he had been induced to execute the deed by fraud and that there was no consideration for his contract. The plaint did not specify what the fraud was but it was explained later, on behalf of the plaintiff, that defendants had promised to secure a wife for him and that they had no intention of carrying out their promise and had in fact failed to do so. Defendants pleaded that full consideration had passed and that they had never undertaken to secure a wife for the plaintiff. The first Court found that no consideration had passed and granted the plaintiff the decree for which he prayed. Defendants appealed to the District Judge, who found that the consideration for the mortgage was unproved, at any rate to the extent of Rs. 575 (out of the alleged total of Rs. 800), and that the transaction was in fact fictitious, but he disbelieved the plaintiff's story that the consideration for the transaction was a promise on the part of the defendants to secure him a wife and that what really happened was that plaintiff and defendants had conspired to concoct the fictitious mortgage to the detriment of Khuda Bakhsh, plaintiff's near reversioner. Upon these findings he held that the parties were *in pari delicto* and that as the fraud was not only concocted but also carried into effect to the detriment of Khuda Bakhsh, each party was estopped from showing the truth as against the other and that, therefore, plaintiff was not entitled to the relief which he claimed. He accordingly accepted the appeal and dismissed plaintiff's suit with costs.

The District Judge's enunciation of the law is undoubtedly correct, but it appears to me that in the present case the purpose of the fraud had not been carried into effect and that on this ground plaintiff was entitled to ask for the cancellation of the mortgage deed. Obviously, Khuda Bakhsh, whose rights would come into operation only on the death of the plaintiff, had not been defrauded in any way up to the time when the plaintiff brought his suit, and so far as Khuda Bakhsh is concerned, the cancellation of the deed would be a step towards doing away with the possibility of any fraud being perpetrated at his expense. On the other hand, as regards the defendants, it is clear that at the time when the plaintiff instituted his suit nothing had been done to carry the mortgage into effect. Rs. 575 had, upon the findings of both the Courts, not been paid by the defendants, nor had the latter paid off, as they undertook to do, the previous mortgagee. The land had consequently not passed to the defendant and the previous mortgagee was at that time in possession. It is alleged that on the 7th of May 1917, *i. e.*, at the time when the trial of the case in the first Court had terminated and the suit was ripe for judgment, the defendants paid off the previous mortgagee. This, however, was long subsequent to the institution of the suit and was obviously done in order to make evidence on behalf of the defendants. From the facts then as established, it is clear that even if both parties had conspired to defraud Khuda Bakhsh, nothing had been done at the time when the suit was brought to carry that fraud into effect, and in this connection the ruling of their Lordships of the Privy Council in *Pethermal Chetty* v. *Muniandy Chetty* (1) is in point and is an authority for holding that the plaintiff is not debarred from asking for the relief which he claimed.

I, therefore, accept the appeal and set aside the decree of the District Judge and restore that of the Munsif. Defendants must pay plaintiff's costs throughout.

Appeal accepted.

(1) 35 C. 551; 10 Bom L. R. 590. 12 C. W. N. 562; 5 A. L. J. 220; 7 C. L. J. 528; 14 Bur. L. R. 103; 18 M. L. J. 277; 35 I. A. 93; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).

BHEEM SHANKAR DATT v. KEDAR NATH.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEALS NOS. 12 AND 13 OF 1919.

June 17, 1919.

Present:—Mr. Ashworth, A. J. C.

BHEEM SHANKAR DATT—PLAINTIFF—APPELLANT

versus

KEDAR NATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 108, 135—Civil Procedure Code (Act V of 1908), O. II, r. 3—Joinder of claims—Claim for share of profits as co-sharer, whether can be joined with claim for arrears of revenue as lambardar.

A plaintiff can join a claim for a share of profits as co-sharer with a claim for arrears of revenue, etc., as *lambardar* in one suit. Section 108 of the Oudh Rent Act does not contain anything which would make this improper or unlawful, and under Order II, rule 3 of the Code of Civil Procedure, read with section 135 of the Oudh Rent Act, a plaintiff can unite in the same suit the two causes of action. [p. 456, cols 1 & 2.]

Appeal against the decree of the District Judge, Lucknow, dated the 4th February 1919, reversing that of the Assistant Collector, Unao, dated the 26th September 1918.

Mr. *Salig Ram*, for the Appellant.

Mr. *Puttu Lal*, for the Respondents.

JUDGMENT.—In these cases the plaintiff sets forth in his plaint that he is a co-sharer and that the defendant (in the one case) and defendants (in the other case) are co-sharers in the same Mahal. In the second paragraph he states that the land in the possession of the defendants exceeds their share. In the third paragraph he states that according to Patwari's account certain sums are due from the defendants. In the fourth paragraph he sets forth four dates as the dates on which the cause of action in each case accrued. Amongst other grounds taken up by way of defence it was urged that the suit as brought was not maintainable. This has been explained to mean that the account subsequently filed in evidence by the Patwari showed that the plaintiff was claiming not only a share of profits as co sharer but also arrears of revenue, Lambardari commission and village expenses as Lambardar. The Court of first instance, namely, the Assistant Collector of Unao, held, notwithstanding, that the suit was one for profits and not a suit for revenue or rent. On first appeal the District Judge of Lucknow held that inasmuch as the amount allowed to the plaintiff included the revenue, Lambardari dues and village expenses, the award could not be regarded as an award under section 108, clause (15) of the Oudh Rent Act, which covers only a suit by a sharer against a co-sharer for share of the profits of an estate or any part thereof. He also held that the suit must be regarded as one under clause (15) and not under clause (16 of section 108 and consequently he allowed the appeal and dismissed the suit.

On second appeal to this Court it is maintained that the District Judge was wrong in holding that the suit as framed was not maintainable under section 103, clause (15), of the Oudh Rent Act and alternatively that, even if the suit were held to be governed by clause (16), then the plaintiff's claim should have been decreed. In argument it has also been urged that there is nothing in the Oudh Rent Act to prevent the suit being treated both as a claim for profits by the plaintiff as co sharer and a claim for arrears of revenue, etc., by him as a co sharer, the former claim falling under clause (15), the latter claim falling under clause (16). It is quite clear that the decree of the Assistant Collector cannot be regarded as a decree under clause (15). A decree under clause (15) could not award arrears of revenue, etc. Nor again can the suit be regarded as one brought under section 108, clause (16), though wrongly described as under clause (15). The plaint nowhere sets forth that the plaintiff is Lambardar, nor does it set forth the amount of revenue, etc., claimed. As to the extra plea added in argument that the suit might have been regarded as partly under one section and partly under the other, I am not prepared to say that by means of a properly framed plaint a person could not join a claim for a share of profits as co-sharer with a claim for arrears of revenue, etc, as Lambardar in one suit. The inducement to section 103 of the Act does not contain anything which would make this improper or unlawful, and under Order II, rule 3, of the Code of Civil Procedure, read with section 135 of the Oudh Rent Act, the plaintiff could unite in the same suit the two causes of action. If the original Court found that they could not conveniently be tried or disposed of together it would be open to it to order separate trials, but apparently

the Assistant Collector found no difficulty in trying the suits together. At the same time it is impossible to hold that the plaint as framed was a suit based on two separate causes of action, one under clause (15) and one under clause (16) of section 108. The District Judge in his judgment has stated that, excluding the amount awarded for Lambardari dues and village expenses, the Patwari's evidence shows that there is nothing due to the plaintiff at all, and this statement of fact has not been impugned in appeal to this Court If this were the case, there would be no cause of action for a claim under clause (15). Again, as in the plaint the plaintiff has not mentioned that he is a Lambardar, it is clear that no cause of action was shown for claiming arrears of revenue, etc. The District Judge was right in regarding the claim as one under clause (15). The statement in the plaint that according to the Patwari's account the defendants owe the plaintiff so much, coupled with the statement that the parties are co-sharers could only mean that the plaintiff was prepared to prove a claim to a share of profits under clause (15). The evidence of the Patwari does not prove that he is entitled to anything as a co-sharer because the Patwari's evidence of account inextricably mixes up the accounts of what is due to the plaintiff as a co-sharer with the accounts of what is due to him as Lambardar. If we are to accept the District Judge's statement indeed these accounts show nothing due to the plaintiff as co sharer. I, therefore, agree with the lower Court that the claim was one under clause (15) and that the plaintiff failed to prove that he is entitled to any relief under this clause.

In this judgment it is not intended to convey the meaning that a co-sharer who is also a Lambardar cannot ask for relief as a co-sharer under clause (15) of section 108 of the Oudh Rent Act until he has had the amount of the sum due to him as Lambardar for arrears of revenue, village expenses and Lambardar's commission decreed under clause (16). It is true that the share of profits that can be claimed under clause (15) against a co-sharer is a share of the net profits obtained by subtracting from the gross amount of profits realised by him the sum due from him for arrears of revenue, etc., but the co sharer Lambardar in a suit under clause (15) can specify the amount so to be subtracted from the gross profits without claiming it. This amount, if disputed, will have to be determined but will not be decreed. If the plaint in the present suit had been on these lines, there would have been no flaw in the frame of the suit. Assuming, however that the suit as brought could be regarded as one on these lines, the suit must fail by reason of the unchallenged statement of the District Judge that there is no balance of profits after deduction of the arrears of rent, etc.

The appeals are, therefore, dismissed with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1709 OF 1913.

February 16, 1919.

Present:—Mr. Justice Chevis.

THAMMAN SINGH—DEFENDANT—APPELLANT

versus

SANTA—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Custom—Alienation—Sale of ancestral land to pay off father's debt, whether can be avoided—Necessity—Minor, sale by—Property, whether can be recovered by minor—Compensation, minor, whether bound to pay.

A man who has sold a portion of his ancestral land to pay off his father's debts cannot subsequently avoid the sale merely on the plea that the sale was not for necessity. [p. 458, col. 2.]

A minor, however, is not bound to recognise his father's debts as a charge on the ancestral land and, therefore, where a portion of a minor's ancestral land is sold by his mother to pay off his father's debts, the minor is entitled to recover the property without being made to pay anything. [p. 458, col. 2]

Second appeal from the decree of the District Judge, Ludhiana, dated the 6th May 1913.

The Hon'ble Pandit *Sheo Narain*, for the Appellant.

Mr *Nanak Chand*, for the Respondents.

JUDGMENT.—On the 12th June 1911 the land in suit was sold to Thamman

Singh for Rs. 814 by a registered deed of sale executed by Santa and his mother, *Musammat* Kahno, the latter acting on behalf of her minor son, Ramditta. Ramditta and Santa now sue to recover the land, alleging that the sale was without necessity and not for the benefit of the minor. The lower Courts have found that the sale was executed in order to pay off debts due by the father of Ramditta and Santa. As regards Santa, it is clear that he was a major at the time of the sale but the lower Courts regard him as a simpleton, who was under the thumb of his father's creditor and think that he was overreached and acted under undue influence. As to Ramditta, the lower Courts hold that he is not liable as the consideration for the sale was merely unsecured debts left by his father for which the ancestral land was not chargeable. The first Court held that the plaintiffs should refund the benefit which they have received and gave a decree for possession on payment of Rs. 814. The learned District Judge on appeal held, that there was no legal obligation on the plaintiffs to pay their father's debts and that there was no consideration for the sale, and so they were entitled to regain possession without any payment. The vendee appeals to this Court.

So far as Santa's share of the land is concerned, I think the decision of the lower Courts cannot stand. Santa no doubt had not long been a major when the sale deed was executed, but apart from the question whether by agricultural custom unsecured debts cannot be regarded as a charge on ancestral land, there is a moral obligation on a son to discharge his father's debts; and if the son chose to do so, I do not see how he can now turn round and seek to avoid the sale. I can find no evidence of any sort which in my opinion proves that Santa was overreached in any way. At the time when the sale-deed was executed, it was the general impression that ancestral land was liable for the debts of the last owner, and though that impression has now been removed by the publication of *Jagdip Singh* v *Bawa Narain Singh* (1), still even that ruling is no authority for the proposition that a man who has sold a portion of his land to pay off his father's debts can undo the sale merely on the plea that the sale was not for necessity. I note too that it is not a case of the whole estate being sold. It is admitted before me that plaintiffs have plenty of land left. The appeal must, therefore, succeed so far as Santa's share in the land is concerned. But as regards the share of Ramditta, who was a minor at the time of the sale, the decision seems to me to be correct. The minor was not bound to recognise his father's debts as being a charge on the ancestral land, and his mother was not authorised to alienate the land in discharge of these debts. In fact all that Counsel for the appellant urges as regards the share of Ramditta is that since this appeal was lodged, Ramditta has died sonless and is now represented by his brother Santa. So it is urged that Santa, having joined in the sale, cannot now seek to avoid it even as regards his brother's share. The only authority quoted in support of this is *Ram Chunder* v. *Ram Jeebun* (2). The facts of that case, however, were quite different from those of the present case, as in that case there was no question of a party dying during the pendency of appeal. It was rather a case of certain parties to a suit being held to be estopped by reason of their conduct during a previous suit. The appellant is seeking to set aside the decree of the lower Court, and in order to succeed, I think, he should be able to prove that that decree is in some way incorrect. So far as Ramditta's share is concerned, it is not contended that the decree passed was an incorrect one. It is merely urged that circumstances have since arisen which if they had arisen earlier would have altered the decree. This, however, in my opinion makes no difference to the correctness of the decree. If Ramditta had lived to the present day and subsequently died after recovering his share of the land, that share would undoubtedly have passed to his brother Santa and the present appellant would not have been able to claim that the case should be re-opened. So far then as Ramditta's

(1) 15 Ind. Cas. 666; 4 P. R. 1913; 160 P. W. R. 1912; 173 P. L. R. 1912 (F. B.).

(2) 12 W. R. 427.

share is concerned, I think, the District Judge's decision is a correct one and I uphold it.

The result is that the appeal is accepted in part and the decree is reduced to one for possession of one-half of the land. The parties shall bear their own costs in all Courts.

Appeal partly accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 252 AND 253 OF 1918.

June 18, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

Raja SURAJ BAKHSH SINGH—PLAINTIFF—APPELLANT

versus

BALDEO BIHARI (AFTER HIS DEATH JAGDEO PRASAD, MINOR) AND ANOTHER—DEFENDANTS AND *Pandit* CHAKRAPAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Muafidar, *interest of, nature of—Transfer of Property Act (IV of 1882), s 6, applicability of—Oudh Rent Act (XXII of 1886), s. 107 (H).*

A *muafidar* holding a rent-free tenure liable to resumption has no higher position than that of a tenant entitled to hold the land rent-free, unless he is a grantee under other conditions [p. 459, col. 2.]

Section 6 of the Transfer of Property Act does not apply to such a holding, because tenants having an untransferable right of occupancy have been expressly excluded from the operation of that section [p. 459, col 2.]

The possibility of a declaration that a *muafidar* has acquired under-proprietary rights under section 107 (H) of the Oudh Rent Act being made in a future suit which may be brought against him by the landlord cannot be taken into account for determining whether the *muafidar* has at present a saleable interest or not. [p. 460, col. 1.]

Appeal against the decree of the District Judge, Sitapur, dated the 14th March 1918, upholding that of the Munsif, Biswan (Sitapur), dated the 22nd December 1917

Mr. *Gulab Chand Srimal*, for the Appellant.

Mr. *Har Dhian Chandra*, for Respondent No 1.

JUDGMENT.—The plaintiffs are the Zemindars of the village in which the defendant Baldeo had a *muafi* holding. That holding was attached in execution of certain decrees obtained by Baldeo Bihari against Baldeo. The plaintiffs thereupon sued for a declaration that the said holding was not liable to attachment or sale in execution of the said decrees.

The allegation of the plaintiffs was that Baldeo had quitted the village more than 7 years ago and had not been heard of, that there was no one to succeed him and that the plaintiffs resumed the holding in consequence. The Court of first instance found that Baldeo was still in possession of his holding. It further found that he was not an under-proprietor but a person holding a rent-free tenure liable to resumption. It, however, dismissed the suit of the plaintiffs, on the ground that the tenure was saleable in execution of the decrees obtained by Baldeo Bihari against the *muafidar*. The lower Appellate Court upheld the same view on general grounds.

A *muafidar* holding a rent-free tenure liable to resumption has, however, no higher position than that of a tenant entitled to hold the land rent free, unless he is a grantee under other conditions. Section 6 of the Transfer of Property Act (IV of 1882) does not apply to such a holding, because tenants having an untransferable right of occupancy have been expressly excluded from the operation of that section. In *Gaya Prasad* v. *Tasadduk Husain* (1) it was held that a *muafidar*, the grant to whom was resumable in whole or in part, held no proprietary right in the land and had no permanent interest which he could assign. So far as the grant was resumable in part, his possession was analogous to that of a tenant who was not liable to ejectment at will but whose rent might be enhanced at any moment at the will of the landlord, and so far as the grant was resumable in whole, his possession was analogous to that of a tenant at will, liable to ejectment at any time at the will of the landlord. In *Tika* v. *Sheo Narain* (2) it was held that the rights of an ordinary tenant in Oudh were not transferable.

(1) 6 O. C. 110.
(2) 34 Ind. Cas. 426; 19 O. C. 117; 3 O. L. J. 175.

The learned Counsel, who appears for Baldeo Bihari, contends that a *muafidar* could get under-proprietary rights under section 107 (H) of the Oudh Rent Act (XXII of 1886), if the landlord were to sue him for resumption or for assessment of rent. It is stated that a suit was actually brought by the former proprietor of the village for the resumption of the *muafi* holding but was subsequently withdrawn. There was no occasion then for the Revenue Court to declare that the *muafidar* had acquired an under-proprietary right under section 107 (H) of the Oudh Rent Act. The possibility of such a declaration being made in any future suit, which may be brought by the present landlords for the assessment of rent, cannot be taken into account for the purpose of determining whether the *muafidar* has at present a saleable interest or not. If his interest is not saleable at present, the attachment must be discharged.

The appeals are, therefore, allowed and the claim of the plaintiffs decreed for the declaration asked for. The costs of the plaintiff-appellant here and hitherto will be charged against the contesting defendant-respondent.

Appeals allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2981 OF 1918.

February 19, 1919.

Present :—Mr. Justice Abdul Raoof.

NUSRAT ALI—APPELLANT

versus

SAKINA BEGAM AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Sale, confirmation of—Possession, dispute as to delivery of, whether relates to execution of decree—Judgment-debtor, remedy of.

Where, after an auction sale is confirmed and a sale certificate is granted to the auction-purchaser, the judgment-debtor or his legal representative objects to the delivery of possession of the property sold, the dispute cannot be said to relate to the execution, discharge or satisfaction of the decree within the meaning of section 47 of the Civil Procedure Code, inasmuch as the decree has already been satisfied, and, therefore, the executing Court cannot entertain the objection. [p. 461, col. 2.]

Miscellaneous second appeal from the order of the District Judge, Delhi, dated the 23rd May 1918.

Mr. *Santanam*, for the Appellant.

Mr. *Obedulla*, for the Respondents.

JUDGMENT.—This is a second appeal against an appellate judgment passed by the lower Appellate Court. The facts out of which this appeal has arisen are fully stated in the judgment of the first Court, and I shall refer only to some of them which are material for the decision of this appeal. On the 17th February 1916 an *ex parte* decree on a mortgage was passed in favour of one Gauri Parshad. On the 13th July a final decree for sale was passed in favour of the decree holder. On the 10th October 1916 the house in dispute was sold in execution of the said decree and was purchased by the present appellant Nusrat Ali. The present respondent *Musammat* Sakina Begam, the wife of the judgment debtor Rahim Bakhsh, put in an application objecting to the proceedings on the ground that her husband had gone out of the country and was on the front in France. It does not appear in what capacity she made that application; she had no *locus standi* in her capacity as the wife of the judgment debtor to raise any question with respect to the execution of the decree. Her application was rejected and on the 14th November 1916 the sale was duly confirmed and on the 12th December 1916, a sale certificate was granted to the auction-purchaser. After that *Musammat* Sakina Begam filed a declaratory suit to get the *ex parte* decree set aside, but that suit was dismissed for want of production of evidence. On the 18th November 1916 Nusrat Ali, the auction purchaser, applied to the Court to be put in possession of the house. The decision of that application was delayed pending the decision of the suit to which I have referred above. On the 20th November 1917 the auction-purchaser put in another application asking the Court to put him in possession of the property. Certain proceedings were taken on that application, which need not be specifically referred to. There was obstruction on the part of *Musammat* Sakina Begam to the delivery of possession. Thereupon on the 17th December 1917 the auction-purchaser

put in an application in Court complaining of the obstruction on the part of *Musammat* Sakina Begam. At this stage the Court ordered notice to be issued to *Musammat* Sakina Begam as the legal representative of the judgment debtor Rahim Bakhsh, as in the meantime it had been discovered that he had died. *Musammat* Sakina Begam then came in and put in an application on the 8th of January opposing the application of the auction purchaser for possession. The Court of first instance upon this state of things was of opinion that the objections raised by *Musammat* Sakina Begam could not be entertained and the only remedy open to her was to file a regular suit. Taking this view the Court ordered that delivery of possession of the house should be made to the auction-purchaser and that the objections of *Musammat* Sakina Begam be dismissed.

The objector appealed to the lower Appellate Court. The Court has held that as the lady was brought on the record as the legal representative of her husband who was the judgment debtor under the decree, she was entitled to raise the question which she did under section 47, Civil Procedure Code. Being of this opinion the lower Appellate Court decided on the merits in favour of the lady and set aside all the proceedings in execution and dismissed the application of the auction-purchaser for the possession of the property. The auction-purchaser has preferred the present second appeal to this Court against the decree and order of the lower Appellate Court and the question which has been argued on his behalf before me is that section 47, Civil Procedure Code, has no application to this case. The sale had been confirmed and thereupon a sale certificate had been granted. The question raised, therefore, on the objection by the lady was not one relating to execution, discharge or satisfaction of the decree, inasmuch as the satisfaction of the decree had taken place already. The learned Counsel who has appeared in support of the appeal has relied upon a very recent decision of this Court which is reported as *Chotha Ram* v. *Musammat Karmon Bai* (1), and in my opinion the contention is fully borne out by the decision in that case. In fact, the present case is much stronger than the case reported as *Chotha Ram* v. *Musammat Karmon Bai* (1). In that case the auction-purchaser was the decree holder himself, and in spite of that, it was held that the matter did not relate to the execution or satisfaction of the decree. The learned Judges in that case observed: "If, therefore, after the Court executing the decree has entered up satisfaction of the decree in whole or in part, a dispute arises between the *quondam* decree holder, in his new capacity of auction purchaser, and the *quondam* judgment-debtor, or their representatives, regarding the possession of the property sold at the public auction held in execution of the decree, the dispute cannot properly be said to relate to 'execution, discharge or satisfaction of the decree,' which under section 47 of the Civil Procedure Code can only be determined by the executing Court." In this case an outsider is the auction-purchaser. These remarks apply with greater force to the case of a stranger auction-purchaser. A similar view was taken by a Full Bench of the Allahabad High Court in a case reported as *Bhagwati* v. *Banwari Lal* (2). That was also a case in which the decree holder himself was the auction-purchaser. In my opinion both these cases fully support the argument put forward before me by the learned Counsel who has argued the appeal. The lower Appellate Court entirely failed to understand the scope of section 47, Civil Procedure Code, and merely based its judgment on the finding that the lady having been brought on the record as the legal representative of the deceased judgment-debtor, she was entitled to raise the question. It entirely failed to consider whether the question raised was one which related to the execution, satisfaction or discharge of the decree.

In this view the appeal should be allowed, the decree of the lower Appellate Court should be set aside and that of the Court of first instance restored with costs in all Courts, and I order accordingly.

Appeal allowed.

(1) 44 Ind. Cas. 169; 8 P. R. 1918.

(2) 1 Ind. Cas. 416; 31 A. 82 (F. B.); 6 A. L. J. 71; 5 M. L. T. 185.

JANKI v. SUNDAR LAL.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 472 OF 1918.

June 3, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

Musammat JANKI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SUNDAR LAL—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Surrender of estate, validity of—Surrender in favour of secondary reversioner, with consent of immediate reversioner, effect of.

A Hindu widow can renounce her husband's estate in favour of the nearest reversioner, if there is only one, and in favour of all the reversioners nearest in degree, if more than one exist at the moment, that is to say, she can by a voluntary act part with her own title *qua* the estate inherited by her from her husband and accelerate the devolution in favour of the donee. A surrender by a widow of her husband's estate in favour of the secondary male heir with the consent of the nearest female heir can be treated as a joint surrender by both, the result being to vest an absolute title in the secondary male heir.

Appeal against the decree of the Officiating Subordinate Judge, Partabgarh, dated the 21st October 1918, affirming that of the Munsif, Kunda, dated the 5th July 1918.

Mr. *Lachman Das*, for the Appellants.

Mr. *Ali Mohammad*, for the Respondent.

JUDGMENT.—The dispute in this case relates to a house situated in the village Samaipur. Sheo Dayal was the original owner of the house. He was at first married to a woman whose name is not exactly ascertainable. The defendants-appellants state that her name was *Musammat* Subhao, but whether that was so or not is of little consequence.

The allegation of the plaintiff is that after the death of his first wife Sheo Dayal took another wife, whose name was *Musammat* Subhao, and that by her was born a daughter, *Musammat* Rukmin, whose son is Sundar Lal, the present plaintiff respondent. Sheo Dayal died two years prior to the suit and was succeeded by his widow, who died in October 1916. Before her death she executed a deed of gift transferring the entire property left by her husband to Sundar Lal, her daughter's son. Sundar Lal claims possession of the disputed house on the strength of the said deed of gift.

The finding of the Courts below is that *Musammat* Rukmin had assented to the gift and the gift, therefore, operated as an acceleration of the estate in favour of the nearest male heir. On behalf of Gokul Prasad, who describes himself as a nephew of Sheo Dayal, it is contended that the mother of *Musammat* Rukmin was not formally married to Sheo Dyal, that the consent of *Musammat* Rukmin to the said gift was not proved, and that the existence of *Musammat* Rukmin was an impediment to the devolution of the estate on Sundar Lal. The finding of the Court of first instance on the question of the marriage of the mother of *Musammat* Rukmin with Sheo Dayal was against the defendants. Its correctness was not challenged in the lower Appellate Court. It cannot, therefore, be impugned here

In regard to the question of *Musammat* Rukmin being entitled to an intervening estate, there is a clear finding of both the Courts below that she had assented to the gift. In fact she gave evidence to that effect. As pointed out by their Lordships of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (1), it is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner, if there is only one and in favour of all the reversioners nearest in degree, if more than one exist at the moment, that is to say, she can by a voluntary act part with her own title *qua* the estate inherited by her from her husband and accelerate the devolution in favour of the donee. The surrender was made in this case in respect of the entire estate, which the widow possessed, and the mere fact that a daughter was in existence was not an impediment to the surrender, because as observed in *Ohinnaswami Pillai* v. *Appaswami Pillai* (2), a surrender by a widow with the consent of the nearest female heir to the secondary male heir can be treated as a joint surrender by both, the result being to vest an absolute title in the secondary male heir.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) 50 Ind. Cas. 493 46 I. A. 72 at p. 79; 36 M. L. J. 493; 17 A. L. J. 536. 24 C. L. J. 534; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 264; 41 M. 523; 26 M. L. J. 5; 10 L. W. 105 (P. C.).

(2) 48 Ind. Cas. 147; (1918) M. W. N. 736; 24 M. L. T. 403; 42 M. 25 at p. 27; 35 M. L. J. 512; 8 L. W. 512.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2908 OF 1918.

February 21, 1918.

Present:—Mr. Justice Martineau.

LAHORE SPINNING AND WEAVING MILLS Co, LIMITED (IN LIQUIDATION)—PLAINTIFF—APPELLANT

versus

UTTAM CHAND—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (1) (b)—Security bond executed in compliance with order of Court hypothecating immoveable property of value of more than Rs. 100, whether requires registration.

Where execution of a decree is stayed conditionally on the judgment debtor's furnishing security, and the security bond executed hypothecates immoveable property exceeding Rs. 100 in value, the bond requires registration under section 17 (1) (*b*) of the Registration Act.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Amritsar, dated the 13th June 1918.

Mr. *Dalip Singh*, for the Appellant.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—An order was passed by this Court staying execution of a decree of the Senior Subordinate Judge of Amritsar, from which an appeal is pending conditionally on the judgment-debtor's furnishing security. A security bond has been executed, and the executing Court has accepted it. It has not been registered, and the question raised is whether, as the property hypothecated exceeds Rs. 100 in value, the bond requires registration under section 17 (1) (*b*) of the Registration Act. The Senior Subordinate Judge holds that registration is not necessary, as the security is furnished under orders of the Court and will practically become part of the order of the Court. He regards the bond as being a petition to the Court.

The decree-holders have appealed, and, their learned Counsel has referred to *Nagaruru Sambayya* v. *Tangatur Subbayya* (1), in which it was held that such a security bond is compulsorily registrable under section 17 of the Registration Act.

The bond clearly requires registration, unless it can be regarded as an order of the Court, falling under section 17 (2) (*vi*) of the Act.

I cannot agree with the lower Court that the document is in any sense a petition. It contains no request for anything to be done, and is nothing but a security bond.

It also appears to stand on a different footing from a compromise, which, in so far as it is submitted to, and judicially acted upon by, the Court, is a step of judicial procedure not requiring registration. A compromise submitted to the Court has to be followed by a decree, but a security bond requires no order of the Court to render it effectual. The Court's acceptance of the bond given by the judgment-debtors merely indicates, as has been pointed out by the Madras High Court in the case mentioned above, that the Court considers the security sufficient, and does not give validity to the bond.

Nor can the bond be treated as a part of the order of this Court directing execution to be stayed on the judgment-debtor's furnishing security. It was executed in compliance with, or in consequence of, that order, and is something distinct from the order itself.

I agree, therefore, with the view taken in the Madras case, and hold that the security bond requires registration.

I accept the appeal and direct the lower Court to require the judgment-debtors to execute a fresh security bond and have it registered.

The parties will pay their own costs.

Appeal accepted.

(1) 31 M. 330; 3 M. L. T. 313.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 992 OF 1918.

April 10, 1919.

Present:—Mr. Justice Bakewell and Mr. Justice Phillips.

ANNAMMAL, MINOR, BY GUARDIAN VENKATARAMA VATHIAR—DEFENDANT—APPELLANT

versus

M. V. SAMBASIVA AIYAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 21, applicability of—Jurisdiction, submission to—Summons,

ANNAMMAL v. SAMBASIVA AIYAR.

*receipt of—Failure to object to jurisdiction, effect of—*Ex parte *decree, suit to declare invalidity of, maintainability of.*

A party residing outside the territorial limits of the jurisdiction of a Court, who receives a summons from that Court and raises no objection to its jurisdiction, must be deemed to have submitted to jurisdiction and once a party so submits, he cannot subsequently raise the question again in another Court An *ex parte* decree passed against such a person cannot be vacated on the ground of want of jurisdiction. [p. 467, col. 1.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 281 of 1915, preferred against the decree of the Court of the Subordinate Judge, Tanjore, in Original Suit No. 5 of 1914.

FACTS.—A decree *ex parte* was passed by the High Court on its original side against the present plaintiff. No leave of Court had been obtained, the allegation having been that the High Court had jurisdiction on the ground that the cause of action and the breach of the contract of bailment in question both took place in Madras and that the defendant was also within the jurisdiction. It also transpired that the defendant (the present plaintiff) was in Madras on the 6th and 7th November 1910, that the suit was instituted on 9th November 1910, that the defendant passed Madras at least on the 11th on his way on transfer from Kumbakonam to Vizagapatam and that he had his son in law resident in Madras. The present suit is for a declaration that that decree was passed without jurisdiction and was, therefore, null and void. The lower Appellate Court gave the declaration prayed for.

Mr. *T. R. Ramachandra Aiyar*, for the Defendant Appellant.—The High Court had full jurisdiction to pass the decree. The jewels in question were entrusted by way of bailment in Madras and the jewels ought to have been returned in Madras, because the person who was to receive them back was admittedly in Madras.

This suit is not maintainable. For if a decree is a nullity, no declaration is needed. It need not be set aside. *Lakshmanaswami Naidu* v. *Ramaswami Naidu* (1). But these objections as to jurisdiction cannot be taken by way of this suit. The general rule is not that objections as to jurisdiction can be taken without any restriction as to time or place. *Puran Chand* v. *Sheo Dat Rai* (2), *Kadircelu Nainar* v. *Kuppuswami Naicker* (3). *Chokkalingam Chettiar* v. *Kurunthappan Chettiar* (4), *Moore* v. *Gamgee* (5); Black on Judgments, Chapter XII, section 217, *Fry* v. *Moore* (6).

[BAKEWELL, J.—Your client's predecessor-in-title is said to have died out of the High Court's jurisdiction. Is not that death part of your cause of action?]

No. The death has to be proved, for then only my cause of action arises. But where the death took place is immaterial.

The objection as to jurisdiction must be deemed to have been waived. For section 21, Civil Procedure Code, requires clearly that the objection should be taken at the earliest possible stage.

Clause 12 of the Letters Patent must be widely construed. The High Court has unlimited jurisdiction.

Mr. *K. S. Jayarama Aiyar*, for the Respondent.—There can be no waiver, for my clients come in only in execution proceedings, and it is not open to the Court then to go behind the decree.

Clause 12 has its limitations which are judicially recognised. A distinction has to be drawn between cases where a Court, having general jurisdiction, declines to exercise it for want of compliance with certain formalities prescribed by law and cases where the Court has no jurisdiction whatsoever. Thus, for instance, the High Courts have unlimited jurisdiction to hear cases. But still in *Harendra Lal Roy* v. *Hari Dasi Debi* (7) it was held that, where the property was not within jurisdiction, the Calcutta High Court had no jurisdiction to entertain the suit on a mortgage of property.

[PHILLIPS, J.—If the defendant accepts

(1) 26 M. 31.

(2) 29 A. 212; 4 A. L. J. 51; A. W. N. (1907) 31.

(3) 45 Ind. Cas. 774; 41 M. 743; 34 M. L. J. 593; 23 M. L T. 372; 8 L. W. 103; (1918) M. W. N. 514 (F. B.).

(4) 47 Ind. Cas. 764; (1918) M. W. N. 661.

(5) (1889) 22 Q. B. D. 244; 59 L. J. Q. B. 505; 38 W. R. 669.

(6) (1889) 23 Q. B. D. 395; 58 L. J. Q. B. 382; 61 L. T. 545; 37 W. R. 565.

(7) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 482; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 910 (P. C.).

trial without raising an objection as to jurisdiction, he must be taken to have waived it.]

Neither consent nor waiver can confer jurisdiction. *Abdul Kadir* v. *Dulanbibi* (8). *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (9) is the leading case.

Advocate General of Madras v. *Arunachellam Chettiar* (10).

[PHILLIPS, J.—Could you not have properly obtained this relief by an application under Order IX, rule 13 ?]

No; for a Court acting under that rule has no power to go into questions other than those required for deciding whether the *ex parte* decree should be set aside or not. *Rajlakshmi Dasee* v. *Katyayani Dasee* (11), *Maharaja of Jeypore* v. *Gunupuram Deenabandhu Patnaick* (12), *Muhammad Askari* v. *Radhe Ram Singh* (13).

There was no bailment under section 148 of the Contract Act. For the possession of the jewels was with the plaintiff's wife through whom the defendant claims, and it was never with the plaintiff though the control may have been in the plaintiff. So no question of bailment arises in this case. *Venkatalutchmi Ammal* v. *Srirungapatnam Srinivasamurthy* (14).

Radha Raman Shaha v. *Pran Nath Roy* (15) and *Khagendra Nath* v. *Pran Nath Roy* (16) cover the question of *res judicata* in this case.

Advocate-General of Madras v. *Arunachellam Chettiar* (10) is clear that objection as to jurisdiction cannot be taken in execution proceedings. See also *Ratnaswami Chetty* v. *Ratnammal* (17). The case in *Laksmanaswami Naidu* v. *Ramasawmi Naidu* (1) does not apply, as it was the case of a consent decree. See *Biswa Nath Prosad Mahata* v. *Bhagwandin Pandey* (18), *Rampurtab Samruthrey* v. *Premsukh Chandamal* (19), *Hadjee Ismael Hadjee Hubeeb* v. *Hadjee Mahomed Hadjee Joosub* (20).

Alderson v. *Palliser* (21). (The case was then argued on the merits).

Mr. *S. Rangachariar* in reply, dealt with the merits of the case.

JUDGMENT.—The defendant in this case obtained a decree of the High Court, made in the exercise of its Ordinary Original Civil Jurisdiction, against the plaintiff for the return of certain jewels or payment of their value, and the present plaintiff has brought a suit in the Court of the Subordinate Judge of Tanjore for a declaration that this decree is null and void and of no effect on the grounds of fraud and want of jurisdiction. The lower Appellate Court has found that there was no fraud on the part of the defendant, and the question to be decided in this appeal is whether the decree is void for want of jurisdiction.

The plaint filed in the High Court by the defendant alleged that the present plaintiff resided with his wife at No. 25, Venkataramaier Street, George Town, Madras, that is within the local limits of the jurisdiction of the Court; that the defendant's mother entrusted some jewels to her mother, the defendant's wife, and subsequently died at Vizagapatam, where the plaintiff was then employed; and that the plaintiff and his wife had failed to return the jewels to the defendant after demand. The plaint alleged that the jewels continued in the custody of the plaintiff's wife until the death of the defendant's mother, and there was no averment of a conversion of the jewels within the jurisdiction by the plaintiff or his wife The plaint, therefore, contained no averment to support the contention that the cause of action or part thereof arose within the local limits of the jurisdiction of the High Court. The High Court was competent to entertain a suit of this nature and of the value stated, and its jurisdiction depended upon the residence of the persons sued within the prescribed area.

The plaintiff and his wife did not appear in answer to the summons issued in the

(8) 20 Ind. Cas. 530; 37 B 563 at p. 568; 15 Bom. L. R. 672.
(9) 6 M. I. A. 134 at p. 155; 19 E. R. 50.
(10) 5 Ind. Cas. 729; 20 M. L. J. 387; (1910) M. W. N. 14; 7 M. L. T. 292.
(11) 12 Ind. Cas. 464; 38 C. 639.
(12) 23 M. 42; 9 C. W. N. 257; 7 Bom. L. R. 97; 2 A. L. J. 135; 8 Sar. P. C. J 763; 32 I. A. 45 (P. C.).
(13) 22 A. 307; A. W. N. (1900) 73; 9 Ind Dec. (N. S.) 1236.
(14) 11 M. L. J. 91.
(15) 28 C. 475; 5 C. W. N. 757 (P. C.).
(16) 29 C. 395; 29 I. A. 9; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266.
(17) 24 Ind. Cas. 135; 27 M. L. J. 333; 1 L. W. 413; 15 M. L. T. 415.
(18) 10 Ind. Cas. 536; 14 C. L. J. 648.
(19) 15 B. 93; 8 Ind. Dec. (N. S.) 63.
(20) 13 B. L. R. 91; 21 W. R. 303.
(21) (1901) 2 K. B. 833; 70 L. J. K. B. 935; 49 W. R. 706; 85 L. T. 210; 17 T. L. R. 742.

suit, and an *ex parte* decree was passed against the plaintiff upon evidence that he had been served at the house mentioned in the plaint and that this was his residence.

The present plaintiff applied to the High Court to set aside the *ex parte* decree on the ground that he had not been served with summons. In his affidavit in support of this application he admitted that a bailiff of the Court told him that he had a summons against him, and that he wrote to the Assistant Registrar of the High Court requesting him to send the summons through his superior officer, and stated that he was permanently residing at Kumbakonam. The order dismissing the application was confirmed on appeal.

Many authorities have been cited before us with reference to judgments of foreign Courts, but we are of opinion that they are not relevant to the question to be decided. The Courts of this country will not recognise the judgment of a foreign Court, unless it complies with the prescribed conditions (Civil Procedure Code, section 13), and one of the conditions is that the Court had jurisdiction in the particular case.

In the present case the plaintiff is a subject of British India and resides within the Presidency of Madras and is, therefore, subject to the process of its Courts.

For the convenience of parties and for the better despatch of the business of the Courts the Legislature has prescribed the subject with which the several Courts shall deal, and the areas within which they shall respectively exercise their powers, and has determined what persons shall be subject to their process; and it has provided that no objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and unless there has been a consequent failure of justice (Civil Procedure Code, section 21).

Upon the averments contained in the plaint presented to the High Court that Court had power to enquire into their truth, and if it found that the defendant was in fact resident within the local limits of its jurisdiction, it had power to pass the decree prayed for. Such decree could not be set aside by the Appellate Court, unless objection had been taken by the defendant in the prescribed manner.

If its jurisdiction depends upon the existence of certain facts, the Court must decide upon the evidence whether they exist or not, and if upon the facts so found a subordinate Court has assumed jurisdiction, the superior Court will not interfere with its decision except by way of appeal. [See *Monisha Eradi* v. *Siyali Koya* (22), *Revell* v. *Blake* (23), *Gomatham Alamelu* v. *Komandur Krishnamacharlu* (24)].

"Where an inferior Court has no jurisdiction from the beginning, a party by taking a step in a cause before it, does not waive his right to object to the want of jurisdiction. But jurisdiction is sometimes contingent; in such case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards." *Jones* v. *James* (25) per Erle, J., cited in *Moore* v. *Gamgee* (5)].

The plaintiff received a summons from the High Court while he was in Madras, and at the time took no objection to the jurisdiction of this Court, but merely asked that another summons should be sent to him. This Court had, therefore, to determine whether it had jurisdiction. Acting on the averments in the plaint, the return on the summons, and the failure of defendants to raise any objection, it decided that it had jurisdiction and disposed of the suit. Although section 21, Civil Procedure Code, is not applicable to the facts of this case, there is no reason why the principle underlying it should not be applied. This principle is that no objection to the place of suing shall be entertained unless it is taken at the earliest opportunity. All Courts in this Presidency, so far as original jurisdiction is concerned, are local Courts, and there is no Court exercising original jurisdiction over the whole Presidency. If, therefore, a Court has jurisdiction to try a suit of a particular nature, the fact that it has not territorial jurisdiction over the suit is a matter

(22) 11 M. 220 at p. 230; 12 Ind. Jur. 49; 4 Ind. Dec. (N. S.) 153.

(23) (1873) 8 C. P. 533; 42 L. J. C. P. 165; 29 L. T. 67; 22 W. R. 93.

(24) 27 M. 118.

(25) (1850) 19 L. J. Q. B. 257; 1 L. M. & P. 65; 87 R. R. 518.

of minor importance and will not be deemed to be a matter destroying jurisdiction, unless the objection to jurisdiction is taken at the earliest opportunity. In this case plaintiff, by receiving summons and raising no objection, must be deemed to have submitted to jurisdiction. Although such submission would not be effectual, if the Court, apart from the question of territorial jurisdiction, had otherwise no jurisdiction, it is held to be effectual on a question of territorial jurisdiction. (*Vide* the provisions of section 21, Civil Procedure Code.) In the present case, therefore, plaintiff must be deemed to have submitted to jurisdiction, and cannot subsequently raise the question again in another Court. The cases in *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (9) and *Alderson* v. *Palliser* (21) are no authority to the contrary, for there the jurisdiction depended on questions other than territorial.

We are of opinion that the remedy open to the plaintiff was that provided by section 21 of the Code and that he has no other remedy.

The decrees of the lower Courts are set aside and the plaintiff's suit is dismissed with costs throughout.

The memorandum of objection is also dismissed with costs.

M. C. P.

Appeal allowed;
Memo. of objections dismissed.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 924 OF 1918.
February 6, 1919.
Present:—Mr. Justice Broadway.
PAIRA MAL AND SONS—PLAINTIFFS—PETITIONERS
versus
RAJ NARAIN AND COMPANY—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 10—Stay of suit, when can be ordered—Concurrent jurisdiction, what is.

Before an order under section 10 of the Civil Procedure Code can be made, the Courts in which the two suits are pending must be shown to be of concurrent jurisdiction, in the sense that the suit to be stayed could be tried by the Court in which the first suit was instituted.

Revision from the order of the Senior Subordinate Judge, Amritsar, dated the 30th August 1918.

Mr. *Tirath Ram*, for the Petitioners.
Mr. *Bishan Nath*, for the Respondents.

JUDGMENT.—This is an application under section 44 of the Punjab Courts Act for revision of an order passed by the Senior Subordinate Judge, Amritsar, staying the trial of a suit under section 10 of the Civil Procedure Code. The petitioners filed the suit on the 20th April 1918 and the respondents asked for an order staying, it on the ground that they had filed a suit in which the same questions were involved in the Court of the Munsif at Delhi on the 25th March 1918.

Before an order under section 10, Civil Procedure Code, can be passed, however, it seems to me that the Courts in which the two suits are pending must be of concurrent jurisdiction, in the sense that the suit to be stayed could be tried in the Court in which the first suit was instituted [See *Gopikisan* v. *Padamraj* (1)]. It is obvious that the suit now stayed is not triable by the Munsif and the order complained of was, therefore, without jurisdiction.

I accordingly accept this petition with costs and setting aside the order of the Senior Subordinate Judge direct that the case be proceeded with.

Revision accepted.

(1) 37 Ind. Cas. 510; 12 N. L. R. 174.

MAUNG PU ZA *v.* MA NGE MA.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 229 OF 1918.

February 4, 1919.

Present:—Mr. Heald, A. J. C.

MAUNG PU ZA AND OTHERS—APPLICANTS

versus

MA NGE MA AND OTHERS—RESPONDENTS.

Buddhist Law, Burmese—Pre-emption—Co-heirs, right of pre-emption of, extent of—Procedure.

A Burmese Buddhist co-heir has a right of pre-emption in respect of the unseparated interest of any particular co-heir in undivided inherited property, and the whole body of co-heirs, excepting those in respect of whose interest the exercise of the right is claimed, are entitled to settle among themselves which of them shall exercise it in any particular case, but in case there are conflicting claims among the co-heirs and they fail to come to any agreement, any of them may institute a suit to establish his claim as against the others and also against any purchaser who may have bought or be proposing to buy the property in disregard of their rights. [p. 476, col. 2.]

Second appeal against the judgment and decree of the District Court, Yamethin, passed in Civil Appeal No. 64 of 1916, dated the 10th May 1918.

Mr. *J. C. Chatterjee*, for the Appellants.

Mr. *S. Mukerjee*, for the Respondents.

JUDGMENT.—The sub joined genealogical tree shows the relationship of the parties to this litigation, except the 1st and 2nd defendants who are not related to the rest of the parties.

MAUNG TU=MA MI GYI.

- Shwe On
  - Tun Hla married Ma Nge Ma (plaintiff No. 1)
    - Ma Shwe Thon (plaintiff No. 2.)
    - Bo Gale (plaintiff No. 3.)
    - Ma Pu (plaintiff No. 4.)
    - Ma U (plaintiff No. 5.)
    - Ma Shwe Hmon (plaintiff No. 6.)
    - Tun Shwe (plaintiff No. 7.)
    - Ba U (plaintiff No. 8.)
- Ma Kaing
  - Tun Win (defendant No. 6.)
  - On Gaing (defendant No. 7.)
- Shwe Kon, (defendant No. 5.)
- Ma Kyaw
  - Ma Tin
    - Po Thaung (defendant No. 3.)
    - Ma Hla Win (defendant No. 4.)
- Ma E Ma
  - Po Mya (defendant No. 8.)

The plaintiffs represent Shwe On, one of the five children of Maung Tu and Ma Mi Gyi, and the defendants, except the 1st and 2nd, represent the other four children of the same parents.

The plaintiffs' case is that the lands in suit belonged to Maung Tu and Ma Mi Gyi, that on Maung Tu's death many years ago those lands passed to his widow Ma Mi Gyi, that on Ma Mi Gyi's death some 20 years ago they passed into the possession of the eldest surviving son Shwe Kon, that some ten years ago the lands passed from the possession of Shwe Kon to that of his niece Ma Tin daughter of his sister Ma Kyaw, Shwe Kon being understood to have sold his interest in the lands to Ma Tin, that Ma Tin bought from her cousins Tun Win, On Gaing, and Po Mya, who represented Ma Kaing and Ma E Ma, two other children of Maung Tu and Ma Mi Gyi, their interest in the land so that she became entitled to the interest of four out of the five children of Maung Tu and Ma Mi Gyi, that Tun Hla, the son of Shwe On the fifth child of Maung Tu and Ma Mi Gyi, refused to sell his share to Ma Tin but agreed to her holding the entire land on condition that he also should be entitled to hold it in his turn, that Ma Tin died in the following year and was succeeded in possession of the entire estate by her children Po Thaung and Ma Hla Win, that Tun Hla died subsequently, leaving his wife and children, the plaintiffs themselves, as his heirs, that on the 9th May 1915 after the death of Ma Tin and Tun Hla, Ma Tin's children sold the whole estate by registered deed for Rs. 1,000 to Maung Pu Za and Ma Bwin Pyu, who were strangers to the family, and that, therefore, the plaintiffs as representing Tun Hla,

son of Shwe On, one of the five original co-heirs, were entitled to have the sale set aside so far as it affected their one-fifth share of the estate and had a right to pre-emption in respect of the other four-fifth shares. The suit was instituted on the 9th July 1915.

The 1st and 2nd defendants Pu Za and Ma Bwin Pyu, who were the purchasers of the property, said merely that the plaintiffs were aware of the sale when it took place and that, therefore, they were not entitled to have it set aside.

The 3rd and 4th defendants, Po Thaung and Ma Hla Win the children of Ma Tin, who were the vendors, said that their mother Ma Tin bought the interest of Tun Hla, whom the plaintiffs represent, for Rs. 30 as well as the shares of all the other co-heirs, and that, therefore, she became sole owner of the estate and the plaintiffs had no interest in it. They also said that the plaintiffs knew of their sale of the estate to the 1st and 2nd defendants at the time when it took place and made no objection and no claim to pre-emption at that time.

The rest of the defendants, except the 6th Tun Win who did not appear or contest the suit in any way, filed a joint written statement saying that they did not sell their interests in the estate to Ma Tin but only mortgaged them, and that they too were still entitled to be regarded as heirs and should have been made co-plaintiffs in the suit.

The trial Court, after hearing the evidence, came to the conclusion that the plaintiffs succeeded in proving that they still retained their right to Tun Hla's one-fifth share of the estate and that, therefore, the sale to the 1st and 2nd defendants, so far as it affected that share, was invalid, and further that the plaintiffs established their right to pre-emption in respect of the other four-fifth shares of the estate. It, therefore, gave them a decree setting aside the sale and declaring that the plaintiffs were entitled to pre-emption on paying such sum not exceeding Rs. 1,600, that is four-fifths of the value of the whole estate, as might be accepted by the other co-heirs.

All the parties objected to this order and either appealed or filed cross objections and the lower Appellate Court framed fresh issues and referred them to the lower Court for trial.

The trial Court, after taking further evidence, recorded findings that the lands were first mortgaged to one Maung Nyun by all the co-heirs, who divided the mortgage money between them, each receiving Rs. 30, and that Ma Tin redeemed the land from Maung Nyun and also paid the representatives of all the other four co-heirs for their interest in the estate so that she became sole owner of the estate.

The lower Appellate Court did not accept these findings but held that it was not proved that Tun Hla's interest in the estate was bought by Ma Tin. It found, therefore, that the original decision of the trial Court was correct and dismissed the appeal of the first four defendants with costs, but passed no order on the cross-objection filed by the plaintiffs and the other defendants.

The plaintiffs and the other defendants then asked the lower Appellate Court to review its judgment on the ground that it had failed to deal with their cross-objection, which was to the effect that the amount payable for pre-emption was Rs. 800 only and not Rs. 1,600.

The Court allowed the application for review, presumably because it had, as alleged, overlooked the cross-objection, and reviewed its judgment to the extent of fixing the amount payable for pre-emption at Rs. 800 instead of Rs. 1,600.

The present appeal, which purports to be filed on behalf of all the four parties to the registered conveyance, that is the first four defendants, regardless of the fact that the 2nd defendant died before the application for review was filed, is said to be a first appeal against the order granting a review and also a second appeal against the final judgment and decree of the Appellate Court passed on review.

So far as it is supposed to be an appeal against the order granting a review, it may be disregarded. There can be no doubt from the lower Appellate Court's judgment that it did overlook the fact that a cross-objection had been filed and when that mistake was brought to its notice, it had every right to review its judgment

The grounds of appeal against the final decree of the lower Appellate Court are:—

(1) that the plaintiffs' claim is barred by limitation,

(2) that there is no right of pre-emption in the case of an ancestral estate which has been partitioned, and that the estate in suit has been partitioned,

(3) that it is proved that all the co-heirs sold their interests in the estate to Ma Tin and that, therefore, she was the sole owner of the estate and the plaintiffs have no interest in it,

(4) that pre-emption requires the consent of all the co-heirs, and that because the 3rd and 4th defendants, who, if the plaintiffs' contention is correct, are co-heirs with them in respect of the estate, do not consent to the plaintiffs' exercising the right of pre-emption, the plaintiffs cannot pre-empt, and

(5) that the trial Court was right in fixing the amount payable for pre-emption at Rs. 1,600.

I have read the record and heard Counsel, and it seems to me that as the lower Courts have come to divergent findings on the facts, the first thing to be done is to see what facts ought to be found on the evidence.

The plaintiffs relied mainly on the evidence of those defendants who practically made common cause with them.

The most important of these is Shwe Kon, one of the five original co-heirs, who is equally related to the 2nd to 8th plaintiffs and to the 3rd and 4th defendants and who, if he had any prejudice at all, might be expected to be prejudiced against the 1st plaintiff, Ma Nge Me, who since the death of her husband Tun Hla would ordinarily be regarded among Burmans as a stranger to the family. His account of what happened seems to be that very soon after the death of Ma Mi Gyi, which took place over 20 years ago, he and his nephews On Gaing and Tun Win, who were sons of his sister Ma Kaing, and Po Mya, the son of his sister Ma E Me, and Ma Tin, daughter of his sister Ma Kyaw, mortgaged the land in suit to a Shan Maung No (Maung Nyun) for Rs. 150. He did not at first mention the name of Tun Hla, son of his brother Shwe On, as one of the mortgagors, but subsequently he said that Tun Hla was a party to the mortgage and received his share of the mortgage money which was divided into five shares of Rs. 30 each, one share going to the representatives of each of the five children of Maung Tu and Ma Mi Gyi. He said that some 10 to 13 years ago, about the year 1266 (1904), Ma Tin with the consent of the other heirs redeemed the land with her own money and that at that time Tun Win, Po Mya and he executed a bond mortgaging the land to Ma Tin for Rs. 300 and received Rs. 30 each on account of their shares in the property. He alleged that Tun Hla, who was present at that mortgage and was at that time living with Ma Tin, agreed to their executing the mortgage bond but refused to execute it himself or to take any share of the money. He admitted that the mortgage bond was not registered and he said that from that time Ma Tin and her children remained in possession of the property until they transferred it to the 1st and 2nd defendants, Pu Za and Bwin Pyu.

The defendant On Gaing, who, as I have said, claims that he still has an interest in the estate, said that he and Shwe Kon, and Tun Hla and Ma Tin and Po Mya originally mortgaged the land to Maung Nyun and divided the mortgage money, which was Rs. 150, among them in five equal shares of Rs. 30, that Ma Tin redeemed that mortgage with her own money, that after that redemption he and Shwe Kon and Po Mya mortgaged the land to Ma Tin and again received Rs. 30 each as their shares of the mortgage money and that at the time Tun Hla was living with Ma Tin, but he did not know whether or not Tun Hla received his share of the mortgage money from Ma Tin. He admitted that from that time the whole estate remained in the possession of Ma Tin and her children for ten or twelve years, and that he himself had never made any claim to redemption as against Ma Tin.

The defendant Po Mya similarly said that the land was originally mortgaged by the five co-heirs to Maung Nyun for Rs. 150 of which they received Rs. 30 each, that Tun Hla redeemed that mortgage with Ma Tin's money and that three years later he and Shwe Kon and On Gaing and Tun Hla mortgaged the land to Ma Tin. He admitted that he and Shwe Kon and Po Mya received

Rs. 30 each again at the time of the mortgage to Ma Tin, but alleged that Tun Hla said he would not take his share of the money because he was living with Ma Tin and was leaving his share with her. He also said that during the 3 years which elapsed between the redemption from Maung Nyun and the mortgage to Ma Tin, Tun Hla worked the land for two years and his brother worked it the third year.

Ma Pa U, who was Tun Hla's mother, said that although the estate was in the possession of Po Thaung and Ma Hla Win, she knew that Tun Hla had never received his share of it. She said that when Po Thaung and Ma Hla Win sold the land to Ma Shan Ma and her son Pu Za after Tun Hla's death, she and her daughter-in-law, the plaintiff Ma Nge Ma, went and protested against the sale. She admitted that before the land came into the possession of Po Thaung and Ma Hla Win it was in the possession of their mother Ma Tin, but said that before it came into the possession of Ma Tin the heirs used to cultivate the land by turn, Tun Hla's younger brother Maung Kaing cultivating the land for one year about 12 years ago as Tun Hla's tenant. She also claimed an interest in the property herself as being the widow of Shwe On.

Maung San Nyun, who is related to all the parties except of course the 1st and 2nd defendants, said that he witnessed the bond recording the mortgage of the land to Ma Tin by certain of her co-heirs but as the bond was admittedly unregistered, he was not allowed by the Court to give any evidence of its contents. He said further that Ma Tin and her son Po Thaung were in possession of the land for about 7 years.

Po Saing said only that he once heard Ma Hla Win asked Tun Hla to let her work some land but he did not know what land was referred to.

Po Ka said that during the rains not long before Tun Hla's death, he heard Ma Hla Win tell Tun Hla 'that she would either give over the land in suit to Tun Hla after harvest or pay him Rs. 200 as his share of the inheritance and that on her saying this Tun Hla agreed to her working the land. Po Saing was present at the time and so was Ma Nge Ma. In cross-examination he admitted that the name of the land was not mentioned and it is to be noted that his account of the conversation is quite different from that given by Po Saing.

Maung O, son of the original mortgagee Maung Nyun, said that Tun Hla mortgaged the land to his father about 18 or 19 years ago, that he himself cultivated it for some years, and that it was subsequently redeemed from his father, but he did not know who redeemed it.

Po Min, an ex-convict who is apparently on bad terms with the defendant Pu Za, was called by the plaintiffs as their witness, but his evidence was all hearsay and was in any case worthless.

Tun Nyo, who was called by both sides, said merely that Ma Tin once gave a bullock to Tun Hla's brother Maung Kaing, but he did not know on what account the animal was given.

Ma Nge Ma, the 1st plaintiff, did not give evidence on her own behalf but she was called by the first four defendants as their witness, and in cross-examination she said that she did not wish to deny that the land was mortgaged to Maung Nyun. She also said that the statement of the defendant Po Mya that her husband worked the land in dispute for three years before it went into Ma Tin's possession was correct, and that she was present about a year before Tun Hla died, when Ma Hla Win asked Tun Hla to allow her to work the land for another year, and Tun Hla agreed.

That may be regarded as the end of the plaintiffs' evidence.

For the defence Maung E Ni was called apparently to show that the document executed in Ma Tin's favour by her co-heirs was a deed of sale and not a mortgage but in view of the fact that the document was admittedly unregistered his evidence was held to be inadmissible.

Chit Pu, husband of Ma Tin and father (or possibly step-father) of Po Thaung and Ma Hla Win, swore that he saw his wife Ma Tin deliver a pair of bullocks to Tun Hla saying that it was the price of land. He admitted that in 1915 Tun Hla came to Ma Hla Win and said that if they

wanted to sell the land, it ought to be sold to a co-heir.

Po Myat said merely that he himself proposed to buy the land from Ma Hla Win before it was sold to Pu Za, but Ma Hla Win told him that she had decided to sell it to Pu Za and returned the advance which he had already paid on account of the price.

It is clear from the evidence that Ma Tin and her children had been in exclusive possession of the land for a good many years, apparently at least 10 years, when the suit was filed and that the initial burden of proof was on the plaintiffs. But I think that it was proved that Ma Tin's possession was originally permissive, that is to say, that after she redeemed the land from Maung Nyun she held it on behalf of the whole body of the co-heirs, who would be entitled to obtain their shares of the estate on paying their shares of the Rs. 150 which she had paid to Maung Nyun.

It is admitted that Ma Tin subsequently paid the representatives of three of the five co-heirs Rs. 30 each for their remaining interest in the land, and her children naturally say that the transaction was a purchase of the interest of the other co-heirs for that amount. The representatives of the other co-heirs on the other hand say that it was a mortgage and not a sale of their interests. Neither side can prove its allegations but if Ma Tin's children could prove that their possession for the last twelve years had been adverse, they would establish a good title by prescription as against these three co heirs.

The case of Tun Hla is different. It is said that he was living with Ma Tin at the time of the transaction and that for that reason he did not take his share of the mortgage money paid by Ma Tin, and there is no sufficient evidence to prove that he did take it. I see no reason why the witnesses should be lying when they say that he was living with Ma Tin or when they say that he did not transfer his interest in the property to her, and if he was living with her, there would seem to be no particular reason why he should transfer it. The question whether or not the various defendants who claim interests in the estate still have rests does not arise in this case and all I have to decide is, whether or not Tun Hla retained his interest. There is no evidence that he parted with it and it is not proved that the possession of Ma Tin and her children was adverse to Tun Hla for more than 12 years. It is proved that their possession, when it began, was permissive and in the absence of any reliable evidence to the contrary I am bound to hold that Tun Hla retained his interest in the estate, which on the evidence would be a right to recover one-fifth of the land on payment of Rs. 30, that is one-fifth of the amount which Ma Tin paid for redemption. Ma Tin's children had no right to sell Tun Hla's interest in the estate and as no question of ostensible ownership has been raised, the sale of Tun Hla's share of the land to the 1st and 2nd defendants was invalid, except to the extent to which the 3rd and 4th defendants were entitled to transfer their right to possession of that share subject to the plaintiffs' right to recover it on payment of Rs. 30.

The question of the plaintiffs' right to pre-emption in respect of the rest of the estate remains for consideration.

Appellants' learned Advocate says that supposing that co-heirs have a right of pre-emption in respect of the interests of other co-heirs in the estate in which they are co-heirs, and supposing that the plaintiffs and the 3rd and 4th defendants are co-heirs in the estate in suit, and supposing further that pre emption is a matter of inheritance, which he denies, even then the plaintiffs cannot exercise their right of pre-emption because that right can be exercised only with the consent of all the co heirs and the 3rd and 4th defendants, who according to the plaintiffs are their co-heirs, do not consent.

As for the question whether pre-emption is a matter of inheritance, it has been pointed out by Sir Charles Fox in *Maung Ye Nan O* v. *Aung Myat San* (1) that it does not matter whether pre emption be regarded as a question of inheritance or as a matter of custom since the right would be recognised by the Courts in either case, but I may say that although pre emption is not necessarily a matter of inheritance, it is in my opinion clearly a matter of inheritance in cases where it is a right to which heirs are entitled

(1) 31 Ind. Cas. 512; 8 L. B. R 466; 8 Bur. L. T. 167 (F. B.).

solely on account of their status as heirs and not on any other account.

I have already held that the plaintiffs are co heirs with the 3rd and 4th defendants, and, therefore, the argument resolves itself into the questions, (1) whether any right of pre emption is recognised in Burmese Buddhist Law, (2) if so, whether co-heirs have a right of pre-emption in respect of the interests of other co-heirs in the estate in which they are all co-heirs, (3) whether that right continues after partition of the estate, and (4) whether the right can be exercised by any co heir or co heirs without the consent of all.

The first two of these questions were raised in the Lower Burma case cited above and were answered in the affirmative, while the third was also raised but was answered in the negative.

The proposition that the consent of all the co heirs is necessary before the right of pre-emption can be exercised is based on the cases of *Lu Dok* v. *Mi Po* (2) in this Court and *Mi Te* v. *Po Maung* (3) in Lower Burma.

Unfortunately the Burmese Buddhist Law of pre emption has been differently interpreted in Upper and Lower Burma.

The latest ruling of this Court, which is at present binding on all Courts in Upper Burma, is the case of *Nga Tin* v. *Nga Shwe On* (4), in which Sir George Shaw held that after an ancestral estate has been partitioned among the co-heirs, a co-heir who on such partition has received his share retains a right of pre-emption in respect of the shares which his co-heirs have similarly received and that his widow who succeeds to his share on his death succeeds also to his right of pre-emption. Sir George Shaw expressly followed the earlier rulings of this Court in the cases of *Lu Dok* v. *Mi Po* (2) and *Shwe Nyun* v. *Mi So* (5), which he said were based on the Lower Burma decisions in *Mi Ngwe* v. *Lu Bu* (6), *Mi Te* v. *Po Maung* (3) and *Nga Myaing* v. *Mi Baw* (7), and he came to the conclusion that the Buddhist Dhammathats contain provisions which give a right of pre-emption to co heirs in respect of divided as well as undivided property. That conclusion, so far as it concerns divided property, is directly opposed to the ruling of Sir Charles Fox in the Lower Burma case of *Shwe Eik Ke* v. *Tha Hla Aung* (8), which Sir George Shaw considered and refused to follow.

Sir George Shaw's judgment was considered by a Full Bench of the Chief Court of Lower Burma in *Maung Ye Nan O* v. *Aung Myat San* (1), where Sir Daniel Twomey pointed out that the learned Judicial Commissioner did not mention the portion of the Dhammathats on which he relied as establishing his proposition in respect of divided property. The original texts on which the previous rulings purported to have been based were considered and Ormond, J., pointed out that the passage from Manu Thara Shwemyin on which Sandford, J., relied in the leading case of *Nga Myaing* v. *Mi Baw* (7), applied only to special lands which in Burmese Buddhist Law were known as "dead" lands (*myethe*) and not to ordinary lands which were known as "live" lands (*myeshin*). Twomey, J., went a step further and pointed out that on reference to the original Dhammathats it appears that the passage from Manu Wunnana, on which Sandford, J., also relied, similarly referred to "dead" lands (*myethe*) and not to ordinary lands.

This disposes of the authorities from Manu Thara Shwemyin and Manu Wunnana.

The only other authorities cited by Sandford, J., for his decisions in *Nga Myaing* v. *Mi Baw* (7), *Mi Te* v. *Po Maung* (3) and *Mi Ngwe* v. *Lu Bu* (6) were two passages from Manugye. With reference to the first of these Sir Charles Fox pointed out that it applied to all property which had been bought and sold, that it had nothing to do with inheritance, or rights of co-heirs or inherited property, and that in any case the rule embodied in it was admittedly long obsolete. I agree with all this and I would add that in view of the fact that the rule given in that passage (7 Manugye 36) is exactly the same as that given in Manu Wunnana 458 (*c*) which applies only to "dead" lands (*myethe*), it is probable that the rule in Manugye also applied only to "dead" lands and not to ordinary lands.

(2) U. B. R. (1897-1901) II, 162.
(3) S. J. L. B. 41.
(4) U. B. R. (1907-1909) II, Buddhist Law Inheritance and Pre-emption, 1.
(5) U. B. R. (1897-1901) II, 155.
(6) S. J. L. B. 76.
(7) S. J. L. B. 89.
(8) 1 L. B. R. 144.

MAUNG PU ZA *v.* MA NGE MA.

I agree, therefore, that no right of pre-emption in respect of ordinary lands can be inferred from the first of the two passages from Manugye on which Sandford, J., based it.

In respect of the second passage many difficulties have arisen mainly through mis-translation, and although I accept the translation given by Twomey, J., in *Maung Ye Nan O's case* (1) as substantially correct, I think it desirable to give, so far as possible, a literal version.

As I read the passage (excluding the second paragraph which expressely deals with dead" lands), the wording is as follows:—

"As regards right of ownership lands are of two kinds, 'dead' and 'live.'

'Dead' lands are soldier's lands, lands given as allotments, lands of definite area given by the King to Headmen, Governors, Surveyors, Foresters, Secretaries and Stewards for their subsistence, and lands anciently held for their subsistence by a line of hereditary officials in succession.

'Live' lands are all lands except 'dead' lands, and include lands received from parents as inheritance, lands purchased from some one else, lands got by some one else absconding, lands openly worked and owned without objection for ten years, lands got by clearing and cultivating forest, and lands given by Survey Officers, lands worked without the paddy-land owner's objecting, and lands worked by clearing and cultivating forest, these lands the owner can sell outright. If they are bought let the buyer have an undisputed right to work, enjoy, and own them, while the seller is alive, if redemption is claimed, redemption shall not be allowed, but if the buyer die while the seller is alive let the seller redeem and if he is dead and there is an 'office-bearer' let redeem.....As for all the aforesaid 'dead' and 'live' lands, parents, grandfathers, and great-grandfathers, relations, sons, grandsons, and great grandsons, and though it be between younger and elder brothers or brothers and sisters only, they shall not redeem. If the sale was outright, let the buyer be owner. Though they be truly relations within the seven degrees and none others, even sons or grandsons, they shall not redeem. According to the original sale let the ownership be. Suppose among relations only a sale of any of the aforesaid is intended, those interested as relations or (and) heirs having been asked generally, let the person who says 'I will not buy' be. Let the person who says 'I will buy' buy. If the matter is between relations, then although one who when asked said 'I will not buy' should say after another has bought, 'Let me share equally in the purchase,' if this be said after the other has bought and worked for a year, the original buyer alone shall be owner, because the one who said 'I will not buy' has delayed, he cannot buy, let him lose his right. But if in the day or month when he said 'I will now buy' he says again: 'At the time of the selling and buying' I said 'I will not buy,' now 'I will buy', let there be no objection to his buying because he said in the sight and knowledge of the buyer that he would not buy. The matter is between relations and the selling and buying must be carried out as becomes relations. Suppose a sale to a person who has an interest is intended and the seller says to all those who have an interest 'Buy I am in debt to someone and shall have to pay up,' if they say: 'We will buy', let them all buy together equally. But if one of the purchasers say: 'It ought to be sold to me alone, I alone ought to buy the whole,' let the discussion as to who ought or ought not to buy be among the purchasers. Let it not be said to the seller. But suppose the seller desiring one only to have the property has sold without telling another who has said 'I will buy', the seller is wrong. As for the buyer turn him out and let them then discuss who ought or ought not to buy. Let the owner take back his property and let those who say they ought to buy say among themselves who ought to buy. Let the property be sold to the one who ought to buy and if the owner say 'I will not sell', let him bear the law-costs and let him not sell to another. As for those costs let him not say: 'We are relations; let him pay them.'"

The distinction between "dead" and "live" lands is now as Twomey, J., said in *Maung Ye Nan O's case* (1) of merely historical interest, because the lands in respect of which pre-emption is claimed in the Courts now-a-days are always "live" lands.

It is, therefore, unnecessary to consider

the passage from Manugye so far as it deals with "dead" lands.

So far as it refers to "live" lands, what the passage says in plain English seems to me to be as follows:—

"(1) Lands allotted by Survey Officers, lands occupied without objection on the part of a former occupier, and lands obtained by clearing waste can be sold outright by the person who has occupied them and the seller has no right to redeem them unless the buyer dies in his lifetime."

The passage about redemption by an "office-bearer" after the death of the seller is obscure. Judson's Dictionary gives the meaning of the words translated "office-bearer" as "one who has a civil office", and so the passage might possibly mean that an "Officer," possibly the Revenue Officer, has a right to redeem. I think, however, that this is unlikely and probably the translation which regards the words as meaning a "representative of the seller" is correct.

"(2) Relations as such have no right to redeem any lands.

"(3) If the sole owner of any lands wishes to sell them to a relation, he must offer them not to one but to the whole body of his relations. Any of them who may wish to buy may do so, but if any one has bought and another claims to do so within a year, he should be allowed to join in the purchase."

"(4) If one of a number of co-sharers in any lands wishes to sell his share to another of the co-sharers, he may not sell it to whom he likes but must leave the decision as to who is to buy to the whole body of co-sharers, and must either accept their decision or not sell at all."

The first of these provisions seems to me to give no right of pre-emption to heirs.

The second says merely that relations as such have no right to redeem. It does not refer to pre-emption.

The third says that if a sole owner of any lands wishes to sell those lands as a whole to relations he must offer them to all his relations without distinction, but does not say that the relations have any right of pre-emption if the owner chooses to sell to a stranger.

The fourth similarly says that if a co-sharer wishes to sell his interest in any lands in respect of which he is a co-sharer to another co-sharer in those lands, he shall not himself decide to which of the co-sharers he will sell but must allow the co-sharers to decide among themselves and must abide by their decision.

There is no express provision for pre-emption in any of these cases, but the existence of a right of pre-emption might be inferred from the direction in the last case that the seller must abide by the decision of his co sharers. So far as the express words go, all that the passage says is that if one co-sharer wishes to sell his share to another he must abide by the decision of all. It does not actually say that he must sell his share to another co-sharer, but possibly that might be inferred.

That inference is apparently the sole basis for the law of pre-emption as found by Sandford, J., in the three rulings on which all the subsequent case-law has been founded, and as Sir Charles Fox said in the Lower Burma case already cited: "If the question of the right of pre-emption among co heirs depended solely on the reasons given in favour of it in Mr. Sandford's judgments, I should be prepared to hold that these were decisions which should not be followed because they were not founded on materials recognized by law as the basis for a decision that a binding custom prevailed at the time the question as to its existence had to be decided."

I entirely agree with that view. I think that although the passages from Manugye to which reference has been made do suggest a custom of pre emption among co-heirs, they do not contain any express statement of any such custom, and I should be loth to say that they are by themselves sufficient to establish the existence of a right to pre emption among co-heirs in Burmese Buddhist Law. But Sir Charles Fox went on to refer to section 97 of the "Civil Code of the Province of Pegu sanctioned by Resolutions of His Honour the President in Council," commonly referred to as "Sparks' Code," and he remarked that the rules embodied in it were at the time equivalent to legislation.

Section 97 of that Code is headed: "Sale and right of pre-emption" and runs as follows:—

"If a person wish to sell his share in an undivided ancestral estate, he should first

offer it to all the co-heirs. They may buy his share jointly, or each buy his separate portion of the share, or one may buy in trust for the whole, according as the co-heirs shall decide among themselves; the seller shall have no voice in the decision and shall not be at liberty to sell his share otherwise than they or the majority of them shall decide."

That statement of the law purports to be based on the passage of Manugye translated above and is clearly a paraphrase of the part beginning: "Suppose a sale to a person who has an interest is intended," that is to say, it corresponds to my fourth paragraph above.

In this connection I may note that Richardson's translation of the preceding passage which says that relations "shall not redeem" omits the word "not" and says that if relations wish to redeem "they shall have a right to do so." Now Richardson's translation was published in 1847 and Sparks' Code was prepared in the fifties, so it seems possible that Major Sparks' reading into the paragraph in Manugye about co-sharers a definite rule of pre-emption in favour of co-heirs may have been induced by Richardson's mistranslation of the preceding passage about relations. It may be remarked also that the Kinwun Mingyi in compiling his Digest of the Dhammathats omitted to include any texts on pre-emption, except those referring to the now probably obsolete right of the relatives of one of a married couple who predeceases the other to pre-empt the "hereditary belongings" (probable "heirlooms") of the deceased to which the survivor has succeeded, in case there are no children of the marriage and the surviving spouse proposes to sell them. Twomey, J., has suggested that that omission might be due to the learned author's regarding matters of pre emption as relating to inheritance only in a secondary sense, but it is clear that another possible explanation would be that the Kinwun Mingyi was of opinion there were no passages in the Dhammathats which gave any other right of pre-emption than the one which he mentioned.

If the matter were *res integra*, I should be inclined to hold on the materials which are available that the right of co-heirs to pre emption under Burmese Buddhist Law in respect of the shares of other co heirs in the estate in which they are co-heirs is not established, but in view of the fact that the right of persons who are co-heirs in undivided inherited property to pre-emption in respect of the unseparated interest of any particular co-heir in that property was recognized in Sparks' Code 60 years ago and has not, so far as appears from the published rulings, ever been questioned in the Courts until recently and that the Full Bench of the Chief Court of Lower Burma before whom it was lately questioned recognized it in a judgment in which the whole question was considered with the greatest care and learning, I agree with Sir Charles Fox that to the extent to which it was laid down in Sparks' Code, and to that extent only, the right of pre-emption amongst co-heirs must be recognised. I agree also with Sir Daniel Twomey that the right belongs to all those who are co-heirs in respect of undivided lands and that the whole body of co-heirs, excepting those in respect of whose interest the exercise of the right is claimed, are entitled to settle among themselves which of them shall exercise it in any particular case, but in case there are conflicting claims among the co-heirs and they fail to come to any agreement, any of them may institute a suit to establish his claim as against the others and also, of course, against any purchaser who may have bought or be proposing to buy in disregard of their rights.

Possibly I have failed to grasp what was in the learned Judge's mind when he made the further deduction that the right can be enforced only against the person who inherited the land jointly with the claimants, that it lapses with his death, and that his heirs take the land free from all obligation as regards pre-emption; but I do not think that there is any authority for the limitation suggested and I would hold that so long as inherited land is undivided all the co heirs, whatever their degree of relationship to the original owner, have a right of pre-emption in respect of the interest of any particular co heir in the undivided inherited property in which they are all co heirs.

I agree, of course, that the right must be claimed promptly, but I would interpret "promptly" as meaning within the period

limited by Article 10 of the First Schedule to the Limitation Act.

One effect of this decision is to overrule the judgment of this Court in the case of *Lu Dok* v. *Mi Po* (2), in so far as that judgment can be regarded as suggesting that no co-heir can enforce pre-emption unless the actual consent of the other co-heirs has been obtained, but I think that the learned Judicial Commissioner's addition of the words "or unless they have been made parties to the suit" shows that he did not intend to rule that no co-heir can succeed in a suit for pre-emption if any of the other co-heirs who are made parties to his suit object.

The Lower Burma case on which appellants' learned Advocate also relies, namely, the case of *Mi Te* v. *Po Maung* (3) has already been overruled, and, therefore, I find that there is no basis for the fourth ground of appeal

I have already found that the appellants failed to prove that the plaintiffs' claim was barred by limitation by reasons of adverse possession on the part of the 3rd and 4th defendants, and no other question of limitation arises.

I agree that there is no right of pre-emption in respect of an inherited estate after it has been partitioned, but I have found that in this case, so far as the plaintiffs are concerned, the estate has not been partitioned.

These findings dispose of the first three grounds of appeal.

The fifth ground, that the amount payable for pre-emption is the whole value of the share in respect of which pre-emption is claimed and not the amount offered or paid for that share by the purchaser at the sale against which pre-emption is claimed, has not been seriously argued and is manifestly baseless. The amount payable for pre-emption in such a case as the present is, of course, the amount which the vendor has agreed to receive or has received from the purchaser whose purchase is avoided for the share in respect of which pre-emption is claimed and that amount in this case is Rs. 800, being four-fifths of Rs. 1,000, the amount which the 1st and 2nd defendants paid for the whole estate.

I hold, therefore, that the plaintiffs are entitled to pre-emption in respect of four-fifths of the estate for Rs. 800 and that as regards the other one-fifth share they are entitled to recover the lands which represent that share on payment of Rs. 30.

The decrees of the lower Courts are set aside and in substitution of the trial Court's decree there will be a decree directing as regards four-fifths of the estate that on the plaintiffs paying into Court the sum of Rs. 800 within three months from this date, together with the costs of the 1st and 2nd defendants, the 1st defendant shall deliver possession of the property to the plaintiffs whose title thereto shall be deemed to have accrued from the date of such payment, but that if the said sum of Rs. 800 and costs are not so paid, the suit shall be dismissed with costs for the 1st, 2nd, 3rd and 4th defendants against the plaintiffs, and as regards the other one-fifth share that the 1st defendant shall deliver it to the plaintiffs on receipt of Rs 30.

I think it equitable under the circumstances that the plaintiffs, whose long delay in asserting their claim to an interest in the property has occasioned this litigation so far as the 1st and 2nd defendants are concerned, should, if they recover the property, pay the 1st and 2nd defendants' costs, and that the parties other than the 1st and 2nd defendants should bear their own costs unless the plaintiffs fail to pay the amount found due, in which case I think the plaintiffs should pay the costs of the 3rd and 4th defendants also.

I note that if on the expiry of the three months allowed by this decree the decretal amount and the costs have not been paid into Court, the trial Court should pass a final decree dismissing the plaintiffs' suit with costs for the 1st, 2nd, 3rd and 4th defendants throughout.

I note also that the Rs. 830 will be payable to the 1st defendant, not to the 3rd and 4th defendants as the lower Courts seem to have thought.

Decrees modified.

NAZIR AHAMAD *v.* RAGBAT ALI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2399 OF 1917.

May 13, 1919.

Present :—Mr. Justice Newbould and Mr. Justice Duval.

NAZIR AHAMAD, ADMINISTRATOR TO THE ESTATE OF *Late* MOULVI KHABIR-UD-DIN—PLAINTIFF—APPELLANT

versus

RAGBAT ALI—PRINCIPAL DEFENDANT AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXI, rr. 1, 2—Administrator, one of several, suit by, to recover rent, maintainability of—Consent of other administrators.

A suit by one of several administrators of an estate with the consent of the other administrators, who are impleaded as *pro forma* defendants, to recover rent, is maintainable.

Appeal against the decree of the District Judge, Noakhali, dated the 27th August 1917, reversing that of the Additional Munsif, Sundip, dated the 4th July 1916.

FACTS appear from the judgment.

Babu *Suresh Chandra Talukdar*, for the Plaintiff Appellant.—There was no defect in law in the frame of my suit. Though I am one of the four administrators of the estate, and the other three have not joined me as plaintiffs in the rent suit, there was no defect inasmuch as the other three administrators gave consent and were duly made *pro forma* defendants. So, there ought to be a remand for the adjudication of the next issue as to the amount of rent payable by defendant No. 1, which remains undecided. The suit by me was legally maintainable and should not have been dismissed by the lower Appellate Court.

JUDGMENT.—This appeal arises out of a suit for rent. It was decreed by the first Court, but dismissed by the lower Appellate Court on the ground that the plaintiff, who was one of the four administrators to the estate of Moulvi Khabir-ud-din, could not maintain the suit in the absence of the other three persons who joined him in taking out the Letters of Administration. In our opinion, any defect which could have arisen from the absence of the other three persons was cured by making them *pro forma* defendants and by their giving consent in their capacity as *pro forma* defendants to the plaintiff continuing the suit.

We accordingly reverse the judgment and decree of the lower Appellate Court and remand the case for a decision on the second issue that arose before the lower Appellate Court as to the amount of rent payable by defendant No. 1. After hearing the case on this point, the lower Appellate Court will finally dispose of the appeal according to law. Costs of this appeal will abide the result

As we have held that the appeal lies in this case, the connected Rule is discharged as being unnecessary.

Appeal allowed;
Case remanded.

KANSHI RAM *v.* RAO BALDEO SINGH.

PUNJAB CHIEF COURT.

CIVIL APPEAL No. 3055 OF 1918.

March 26, 1919.

Present:—Sir Henry Rattigan, KT., Chief Judge.

KANSHI RAM—VENDEE—DEFENDANT—APPELLANT

versus

RAO BALDEO SINGH—PLAINTIFF, TULSI RAM—VENDOR—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit without leave to bring fresh suit—Suit, subsequent, based on different allegations, maintainability of.

Plaintiff brought a suit against *C.* and *T.* to recover possession of a house, on the allegation that it had been let to *C.* who had abandoned it and that *T.* was in possession of it as a trespasser. The defendants pleaded that they were the owners of the house The plaintiff obtained permission to withdraw the suit but he was not given leave to bring a fresh suit Subsequently he brought another suit for possession of the same house against *T.* and *K.*, on the ground that after the withdrawal of the first suit he had let the house to *T.* who had abandoned it and had sold it to *K*:

Held, that the previous suit having been withdrawn without leave to bring a fresh suit, the plaintiff was debarred under the provisions of Order XXIII, rule 1, of the Civil Procedure Code from alleging that *T.* was not the owner of the house, and that, therefore, the present suit was not maintainable. [p. 479, col. 2.]

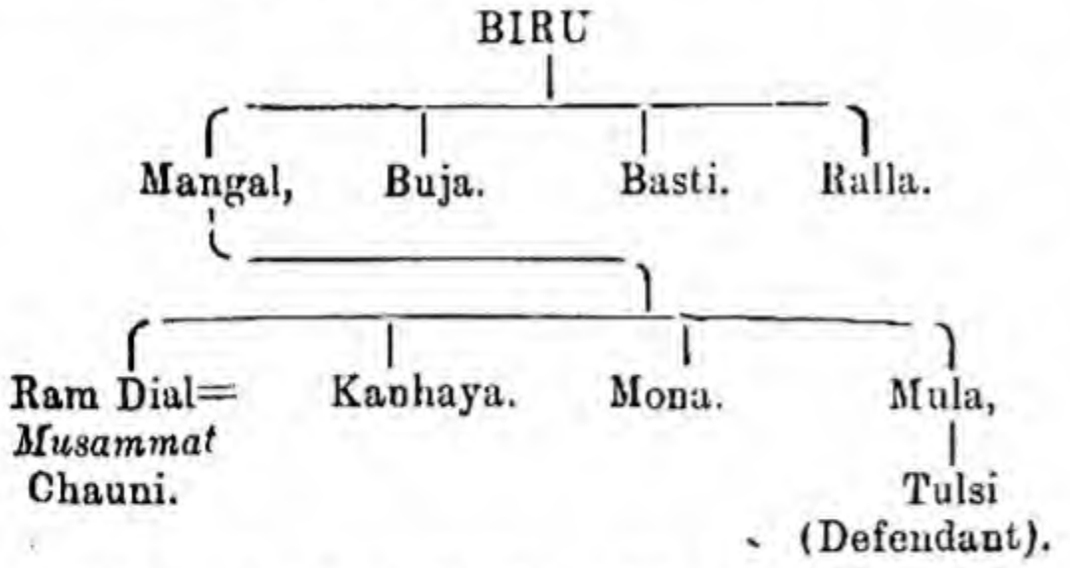
Second appeal from the decree of the Senior Subordinate Judge, 1st Class, Ambala, dated the 29th July 1918.

KANSHI RAM v. BALDEO SINGH.

Pandit *Nanak Chand*, for the Appellant.

Mr. *Sewaram Singh*, for the Plaintiff-Respondent.

JUDGMENT.—The following pedigree-table relating to the family of the defendant Tulsi will help towards a proper understanding of the present case:—



Plaintiff, Rai Baldeo Singh, who is the proprietor of the village of Raipur in the Ambala district, sues, through the Court of Wards as his next friend, for a declaration to the effect that he is the owner of a certain house in the village *abadi*: that the said house was leased by him some 19 years before suit to Tulsi defendant No. 2 for residential purposes; that about a year thereafter Tulsi left the house in the village; that on the 10th March 1916 Tulsi sold the house to Kanshi Ram defendant No. 1; that he was not competent to sell it; and that the sale is not binding upon the plaintiff. Kanshi Ram and Tulsi denied plaintiff's title as owner and pleaded that Tulsi was himself the absolute owner of the house and that the sale was valid and binding. The Munsif found that plaintiff had failed to prove his title to the house and that he had not established his allegation that he had leased it to Tulsi. The Senior Subordinate Judge, after remanding the case for an enquiry on certain points, reversed the decree of the first Court and found that Tulsi had by reason of abandonment lost all rights in the house and that plaintiff as the owner of the village was presumably in possession of the site in question and was, therefore, entitled to the declaration prayed for. Kanshi Ram has preferred a second appeal to this Court and the various points involved have been argued at some length before me.

It appears that in 1896 the present plaintiff brought a suit for possession of the same house, based on very similar allegations, against *Musammat* Chauni the widow of Ram Dial and Tulsi, and that in that suit he claimed that he was the owner of the house; that he had leased it to Mangal, the father-in-law of *Musammat* Chauni; that *Musammat* Chauni after the death of her husband had left the house in the village and had thereby lost all rights in the property and that he was consequently entitled to a decree for possession. *Musammat* Chauni and Tulsi pleaded that the plaintiff was not the owner of the house but that on the contrary they and their ancestors had for a long time past been in proprietary and adverse possession of it and that plaintiff had no right to claim possession. Plaintiff did not proceed with the suit but asked permission to withdraw his claim. This permission was granted but the Court did not, at the time of passing this order, give plaintiff leave to institute a subsequent suit in respect of the same subject-matter. It has been argued before me that Order XXIII, rule 1, Civil Procedure Code, precludes plaintiff from suing now for the declaration claimed by him inasmuch as the allegations in the plaint relate to the same cause of action which he put forward in the previous suit. In answer Mr. Sewaram Singh contends that the present suit is based upon an entirely different cause of action inasmuch as the plaintiff alleges that on a date subsequent to the previous suit the plaintiff leased the house to Tulsi and that Tulsi thereafter abandoned it. I have considered these arguments and my conclusion is that Order XXIII, rule 1, debars plaintiff from alleging against Tulsi any claim founded upon his alleged ownership of the property. The withdrawal of the suit in 1896 must be regarded as a bar to any plea by the plaintiff that Tulsi was not an absolute owner of the house and site in dispute. In the previous case Tulsi in express terms claimed to be the absolute owner, and in view of the result of that case plaintiff must now concede that at that time at all events Tulsi was such absolute owner. It is impossible for plaintiff, therefore, in the present suit to claim that he was the owner of the property in 1898 or 1899 and that Tulsi was merely a tenant holding under him. His whole

suit as at present framed is based on the assumption that he is as much the owner of the site of the house in question as he is of the rest of the village *abadi*, and in my opinion this is a position that he is not entitled to take up.

Of course there is nothing to debar plaintiff from proving that subsequently to the previous suit Tulsi abandoned the house and that he (plaintiff) thereupon took possession of it and has acquired proprietary right therein by adverse possession for more than 12 years. But it is not upon this allegation that his claim is based and there is no evidence to prove that he has actually had such adverse possession in respect of the house. The first Court, for reasons which appear to me sound, came to the conclusion that plaintiff had failed to prove that he had been in possession at all, and this is practically the same conclusion that was arrived at by another Munsif after the remand ordered by the Subordinate Judge. The latter does not find that plaintiff has in fact been in possession of the house or of the site, but concludes that he must be presumed to have been in possession because he is the owner of the site. Obviously upon the view that I take, this presumption cannot arise as it is not open to the plaintiff to claim, as against Tulsi, that he as the proprietor of the village is also the proprietor of the site of this particular house. In my opinion the first Court was right in dismissing the suit and I accordingly accept the appeal and set aside the order and decree of the Senior Subordinate Judge. Plaintiff must pay costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 8 OF 1919.

APPEAL FROM APPELLATE DECREE No. 1239 OF 1918.

July 17, 1919.

Present :—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

Raja PROMADA NATH ROY BAHADUR—PLAINTIFF—APPELLANT

versus

ABDUL MAJID MUNSHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Appeal—Death of party—Legal representatives not brought on record—Appeal, second—Substitution, whether can be effected.

Where in an appeal pending in an Appellate Court one of the parties dies and the appeal is proceeded with without bringing his representatives on to the record, the High Court in second appeal cannot order the substitution, because the question of substitution can only arise where there is a death pending a suit or appeal.

Appeal from the decree of the Sub-Judge, 1st Court, Faridpore, passed in Rent Appeal No. 146 of 1917, dated the 13th February 1918, affirming that of the Additional Munsif, Faridpore, passed in Suit No. 72 of 1917, dated the 12th April 1917.

Babu *Bireswar Bagchi*, for the Petitioner.

Babu *Biraj Mohan Mazumdar*, for the Opposite Party.

JUDGMENT.

SHAMSUL HUDA, J.—This application arises out of a suit for rent. The suit was dismissed by the first Court and the dismissal was upheld on appeal. It appears that the defendant No. 17, Sakina Khatun, died when the case was pending in appeal before the lower Appellate Court and the appeal proceeded without her heirs being substituted. We are asked now in the appeal preferred to this Court to substitute the heirs of Sakina Khatun. It seems to me that the question of substitution can only arise where there is a death pending a suit or appeal. In this case, the death having taken place before the appeal in the lower Appellate Court was decided and not while the appeal was pending in this Court, I do not think we can order the substitution prayed for. The Rule is accordingly discharged. The costs of the minor opposite party represented by the Deputy Registrar having already been paid, we make no order as to costs.

If the applicant has any remedy, he has to make a proper application to the proper Court if so advised.

WALMSLEY, J.—I agree.

Rule discharged.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 14 OF 1915.
February 27, 1915.

Present:—Sir Henry Drake-Brockman, KT., J. C., and Mr. Prideaux, A. J. C.

RAMJI—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 392—Murder and robbery—Evidence—Recent possession of stolen goods—Presumption.

In a case in which murder and robbery form part of one transaction, the recent and unexplained possession of the stolen property by the accused is not only presumptive evidence against him on the charge of robbery but is also evidence against him on the charge of murder. [p. 482, col. 2; p. 483, col. 1.]

Queen-Empress v. *Sami*, 13 M. 426 at p. 432; 1 Weir 290; 4 Ind. Dec. (N. S.) 1009, relied on.

Criminal appeal from the judgment of the Sessions Judge, Chhattisgarh Division, dated the 25th June 1915.

JUDGMENT.—The appellant Ramji Mahar, aged 20 years, has been convicted and sentenced to death for the murder of Bahini Mhalin. The Assessors concurred in thinking his guilt established.

The evidence was fully recorded by the learned Sessions Judge and is exhaustively discussed in his judgment. The appellant at his own request was produced before us, so that we had the advantage of hearing his defence from his own lips. What he wishes us to believe is that Timia Dhimar (P. W. No. 8) was seen to murder Bahini by Bakia the nephew and Damia the son of Ramji Kunbi (P. W. No. 11) and that they gave this out in the village before the Police arrived to investigate. Bakia and Damia will be found mentioned, towards the close of the case-diary for the 23rd October last, in a statement attributed to the appellant, but not as in any way cognizant of the crime. We may say at once that we entirely discredit this story. There is no indication of it in the record of the appellant's examination by the Commissioner, Drug, nor did he tell it to the Sessions Judge. The appellant complains that he was not properly examined by the Sessions Judge, and it must be conceded that the record of that examination is not as full as it should have been. He was, however, defended by a Pleader at the trial—indeed on 2 out of the 3 days for which the trial lasted two Pleaders represented him—yet the lengthy cross-examination of Tima contains no hint that he was, to begin with, accused of the murder, nor were Bakia and Damia cited as witnesses for the defence. To the Committing Magistrate Tima was mentioned by the appellant as bearing him a grudge because he had accused another Dhimar Sonia of making an indecent proposal to his wife. In the grounds of appeal the improper overtures are attributed to Tima himself, and by what is evidently a similar afterthought that person is alleged to have himself murdered Bahini.

It is proved beyond possibility of doubt that Bahini, a girl of 7, was in her parents' house at Mauza Sangam on Thursday the 22nd October up to about 10 A. M., that about 4 P. M. the same day her corpse was found covered with sand in a pit a mile from the *abadi*, and that she had been strangled and all her ornaments removed. The first information was laid at the Bhandara station-house at 9 P. M. by the Kotwar Kisnia (*alias* Pichgia), since deceased, and the Sub-Inspector Chunnilal (P. W. No. 1) reached Sangam at 3 30 A. M. on the 23rd October, being joined by the Circle Inspector (P. W. No. 9) at noon. The appellant was arrested at 3 P. M. and is said to have shortly afterwards given up all except two, a silver *bindla* and a gold nose ring, of the murdered girl's missing ornaments. The *chalan* was prepared on the 24th October and on Monday the 26th idem the appellant was placed before the Committing Magistrate. The investigation was thus completed with exceptional despatch, a circumstance which tells very strongly, if not conclusively, against any theory that evidence was fabricated. We would also observe that the Kotwar Kisnia, who was the appellant's uncle and lived on the same premises as the appellant's father, would in all probability have named Tima as the murderer in the first information had Bakia and Damia denounced him as the appellant now asserts.

Looked at in the light of these considerations, the evidence of Bahini's parents Dina (P. W. No. 4) and Jhega (P. W. No. 5), her sister, Maini (P. W. No. 6) and the little girl Sokri (P. W. No. 7) satisfies us that the appellant seized a favourable opportunity of taking Bahini to the jungle on the pretext of giving her *sitaphal* from the trees of which his

family had a *theka*, and that he turned Jhega back from the jungle on her going thither in search of the child. He was staying for Diwali, then just over, with his father Yeshwantia, whose premises have an entrance opposite to and only a few paces from that of Dina's compound. The Sessions Judge writes that Sokri answered his questions fairly intelligently and that Jhega is a simple woman. Nor is there any suggestion that either Dina or Jhega has anything to gain by falsely accusing the appellant, who indeed appears to have been on friendly terms with the family. The appellant denies that he went to Dina's house at all on the 22nd October, just as he denies that he went with Babini to the jungle and gave up her ornaments. To the Committing Magistrate he said he went to the jungle early that morning to watch the *sitaphal* crop which was already ripe, while in this Court he declared that he must have been back at home at the time the murder seems to have been committed: both of these statements, if true, might surely have been supported by evidence, especially as a next door neighbour would be likely to show himself or be referred to as soon as active inquiry for the missing child began to be made.

With regard to Tima, we think like the Sessions Judge that no sufficient reason for disbelieving him appears. It is not likely that Babini found her way to the jungle alone or that a man and a child going there towards noon would meet or see nobody *en route*. Tima was asked in cross-examination about Sonia, and this is what he said:—

"Sonia Dhimar is my castefellow. He had not made any gestures calling the accused's wife and I had no quarrel with Ramji on that account."

There remains the evidence that after being arrested the appellant undertook to give up the murdered girl's ornaments and did in fact produce all but two from a faggot of hemp-twigs in his father's compound. In this Court the appellant says that the Police searched the compound and so found the ornaments without any help or disclosure from him. In this connection it is essential to bear in mind that the investigation began in the jungle, a mile from the *abadi*, and that the appellant was arrested in the jungle. The Circle Inspector having on the strength of a comparison between the appellant's footprints and those found in the jungle pronounced his guilt clear and undertaken to trace the stolen property in a similar way, the appellant may well have thought further concealment useless. Our experience leads us to believe that such an attitude of mind is common among ignorant criminals confronted with evidence of their guilt on the very scene of their crime. Nor can we find sufficient reason for doubting the testimony of Abdul Rashid (P. W. No. 10), *malguzar* of the neighbouring village Tiddi, to say nothing of Ramji (P. W. No. 11), *mukaddam-gomashta* of Sangam Sub-Inspector Chunnilal (P. W. No. 1) and Circle Inspector Rachpal Singh (P. W. No. 9). No doubt there are discrepancies as to the entrance by which the Police got into Yeshwantia's premises and whether, while still in the jungle, the appellant did or did not mention the faggot of hemp-twigs as the place where the ornaments were concealed. The former may be due to some members of the party entering one way and the rest by the other. As to the latter Ramji is the witness who said that the appellant described the place of concealment before going to the dense, and his memory seems to be hazy on the point, for he said:—

"When the *darogha* came the accused said 'the ornaments are not here, I will give them, they are at home.' There he did not say that the ornaments were kept in the *sankaris*. No he did say there that the ornaments were in the *sankaris*. He said so within the hearing of the *malguzar* of Tiddi."

The ornaments found in Yeshwantia's compound are clearly proved to be Babini's. If they were put there by some one other than the appellant, that other must have been the murderer, and we altogether fail to understand why, when so strong a case had been made out against the appellant he should have sacrificed so large a part of the booty. Having given all the evidence our careful consideration we consider it established beyond reasonable doubt that the appellant is himself the murderer. We do not agree with the Sessions Judge that recent possession of property taken by murder can show no more than that the possessor was either the thief or the dishonest receiver. This is manifestly a case in which murder and robbery formed part of one transaction and in such it has been held that recent

and unexplained possession of the stolen property, while it would be presumptive evidence against a prisoner on the charge of robbery, would similarly be evidence against him on the charge of murder: see *Queen Empress* v. *Sami* (1). The murder was a peculiarly cold-blooded and sordid crime and we find no sort of justification for declining to confirm the sentence of death passed by the Sessions Judge. The appeal is accordingly dismissed.

Appeal dismissed.

(1) 13 M. 426 at p. 432; 1 Weir. 290; 4 Ind. Dec. (N. s.) 1009.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 317 AND 318 OF 1919.

CRIMINAL REVISION PETITIONS NOS. 268 AND 269 OF 1919.

August 1, 1919.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Odgers.

R. PONNAPPA AIYANGAR AND OTHERS —COUNTER PETITIONERS NOS. 1 TO 3— PETITIONERS IN C. R. C. No 317

versus

HIS HOLINESS SRI VANAMAMALAI RAMANUJAR JEER SWAMIGAL OF VANAMAMALAI MUTT, NANGUNERI—PETITIONER IN C. R. C. No. 318.

Criminal Procedure Code (Act V of 1898), ss. 144, 435 – Government of India Act (5 & 6 Geo. V, C. 61), s. 107—Order under s. 144, whether can be revised—High Court, power of interference of, when exercised—Order, construction of—Presumption—Duration of order—Order, whether might be addressed to public generally.

An order under section 144 of the Criminal Procedure Code does not fall within the scope of section 435 of the Code and can only be revised in virtue of the jurisdiction conferred on the High Court by section 107 of the Government of India Act. But it is only in very rare cases that the High Court will interfere under that section, even where there is a question of jurisdiction; if there is no question of jurisdiction, it would interfere only if very great miscarriage of justice would otherwise result. [p. 484, col. 1 p. 488, col. 1.]

In construing a judicial order it is an elementary principle that such construction must, if possible, be adopted as would make the order one in accordance with law, and not an order such as the Court making it had no power to pass [p. 485, col. 1; p 487, col. 2.]

Where, therefore, an order under section 144 of the Criminal Procedure Code specifies no time during which it is to be in force, the reasonable presumption is that the order would operate for two months and not for an indefinite time. [p 485, col. 1; p. 487, col. 2]

Under clause (3) of section 144 of the Criminal Procedure Code an order may be directed to the public generally when frequenting or visiting a particular place, but it cannot be directed to the public indefinitely. An order addressed to "all and sundry" frequenting or visiting a particular temple merely means "all and sundry persons who frequent or visit that temple during the course of the two months next following the order." [p. 485, col. 1; p. 487, col. 2.]

Petitions purporting to be put in under sections 144, 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Magistrate, Tinnevelly, dated the 2nd June 1919, in P. C. No. 383 of 1919.

FACTS appear from the judgment.

Messrs. *T. Rangachariar* and *T. R Ramachandra Aiyar*, for the Petitioners.—The order of the District Magistrate is in contravention of the terms of section 144, Criminal Procedure Code. There is no time limit to the order. Under the section the order can enure only for two months. The order looks more like a permanent injunction.

The order is addressed to "all and sundry" and to Jeers and Swamigals who are not parties to the proceedings. It should be restricted to the public resorting to a certain definite place.

The Magistrate had no power to criticise the judgment of the High Court in *Athan Sadagopa Chariar Swamigal* v. *Eliavalli Srinivasa Chariar* (1) as to the rights to honours and to have enjoined on the observance of the opinion of the Devastanam Committee.

Messrs. *K. Srinivasa Iyengar*, *L. A. Govindaragava Iyer* and *N. S Ramasawmi Iyengar*, for the Counter-Petitioners, and the Public Prosecutor, for the Crown.—The order is one that the Magistrate had jurisdiction to pass. It was besides passed in the interest of public peace. The High Court will only interfere when the order has been passed wholly without jurisdiction or a gross miscarriage of justice has resulted from it.

(1) 19 Ind. Cas. 257; 13 M. L. T. 340; (1913) M, W. N. 239.

PONNAPPA AIYANGAR v. SRI VANAMAMALAI.

The non mention of the time for which the order was to be in force does not vitiate it. It must be presumed that it was to operate for the period for which the Magistrate was legally competent to pass the order.

The direction to "all and sundry" should be understood as referring to all and sundary visiting the particular temple at Alwarthirunagari.

ORDER.

SADASIVA AIYAR, J.—These are two revision petitions, one Criminal Revision Case No. 318 of 1919 presented by the Vanamamalai Jeer, head of the Sri Vanammalai Mutt at Nanguneri, and the other Criminal Revision Case No. 317 of 1919 by three of the seven trustees of the famous temple of Audinatha Swami at Alwar Tirunagari.

The petitions are directed against the order of the District Magistrate of Tinnevelly prohibiting (under section 144 of the Criminal Procedure Code) the petitioners from doing certain acts.

The directions in the order are (*a*) that "*all and sundry* shall follow the conclusion arrived at by the Vishnu Devastanam Committee in their Resolution No. 1 of 1919 in Paragraph 1X (*a*) thereof, (*b*) that no other Jeer Swamigal shall receive honours *other than those paid to ordinary devotees* on any day on which the said resolution lays down that one particular Jeer Swamigal shall receive "special plenary honours," (*c*) that counter-petitioners Nos. 1 to 7 shall not give such honours to any such other Jeer Swamigal.

This order of the District Magistrate was passed on 2nd June 1919. Under clause 5 of section 144, it would cease to remain in force on the 2nd August 1919, that is, to-morrow.

Under section 435, clause (3), Criminal Procedure Code, an order passed under section 144 does not fall within section 435. To revise such an order this Court has to resort, not to the Criminal Procedure Code, but to section 107 of the Government of India Act. I need not say that even where there is a question of jurisdiction, it is only very rarely that this Court interferes under section 107 of the Government of India Act with the order of an inferior Court, whether criminal or civil, and if there is no question of jurisdiction it would interfere only if very great miscarriage of justice would otherwise result. *Palani Chetty* v. *Rathina Chetty* (2).

I do not think it necessary, therefore, to set out the 21 grounds for revision urged in the two revision petitions taken together. Mr. Rangachariar for the Varamamalai Jeer argued the following points:—

(1) The order in question is in the nature of a permanent injunction prohibiting a series of acts or a course of conduct for an indefinite time and in passing such an order, the Magistrate exceeded his jurisdiction.

(2) The order is illegal and without jurisdiction in that it purports to be issued to all and sundry and to Jeers and Swamigals who are not parties to the proceedings and is not restricted to persons or to the public resorting to a certain definite place.

(3) The order is very unjust and contains glaring errors and grave irregularities, (*a*) as it ignores the decision of the High Court in *Athan Sadagopa Chariar Swamigal* v. *Eliavalli Srinivasa Chariar* (1) as to the rights of certain of the parties, (*b*) as it adopts the opinion of the Devastanam Committee which was against the decision of the High Court, the Committee also having no competency to interfere with questions of honours and rituals in the temple or to give directions to the trustees in such matters, and (*c*) as it directs the petitioner to receive even "ordinary" honours along with "ordinary" devotees and not in accordance with the order of the precedence mentioned in the High Court judgment or even in the Committee's proceedings.

As regards ground No. 1 the order of the District Magistrate is not expressly confined to the period of two months from its promulgation and by its reference to the Vishnu Devastanam Committee's Resolution No. 1 of 1919, lends colour to the contention that it (the District Magistrate's order) was intended by the Magistrate to be enforced for an indefinite time just as the Resolution of the Devastanam Committee, Exhibit F, dated 19th January 1919, was passed by it intending that order to be enforced for an indefinite time.

After some hesitation, I think that this objection cannot be allowed to prevail. As

(2) 24 Ind. Cas. 597; 26 M. L. J. 208; (1914) M. W. N. 352; 15 Cr. L. J. 509.

Mr. Justice Mookerjee says in *Ram Nath* v. *Emperor* (3): "It is an elementary principle of construction that where a judicial order is to be interpreted, such construction must, if possible, be adopted as would make the order one in accordance with law and not an order such as the Court making it had no power to pass."* * * * "If no time is specified, the reasonable presumption is that the Court intended to pass an order which it was competent to pass and which would operate for two months, and not to pass an order which would be beyond its statutory powers and consequently void." The District Magistrate's reference to the proceedings of the Devastanam Committee were, it must be admitted, unhappy, but I do not think that he thereby intended to make "all and sundry" follow the conclusions of the Vishnu Devastanam Committee for more than two months, though the Devastanam Committee itself intended the trustees and the Jeers to follow their conclusions for an indefinite time. While making it clear, therefore, that the order would last only for two months and must have been intended by the District Magistrate to last only for two months, I shall reject the first contention of the petitioners.

Coming to the second contention, here again the learned District Magistrate would have done better to have qualified the expression "all and sundry" found in his order. Under clause 3 of section 144, the order may be directed to the public generally when frequenting or visiting a particular place, but it cannot be directed to the public indefinitely. Having regard, however, again to the considerations mentioned by Mookerjee, J., in *Ram Nath* v. *Emperor* (3) already referred to, I do not think that I would be straining the language of the Magistrate's order (having regard to its context) if I hold that he meant by the words "all and sundry" to convey merely "all and sundry persons who frequent or visit the Audinathaswami Temple at Alwarthirunagari during the course of the two months next following his order." I, therefore, overrule this second contention also.

Lastly, I shall say a few words as regards the third and last contention. This contention attacks the justice, legality and propriety of the District Magistrate's conclusions. This is, of course, not a ground for interference under section 107 of the Government of India Act save in very exceptional cases. I am not inclined to treat this as an exceptional case, as I have no sympathy with any one claiming so-called honours in a temple of God. The District Magistrate speaks of "honours shown at the hands of deity of the temple" and it is also usual to speak of such "honours." In this case, not only is the expression "honours" used but also the expression "special plenary honours". That favours to be received from the Omnipotent out of His Grace should be spoken of and litigated as "honours" and "rights" shows how the very high spiritual ideas have been brought down and degraded to the lowest material depths. In fact, to claim or receive "honours" in the house of God is one of the 32 serious sins (like entertaining angry or envious feelings in the temple of God which a person who enters a temple should avoid scrupulously, as pointed out by the great Sridhara Swami in his commentaries on the Srimat Baghavatham and as laid down also in the Puranas and the Sastras). Fortunately "honours" as such have been held not to be the proper subject-matter of a civil suit, and I am not going to enter into such questions elaborately in this criminal case rather or in the case involving the *quasi* administrative action of the District Magistrate responsible for the peace of the District. Further, the so-called "honours" are claimed principally on behalf of the person who, though now popularly acknowledged to belong to the fourth order of Sanyasis, ought to have, according to the true definition and characteristic of Sanyasi, give up all claims not only to properties but also to "honours" though, of course, it is the duty of secular men to show honour to real Sanyasis (see the 13th Chapter of the 7th Skandam, Slokas 1 to 10, and Chapter 18 of the 11th Skandam, Slokas 15 to 25, as to the duties and actions of real Sanyasis). However, Matathipathis who are trustees of large properties, who hanker after the increase of Sishyas (which a Sanyasi of the old kind ought not to do according to the Shastras),

(3) 34 C. 897 at p. 901; 6 C. L. J. 186; 11 C. W. N. 942; 6 Cr. L. J. 194 (F. B.); 2 M. L. T. 474.

who ride on palanquins and are accompanied by large pomp and ceremony and claim "honours" have now come under the modern signification of the term "Sanyasi." I do not think, however, that this Court is, therefore, bound to consider the so-called rights of such Sanyasis to receive honours in temples as of such very great importance as to justify the employment of its time in deciding such rights, unless it is bound to do so, as sometimes unfortunately happens in civil suits.

As the questions considered by the District Magistrate are, however, likely to arise again owing to the incurable litigiousness and fantical spirit of some of the parties to these proceedings, I think it desirable to say a few words for the future guidance of the Magistracy.

The learned District Magistrate, as I said already, might have made his order more clear as regards the time, place and individuals to be affected by his order.

He should also not have accepted the Devastanam Committee's views as if they were views of a body competent to regulate the internal management of festivals in the temple. The scope of the powers of a Committee has been defined in *Sundararama Sastri* v. *Anantha Krishna Naidu* (4), and some of the members of the Vishnu Devastanam Committee seem to have gone out of their way to exercise their subtle legal ingenuity for laying down rules as to the conduct of trustees in the internal management of the temple festivals. They had no jurisdiction to do so. The Committee and even the District Magistrate have further attempted the useless task of deciding whether the finding of the High Court on the admissions made and arguments advanced before them, namely, that the petitioner Vanamamalai Jeer has precedence as regards the receipt of Theertham over the 9th counter-petitioner, the Emperumannar Jeer, could be supported by the evidence in that case. That finding is binding as between the petitioner and the 9th counter-petitioner and neither the officious Temple Committee nor the learned District Magistrate could with propriety have gone behind that finding. The learned District Magistrate would have done well if he had not referred to the Committee's opinion of the respective rights of the petitioner and the 7th counter petitioner and if he had accepted the finding of the High Court. If, of course, he considered that the enforcement of the petitioner's right even as found by the High Court against the 9th counter-petitioner was likely to create a breach of the peace at the ensuing festival, he might be (as a matter of emergency and if he had not the necessary Police force or other means of enforcing the petitioner's rights) entitled to pass an order prohibiting temporarily the exercise of such rights.

In paragraphs 23 and 30 of the annexure to his order, the District Magistrate was inclined to doubt the powers of the Committee to interfere with the discretion of the trustees and he also concedes that the appointment of two trustees by the Committee in addition to the already existing five trustees (in order to create a majority of trustees willing to obey the Committee) may have been a clever move on their part. Three out of the 5 Committee members wanted to destroy the powers of the three out of the five trustees of the temple and so by a bare majority they appointed two more trustees in order that 4 out of 7 trustees might support the Committee, or rather the bare majority of the Committee.

Lastly, the order is a little ambiguous as to whether even ordinary honours should be received by the petitioner and other Jeers only along with or like the ordinary devotees on the festival day in which a particular Jeer Swamigal has to receive "special plenary honours." If it means that it is opposed to the judgment, of the High Court and even to the contentions of all the parties before us. The precedence, so far as Theertham is concerned, must be observed according to *mamool* and so far as the petitioner and the 9th counter petitioner are concerned, their respective rights of precedence according to *mamool* have been fixed by the High Court in its judgment in *Athan Sadagopa Chariar Swamigal* v. *Eliavalli Srinivasa Chariar* (1). Whether "ordinary honours" include, so far as the petitioner is concerned, Arulippadu, Idukku Tholasi, Parivattam and Malai (besides the Theertham to which is usually attached only the ordinary Tholasi and Parivattam) is a

(4) 38 Ind. Cas. 695; 5 L. W. 672 at p. 679.

question which I do not propose to consider. But that Theertham should be given to him in precedence over the 9th counter-petitioner and over ordinary Sanyasis and over ordinary devotees is clear from the judgment of the High Court, and this should be kept in mind by the Magistracy on future occasions. With these remarks I dismiss these petitions.

OLDFIELD, J.—These are two revision petitions presented respectively by three of the Trustees of the Audhinathaswami Temple and by the Vanamamalai Jeer Swamigal of Nanguneri. They seek to set aside the order issued by the District Magistrate of Tinnevelly on 2nd June 1919 under section 144, Criminal Procedure Code. The order dated 2nd June 1919 is as follows:—

"Whereas it has been made to appear to me from the various petitions and statements put in before me that such an order or direction is likely to prevent injury to persons lawfully employed, danger to human safety and a disturbance of the public tranquillity owing to the fact that on the occasion of the ensuing Vaikasi festival in the Audinathaswami Temple at Alwarthirunagari, certain Madathipathies (Jeer Swamigals) intend to be present at the same time and on the same days and are clearly in dispute themselves and their adherents regarding the honours which should be shown to them at the hands of the deity of that temple, I hereby order and direct under section 144, Criminal Procedure Code, that "all and sundry" shall follow the conclusions arrived at by the Vishnu Devastanam Committee in their Resolution No. 1 of 1919 in paragraph 9 (*a*) thereof.

"And especially do I prohibit any other Jeer Swamigal from receiving or attempting to receive honours other than those paid to ordinary devotees on any day or days on which the said Resolution lays down that one particular Jeer Swamigal shall receive 'special plenary honours' and prohibit counter-petitioners Nos. 1 to 7 from giving or attempting to give such honours to any such other Jeer Swamigal."

The objections taken to it are:—1. That there is no time limit and the order is, therefore, a permanent injunction.

2. It is addressed to "all and sundry" and it is not directed to a particular individual or to the public in general when frequenting or visiting a public place.

3. The order traverses the decision of the High Court as to the rights of the Jeers *inter se*.

4. It supports the Committee as against the High Court's decision.

5. It directs the petitioner (*inter alia*) to receive only honours paid to ordinary devotees on any day other than those in which he is entitled to "special plenary honours." This again is in contravention of the decision of the High Court in the case referred to.

With regard to (1) above, though an order in the nature of a perpetual injunction is unlawful, *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* (5), it has been held that such an order need not state that its operation is confined to two months, nor is it bad unless there is something to show that it was intended to remain in force for more than two months: *Ram Nath* v. *Emperor* (3). As pointed out by Mookerjee, J., in this case, the presumption must be that the Court intends to pass such an order as it might pass legally. It is further to be noted that the order in question contains the words "on the occasion of the ensuing Vaikasi festival in the Audinathaswami Temple at Alwarthirunagari." I, therefore, think that the first contention fails and that the order is not bad for being in the nature of a perpetual injunction. Though the order is in terms addressed to "all and sundry" I think, read in their context, these words are really addressed to the public frequenting a particular place at a particular time, *i.e.*, attending the Audinathaswami Temple on the occasion of Vikasi festival. 3 and 4.—The privileges and order of precedence among some of the competing Jeers at these festivals were decided by the High Court in Appeals Nos. 105, 70 and 106 of 1919; see *Athan Sadagopa Chariar Swamigal* v. *Elangavalli Srinivasa Chariar* (1). The learned District Magistrate has annexed to his order a long statement in which he analyses the judgment of this Court and directs that a certain resolution of the Temple Committee shall be obeyed. It is

(5) 5 C. 7; 4 C. L. R. 309 (F. B.); 2 Shome L. R. 217; 2 Ind. Dec. (N. S.) 617.

objected by the petitioners that this resolution contravenes the judgment of this Court and has been passed by a packed majority of the Committee.

With regard to other grounds, I have had the benefit of reading my learned brother's judgment and I have nothing to add to his remarks on these points. I agree that it is extremely unfortunate, to say the least of it, that the learned District Magistrate allowed himself to be led into a discussion of the High Court's judgment in a case of this sort.

If the learned District Magistrate means that the Jeers, if they attend on ordinary days, (*i. e.*, days on which they are not entitled to special honours) are entitled only to honours received by the ordinary members of the congregation, he is clearly wrong as the Theerthams and the order of their distribution is settled, so far as the petitioners are concerned, by the judgment in the High Court appeals.

The learned District Magistrate was, therefore, again unfortunate in the expression "ordinary devotees" as it is admitted by all parties before us that it cannot mean what it says with reference to the Jeers.

I am, therefore, of opinion that it cannot be said that the order in question was passed without jurisdiction, nor am I prepared to hold that the fact that the learned District Magistrate was led into the examination of the judgment of this Court and from that to enjoin obedience to the Committee's resolution would invalidate the order. It cannot, in my opinion, be said that the order was passed without jurisdiction, and the Court will usually decline to interfere unless the Magistrate has acted without jurisdiction [*Kamal Kutty* v. *Udayavarma Raja* (6)] or there has been a gross miscarriage of justice [*Palani Chetty* v. *Rathina Chetty* (2)]. It has been contended that any such injustice has in fact resulted from the order, which will lapse automatically at the end of this week, *viz.*, on the 2nd August. I, therefore, concur with the order proposed by my learned brother and would dismiss both petitions.

Petitions dismissed.

M. C. P.

(6) 17 Ind. Cas. 65; 36 M. 275 at p 286; 12 M. L. T. 439; 23 M. L. J. 499; 13 Cr. L. J. 753; (1912) M. W. N. 1154.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 54 OF 1917.

May 3, 1917.

Present—Mr. Mittra, A. J. C.

MAHARAJ SINGH—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 147—Criminal Procedure Code (Act V of 1898), ss. 106 (3), 423 (1) (b), 537—Rioting—Charge not specifying common object of unlawful assembly—Prejudice to accused, absence of—Irregularity—Security to keep peace, whether enhancement of sentence.

An accused person is entitled to know what he is being charged with. [p. 489, col. 1.]

Where a person is constructively made liable for the acts of another under section 147, Indian Penal Code, it is especially necessary to set out in the charge the common object of the assembly. But if the absence of particulars regarding the common object does not prejudice the accused in their defence, the irregularity would be cured by section 537 of the Criminal Procedure Code, and the High Court will not interfere. [p. 489, col. 1.]

Behari Mahton v. *Queen-Empress*, 11 C. 106; 5 Ind. Dec. (N. s) 829, relied on.

In dealing with a case under section 147, Penal Code, an Appellate Court is expressly empowered to pass an order under section 106 (3) of the Criminal Procedure Code requiring security to keep the peace from the appellants. The making of such an order does not amount to enhancing the sentence. [p. 489, col. 2.]

Criminal revision against the judgment, dated 10th March 1917, of the Sessions Judge, Raipur.

Mr. *S. Y. Deshmukh*, for the Applicant.

ORDER.—This is an application by Maharaj Singh for revision of a sentence passed under section 147 of the Indian Penal Code and upheld on appeal by the Sessions Judge, Chhattisgarh Division. The first point urged before me is that the conviction is bad inasmuch as the charge did not set out the common object of the unlawful assembly. According to the findings arrived at by the Courts below, the common object was to assault the complainant Baliram for reasons which are given in those judgments. The learned Sessions Judge has rightly held that the absence of particulars regarding the common object did not prejudice the accused in their defence. In other words, they knew from the prosecution evidence what was being made out against them. The finding is that Maharaj Singh was the ring-leader of the party opposed to the com-

plainant and took an actual part in the riot by ordering the accused to beat the complainant. There are three other petitions before me, and I may mention that none of these people have been, in any way, prejudiced in their defence. They also seem to be active participants in the assault and not merely persons present at an unlawful assembly.

The cases cited before me can be distinguished easily. *Behari Mahton* v. *Queen-Empress* (1) lays down a sound rule that an accused person is entitled to know clearly what he is being charged with, and where a person is constructively made liable for the acts of another, it is especially necessary to set out in the charge the common object of the assembly. I am prepared to concede that there are cases and there may be cases where an accused person is seriously prejudiced if the charge is defective. In the present case, however, nothing of the kind has happened. *Sabir* v. *Queen-Empress* (2) is a case of a trial by Jury, and it was held that where a Sessions Judge in his charge to the Jury referred to two possible common objects of an unlawful assembly, one of which only had been set out in the charge, it was impossible to say which view had been accepted by the Jury. The case cannot apply here where there was no trial by Jury. Lastly *Poresh Nath Sircar* v. *Emperor* (3) is relied upon for the applicant. The facts of the case were somewhat peculiar. The petitioners before the High Court had been already put in possession of some land in certain proceedings under section 145 of the Criminal Procedure Code, and it was not clear whether the dispute related according to the charge to the land so put in possession or to the land excluded from the order of the Magistrate. I hold that section 537 cures the irregularity. It is urged that the accused should not have been called upon to pay costs for recalling prosecution witnesses for examination. This is admitted by the learned Sessions Judge to be correct, but he points out, the reason for giving up Dukalu was not the demand for costs, but the fact that several attempts were made to have him summoned and he could not be got. This is a complete answer to this ground.

It is urged that the learned Sessions Judge has practically enhanced the sentence by passing an order under section 106 (3) of the Criminal Procedure Code requiring security to keep the peace from the applicants. No authority in support of this view has been cited nor do I know of any. It is a power expressly conferred on an Appellate Court. On the merits of the order, I can find no ground for interference, especially as the security has been furnished as I understand.

On the merits of the case the learned Sessions Judge has very carefully gone into the evidence and has arrived at conclusions which are unassailable in revision. The application is, therefore, dismissed.

Application dismissed.

(1) 11 C. 106; 5 Ind. Dec. (N. S.) 829.
(2) 22 C. 276; 11 Ind. Dec. (N. S.) 185.
(3) 33 C. 396; 2 C. L. J. 516; 3 Cr. L. J. 153.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 134 OF 1919.
August 19, 1919.
Present:—Mr. Justice Kumaraswami Sastri.
ANGAPPA MUDALI AND OTHERS—PETITIONERS
versus
RAMAPURAM PERUMAL CHETTY AND ANOTHER—COUNTER-PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 133, 135, 138, 139—"Magistrate" in s. 139 (1), meaning of—Jury, appointment of—Verdict—Disposal of case by Second Class Magistrate after verdict, transfer for—Jurisdiction of First Class Magistrate appointing Jury.

The words "the Magistrate" in section 139 (1), Criminal Procedure Code, refer to the Magistrate to whom application has to be made under section 135 (*b*) to empanel a Jury and who, under section 138 of the Code, does so empanel one. [p. 490, col. 2.]

A Magistrate who sends a notice under section 133 of the Criminal Procedure Code and directs a party to appear before another Magistrate is alone competent to deal with the matter on receiving the verdict of the Jury empanelled under section 138 and cannot transfer it for disposal by a Second Class Magistrate. [p. 490, col. 1.]

ANAGAPPA MUDALI *v.* RAMAPORAM PERUMAL CHETTY.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional First Class Magistrate, Sankari, dated the 21st February 1919, in Miscellaneous Case No. 9 of 1919.

Dr. *S. Swaminathan*, for the Petitioners.

The Public Prosecutor and Mr. *T. M. Krishnaswami Aiyar*, for the Counter-Petitioners

ORDER.—The First Class Magistrate of Sankari passed orders under section 133, Criminal Procedure Code, directing the counter petitioners not to work a cotton ginning factory during nights or to appear before the Second Class Magistrate, Trichengode, on the 25th March 1918 and move to have the order set aside or modified.

The counter petitioners applied under section 135 to the First Class Magistrate to appoint a Jury, and a Jury was empanelled under section 138 who sent their verdict to the Magistrate. The records were then sent by the First Class Magistrate to the Second Class Magistrate for disposal. The petitioners objected to the order on the ground that the Second Class Magistrate had no jurisdiction to deal with the matter after the verdict of the Jury, but their objection was overruled. Hence this revision petition.

The question for decision is whether a Magistrate who sends a notice under section 133 and directs a party to appear before another Magistrate is competent to deal with the matter on receiving the verdict of the Jury empanelled under section 138. The case is one of first impression and agreeing with the contention of the Public Prosecutor, I am of opinion that the First Class Magistrate has jurisdiction.

Section 135 enables a party to obey the order or either to show cause or to apply to the Magistrate *by whom the order was passed* to appoint a Jury to try whether the order is reasonable and proper. Section 138 empowers the Magistrate who passed the order to empanel a Jury and he is given power to fix a date for the return of their verdict and to extend the time so granted. Form 17 of Schedule V of the Code requires that the verdict should be sent to the Magistrate who passed the order, and not to the Magistrate before whom the Magistrate passing the order directs the counter-petitioner to show cause under clause (1) of section 133.

Section 139 enacts that if the Jury or the majority of the Jurors finds that the order of the Magistrate was reasonable and proper or subjects it to a modification which the Magistrate accepts, the Magistrate shall make the order absolute. In other cases the proceedings are to be dropped.

Reading these sections, it seems to me that in all cases when the counter petitioner elects to leave the matter to the decision of a Jury, the case has to be disposed of by the Magistrate who passed the order under section 133.

If the effect of passing an order directing the counter petitioner to show cause before some other Magistrate is to transfer all further proceedings to such Magistrate and to divest the Magistrate who passed the order of all jurisdiction, it is difficult to see why the application under section 135, clause (*b*), or the duty of empanelling a Jury under section 138 should be cast on the Magistrate who passed the order or why the verdict should be submitted to him and not to the other Magistrate.

It has been argued for the counter-petitioners that the duty of appointing Jurors is so important that the Legislature did not want it to be performed by a Second Class Magistrate. but it should be observed that under section 133 the accused may be directed to show cause before another First Class Magistrate and that no exception is made in such cases. It is also difficult to see how the act of calling together a Jury is more important than the decision as to whether the verdict of the Jury is proper or the acceptance of any modification by them. If the latter duties can be performed by the Second Class Magistrate, there is no reason why he should not empanel the Jury whose verdict he has power to dispose of.

I am of opinion that the words "the Magistrate" in section 139, clause (1), refer to the Magistrate to whom application has to be made under section 135, clause (*b*), to empanel a Jury and who under section 138 does so.

I set aside the order of the lower Court and direct that the application be disposed of according to law.

Order set aside.

M. C. P.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 23 OF 1917.

March 30, 1917.

Present:—Mr. Stanyon, A. J. C.

RAISINGH CHAMAR—COMPLAINANT—APPLICANT

versus

PATIA CHAMAR—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 259—Warrant case—Charge framed—Complainant, absence of—Dismissal and acquittal, legality of.

It is no part of a complainant's duty to call any witness for cross-examination or any other purpose of the defence once a charge is framed, and section 259 of the Criminal Procedure Code gives no power to the Court to dismiss a warrant case in default after a charge has been framed.

An acquittal cannot be based on a dismissal in default.

Criminal revision on a report by the Sessions Judge, Raipur, against order, dated the 10th November 1916, passed by the Sub-Divisional Magistrate, Mungeli, Bilaspur District, in Criminal Case No. 89 of 1916.

ORDER.—This case has been reported by the Sessions Judge. One Rai Singh prosecuted one Patia under section 497, Indian Penal Code, in the Court of the Sub-Divisional Magistrate of Mungeli in the Bilaspur District. Process was issued against the accused on the 3rd October 1916, and on the 23rd of the same month, having taken all the evidence for the prosecution the Magistrate framed a charge against the accused, and fixed the 10th November 1916 for hearing the defence. On this day the order sheet sets out the procedure of the Magistrate in these words:—

"The complainant appeared before me 15 minutes ago and went away from the Court saying he would fetch his Pleader without caring to obtain my permission to do so. I will wait 10 minutes more.

(Sd.) N. K. HARDAS.

The complainant has not turned up though I waited for him sufficiently long. It has been found that the complainant did not take steps to recall his witnesses for being cross-examined. This default is fatal to the prosecution. The case is, therefore, dismissed and the accused acquitted.

(Sd). N. K. HARDAS,
Sub-Divisional Magistrate."

It is disappointing to find a Sub-Divisional Magistrate falling into childish errors of the kind here disclosed. It was no part of the complainant's duty to call any witness for cross-examination or any other purpose of the defence once the charge was framed. Section 259 of the Criminal Procedure Code gives no power to dismiss a warrant case in default after a charge has been framed. Nor does it need any citation of the authorities referred to by the learned Sessions Judge to perceive that an acquittal cannot be based on a dismissal in default.

The order dismissing the case is set aside, and the Magistrate concerned, or his successor or other Magistrate appointed by the District Magistrate is directed to resume the case from the point at which the above illegal order stopped it, subject to the provisions of section 350, Criminal Procedure Code, and to dispose of the same according to law.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 633 OF 1918.

(CASE REFERRED No. 56 OF 1918.)

April 7, 1919.

Present:—Mr. Justice Abdur Rahim.

In re KAVATHAM PATTURAJU AND OTHERS—ACCUSED Nos. 1 TO 10.

Criminal Procedure Code (Act V of 1898), ss. 112, 113, 115, 117, 118—Proceedings under s. 112 not drawn up—Service on accused, failure of, effect of—Order under s. 118, validity of.

The fact that no proceedings are drawn up under section 112 of the Criminal Procedure Code at the time summonses are issued, and, therefore, no copy thereof is served under section 115 of the Code upon the accused, would not invalidate an order passed under section 118 of the Code, if, before the passing of such order, the proceedings required by section 112 are drawn up in the presence of the accused and are read out and explained to him, and due inquiry is held. [p. 492, cols. 1 & 2.]

Case referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by the District Magistrate, Guntur, in his letter dated the 19th September 1918.

EMPEROR *v.* SETH JIWANDAS.

ORDER.—Two questions arise upon this reference of the District Magistrate of Guntur, firstly, is the order passed under section 118 of the Criminal Procedure Code liable to be set aside, as no proceeding drawn up according to section 112 of the Criminal Procedure Code was served on the accused persons along with the summons, as laid down in section 115 of the Criminal Procedure Code? What happened was the Sub-Divisional Magistrate first issued summonses and when the accused were present in Court, he drew up proceedings as required by section 112 of the Criminal Procedure Code and read them out and explained them to the accused. Then he fixed the case for the next day for hearing the evidence. The question is whether the fact that no proceedings had been drawn up at the time the summonses were issued and, therefore, no copy of the proceedings required under section 112 served under section 115, is sufficient to invalidate the order subsequently passed after due enquiry. The learned District Magistrate relies upon a ruling of Subrahmania Ayyar, J., in *Subba Naicken, In re* (1). No doubt there is a passage in that judgment to this effect: "The requisition contained in section 112 of the Criminal Procedure Code with reference to the notice being accompanied by a copy of the order has not been complied with, and so far as I can judge from the record, it does not appear that any order was made prior to issuing the notice. This itself would, in my opinion, invalidate the whole proceeding. But there are still other defects." Then the learned Judge points out that there was no enquiry held as required by the Code and set aside the order requiring security. It does not appear whether in the case in *Subba Naicken, In re* (1) any proceeding in accordance with section 112 was drawn up. In this case there was a proceeding properly drawn up when the accused were brought into Court, and the order was then and there read out to them and the substance thereof was explained to them. Section 113 provides that if a person in respect of whom such order (meaning an order under section 112) is made is present in Court, it shall be read over to him or, if he so desires, the substance thereof shall be explained to him. I do not then see why there should be any difference in the validity of the order by reason of the fact that the person against whom proceedings under section 112 were drawn up and to whom they were read out and explained under section 113 had been brought into Court on summons issued under the provisions of this Chapter (Chapter VIII). What was done in this case could not be said to be altogether unwarranted by the Code because section 183 provides for it. I think, therefore, that this case can be distinguished from that reported as *Subla Naicken, In re* (1).

The District Magistrate also points out that a number of persons were joined in the enquiry. According to the evidence they were jointly concerned in the matter which gave rise to the proceedings. That being so, clause 4 of section 117, Criminal Procedure Code, authorised the Magistrate to hold an enquiry into the cases of all those persons together. There is no sufficient reason, therefore, for setting aside the order under section 118 in this case.

M. C. P.

Reference answered in the negative.

(1) 17 M. L. J. 436; 6 Cr. L. J. 332.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 63 OF 1917.

May 14, 1917.

Present:—Mr. Prideaux, A. J. C.

EMPEROR—APPLICANT

versus

R. B. SETH JIWANDAS—ACCUSED—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 439—Revision—Interlocutory orders, interference with—High Court, powers of.

The High Court can interfere in revision with interlocutory orders, but the power must be exercised with great care and only in most exceptional cases. [p. 493, cols 1 & 2.]

Chandi Pershad v. *Abdur Rahman*, 22 C. 131; 11 Ind. Dec. (N. S.) 89, *Jagat Chandra Mozumdar* v. *Queen-Empress*, 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103, *Kuppusami Aiyar, In re*, 29 Ind. Cas. 109; 2 L. W. 463; 17 M. L. T. 398; (1915) M. W. N. 365; 16 Cr. L. J. 477; 39 M. 561; 28 M. L. J. 505, *Queen-Empress* v. *Negesh Appa Pai*, 20 B. 543; 10 Ind. Dec. (N. S.) 927, *Hari Charan Gorai* v. *Srish Chandra Sudhukhan*, 7 Ind. Cas. 747; 11 Cr. L. J. 525; 13 C. L. J. 43; 38 C. 68, *Inamulla* v. *King-Emperor*, A. W. N. (1905) 238; 2 Cr. L. J. 790; 2 A. L. J. 673, followed.

EMPEROR v. SETH JIWANDAS.

It is inadvisable to interfere in a pending case unless there is some manifest and patent injustice apparent from the face of the proceedings and calling for prompt redress. [p. 493, col. 2.]

Criminal revision on report by the Sessions Judge, Jubbulpur, under section 438, Criminal Procedure Code, of order, dated the 15th March 1917, of Magistrate, First Class, Jubbulpur.

The Hon'ble Sir *B. K. Bose*, Messrs. *M. Gupta* and *M. K. Gowalkar*, for the Non-Applicant.

ORDER.—This case has been reported by the Sessions Judge, Jubbulpore, under section 438 of the Code of Criminal Procedure and the applicant has been allowed to appear in support of the reference. The accused, Rao Bahadur Seth Jiwandas, is under trial on a complaint laid under the sanction of the Municipal President by one Ilahibux, Sanitary Sub-Inspector. He is accused of contravening a bye-law framed under section 105 (*j*) of the Municipal Act. The particular bye law said to have been broken is No. 2 of those confirmed by the Hon'ble the Chief Commissioner in his Notification No. 3155 of the 13th March 1905. Jiwandas is accused of allowing some sixty persons to occupy the servants quarter's in bungalow No. 31, now being rebuilt, in contravention of the bye-law that "such quarters shall only be occupied by *bona fide* servants of the occupier of the bungalow and the families of such servants." Objections were taken in the Magistrate's Court that the Sanitary Sub Inspector had no power under the Municipal Law to lodge the complaint and that the bye law in question was *ultra vires*. On these being disallowed, Jiwandas applied to the Sessions Judge for revision with the result that the case has been reported on the ground that the proceedings are bad because instituted by a person without authority. The Sessions Judge also holds that the bye law is *ultra vires* if passed under section 105 (*j*) of the Municipal Act, though possibly it might have been framed under section 105 (*s*) of that Act.

There is no doubt that this Court can interfere with interlocutory orders: see *Chandi Pershad* v. *Abdur Rahman* (1), *Jagat Chandra Mozumdar* v. *Queen-Empress* (2), *Kuppusami Aiyar, In re* (3), *Queen-Empress* v. *Nageshappa Pai* (4) and *Hari Charan Gorai* v. *Srish Chandra Sadhukhan* (5). But the power is to be exercised with great care and only in most exceptional cases: *Inamulla* v. *King-Emperor* (6), and it is inadvisable to interfere "in a pending case unless there is some manifest and patent injustice apparent from the face of the proceedings and calling for prompt redress:" *Jagat Chandra Mozumdar* v. *Queen-Empress* (2). It seems to me that the present is not a case for interference at an intermediate stage. The applicant has, beside the two legal questions, raised other defences, namely, that the bye law, which is supposed to have been infringed and under which the complaint is lodged, has no application to the facts and circumstances of the case and that as there is no bungalow now in existence to which the buildings mentioned in the complaint could be said to have been attached as servants' houses, they are not servants' quarters. He denies that the buildings were crowded and states that they had only been occupied by the Sub-Registrar with his family and his own servants. It is further contended that the prosecution is not *bona fide* but in retaliation for the accused having complained against the misuse of the Raja Gokuldas Dharamsala by Municipal servants.

The defence evidence is yet to be recorded and until that is recorded, it is impossible to say whether the case will result in a conviction. The accused has been allowed to appear by Pleader except on the day on which he was examined. He is, therefore, being put to no personal inconvenience and as the punishment for the offence he is accused of is but a fine of Rs. 50, it is not as if there is any danger of his going to jail in place of paying it. It cannot be said that in the present case delay will be injurious.

(1) 22 C. 131; 11 Ind. Dec. (N. S.) 89.

(2) 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103.

(3) 29 Ind. Cas. 109; 2 L. W. 463; 17 M. L. T. 398; (1915) M. W. N. 365; 16 Cr. L. J. 477; 39 M. 561; 28 M. L. J. 505.

(4) 20 B. 543; 10 Ind. Dec. (N. S.) 927.

(5) 7 Ind. Cas. 747; 11 Cr. L. J. 525; 13 C. L. J. 43 38 C. 68.

(6) 2 A. L. J. 673; A. W. N. (1905) 238; 2 Cr. L. J. 790.

HUBDAR KHAN *v.* SAJJAD ALI KHAN.

Whether the Sanitary Sub Inspector had not power to file the complaint is a matter that can well await the conclusion of the trial and though the question whether the bye law is *ultra vires* is doubtless one of great importance, I do not see why the Municipal Committee should be put to the expense of showing in this Court that it is valid until the question is raised by a person who has been convicted under it.

The case is one which, in my opinion, should not have been reported and I decline to interfere at this stage of the trial. The record to be returned.

Record returned.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 347 OF 1919.

June 23, 1919.

Present:—Mr. Lyle, A. J. C, and Mr. Ashworth, A. J. C.

HUBDAR KHAN—APPLICANT

versus

SAJJAD ALI KHAN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (7) —Court of Subordinate Judge, whether subordinate to District Judge.

The Court of the Subordinate Judge must, for the purposes of section 195 of the Code of Criminal Procedure, be held to be subordinate only to the Court of the District Judge.

The Hon'ble Mr. *Wazir Hasan*, for the Applicant.

Mr. *J. N. Ohak*, for the Opposite Party.

JUDGMENT.—This is an application under section 195 of the Code of Criminal Procedure for sanction to prosecute one Sajjad Ali Khan for an offence under section 193 of the Indian Penal Code. The application has been made in respect of certain evidence given by the said Sajjad Ali Khan in Civil Suit No. 65 of 1914, which was decided by the Subordinate Judge of Lucknow on the 9th of April 1915. An appeal against the decree of the Subordinate Judge was preferred to this Court and the case was finally decided by this Court on the 7th of November 1918.

A preliminary objection has been taken that no application for sanction under section 195 of the Code of Criminal Procedure lies to this Court. In our opinion this objection must prevail. Sub section (1) (*b*) of section 195 of the Code of Criminal Procedure provides that no Court shall take cognizance of any offence punishable under section 193 when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction or on the complaint of such Court, or of some other Court to which such Court is subordinate. The proceedings in which or in relation to which the offence under section 193 is alleged to have been committed took place in the Court of the Subordinate Judge, and the question is whether for the purpose of section 195 the Court of the learned Subordinate Judge is subordinate to this Court. Sub section 7 of section 195 provides that "for the purposes of this section every Court shall be deemed to be subordinate *only* to the Court to which appeals from the former Court ordinarily lie, that is to say, (*a*) where such appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate." Appeals from the Court of the Subordinate Judge lie both to the Court of the District Judge and to this Court and it follows, therefore, from the provisions of clause (*a*) of sub section 7 of section 195 that the Court of the Subordinate Judge must, for the purposes of section 195 of the Code of Criminal Procedure, be held to be subordinate only to the Court of the District Judge. The applicant may, if he is so advised, apply for sanction either to the Court of the Subordinate Judge or to the Court of the District Judge. We would, however, note that there has been very serious delay in making the application and that unless such delay can be satisfactorily explained, no sanction should now be given.

This application is rejected. We make no order as to costs.

Application rejected.

ALLAHABAD HIGH COURT.

[CRIMINAL APPEAL No. 368 OF 1919.

May 30, 1919.

Present:—Sir George Knox, KT., Acting Chief Justice, and Mr. Justice Piggott.

GARIB AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss 302, 302, 304—Murder—Assault causing death—Offence.

The accused, two in number, who were incensed against the deceased, committed a brutal assault upon the latter who was defenceless and unarmed, and caused his death:

Held, that the accused were guilty of murder. [p. 496, col. 1.]

Appeal against the order of the Sessions Judge, Basti.

JUDGMENT.—Sheoharakh Kurmi, resident of Kobra, aged 25, and Gharib Kurmi, resident of the same village, aged 40, were placed on their trial before the Sessions Court of Basti on a charge framed under section 304 of the Indian Penal Code. The learned Sessions Judge before trial charged the accused under section 302 of the Indian Penal Code and called upon the accused to plead to the amended charge. The accused pleaded not guilty to the charge. The learned Sessions Judge has gone very carefully into the evidence before him and has delivered what may be called a very well-balanced judgment. The evidence before the learned Judge was so far believed both by him and the Assessors that they came unhesitatingly to the conclusion that the accused, who are now appealing, were partakers in the assault upon Ram Baran. The Assessors give it as their opinion that they were sure that the accused took part in the affray and beat Ram Baran, the accused did not intend to kill Ram Baran, and, therefore, they did not commit murder. The learned Judge in summing up the case in his judgment writes as follows:—"I am prepared to find, upon the evidence as adduced before me in the present trial, without the least hesitation or doubt that the accused and those who have been convicted in the previous trial attacked Ram Baran; that they were already suffering from keen disappointment on his previous conduct; that his very sight at the time of the occurrence in question made them furious beyond limit; that the aggressors had also come determined to rescue their cattle in spite of all opposition and at any cost; and that prone to commit acts of violence in the above mental state, they brutally beat the deceased who was at the time without means of defence and totally helpless, the whole affair being altogether one sided in aggressiveness as well as cruelty." In order to understand the above remarks it is necessary to remember that two other persons, who according to the evidence joined in this assault upon Ram Baran, were tried by a Judge who preceded the present Judge as Sessions Judge of Basti. They had been committed to his Court charged with an offence under section 304 of the Indian Penal Code. They were found guilty of the offence with which they were charged and sentenced to rigorous imprisonment for seven years each. They appealed to this Court and this Court dismissed the appeal. The accused in this case have been defended by a very learned Counsel of this Court, who took as his line of argument that either the evidence now on record was the same as that which had been recorded in the previous case and the conviction upheld was conviction for an offence under section 304 of the Indian Penal Code, or that the evidence had been so altered as to make the case now put before the Court amount to a case of wilful murder, We are not referred to any difference in the evidence then given and the evidence now given. The evidence shows, so far as the present accused are concerned, that the two accused either themselves, or with others joining them, committed an assault upon a man who was defenceless and unarmed. The nature of the assault can at once be seen from the medical evidence. The officer who conducted the *post mortem* found four marks on the body of the deceased and on removing the skull-cap a firm and thick piece of clotted blood was found pressing on the brain from the left temporal region to the left side of the brain above durameter. The brain was found quite pressed on the side where it was struck and the fracture continued to the petrous portion of the left temporal bone and on the middle part of the base of the brain. He gave it as his opinion that the deceased died from compression of brain as the result of the fracture of the skull, which was probably caused by some blunt weapon, probably a *lathi*. The person or persons

who committed this act must have known that it was so eminently dangerous that it must in all probability cause death or such bodily injury as was likely to cause death. It was open to the accused (now appellants) to show that this act of theirs was not murder but came under one of the provisos to section 300 of the Indian Penal Code. They made no attempt to do this. On the contrary, they said that they were not guilty of murder and that they were not present when the murder was committed. This being so, the learned Sessions Judge was very right in finding the appellants guilty of wilful murder, and it is well that there should be Sessions Judges who in the present day are able to take this right and proper view of the law. In many cases it has come within our experience that the tendency has been the other way and so far as the present case is concerned, we are unable to alter either the conviction or the sentence passed by the learned Sessions Judge.

But the case is undoubtedly open to this anomaly that out of four persons, who so far as we can gather from the evidence committed or took part in the same act, two have been sentenced, as in the present case, to transportation for life and two have been sentenced to rigorous imprisonment for seven years each. The case might well be brought before the Local Government who, if they consider it proper, can take action and remove the inequalities in sentence which have taken place.

The appeals are dismissed. The case will be entered in the record of the Sessions Judge as having been very properly and carefully decided.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 199 OF 1919.

July 14, 1919.

Present:—Mr. Justice Das.

NATHU THAKUR MARWARI AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 239—Bengal Public Gambling Act (II B. C. of 1867), ss. 3, 4—Joint trial—Same transaction—Keeping and frequenting gaming house.

H, Where it is found that a person has opened, kept or used his house as a common gaming house for profit, and that other persons have used that house for the purpose of gambling and have paid charges for the same, a joint trial of all such persons for offences under sections 3 and 4 of the Bengal Public Gambling Act is not illegal, as the offences are committed in the same transaction within the meaning of section 239 of the Criminal Procedure Code.

Criminal revision against the order of the District Magistrate, Manbhum, dated the 24th April 1919, confirming the order of the 2nd Class Magistrate, Manbhum, dated the 21st February 1919.

Mr. *Abani Bhusan Mukharji*, for the Petitioners.

JUDGMENT.—Two points have been urged before me, *first*, that the judgment of the Appellate Court is not in accordance with law, and *secondly*, that the joint trial of the petitioners was illegal.

On the first point I am unable to agree with the learned Vakil that the judgment is not in accordance with law. So far as the second point is concerned, I am of opinion that the offences of which the petitioners were charged were committed in the same transaction and that consequently the joint trial was not illegal.

Nathu Thakur has been convicted under section 3 of the Gambling Act (II of 1867 B. C.) and the other accused have been convicted under section 4 of that Act, and the argument is that the offences committed by them cannot be said to have been committed in the same transaction. Therefore the problem for my consideratian is, what is the meaning of the words "same transaction" in section 239 of the Criminal Procedure Code. In the case of *Gujja Lal* v. *Fatteh Lal* (1), Garth, C. J. said: "A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons." It seems to me that there is a dealing "transacted" between Nathu Ram, who has been found to have opened, kept or used his house as a common gaming house for profit, and the other petitioners, who have used that house for the purpose of gambling and who have paid Nathu Ram his charges for the same. I am of opinion, therefore, that the joint trial of the petitioners was not illegal and that the application fails and must be refused.

Application refused.

(1) 6 C. 171 at p. 186 (F. B.); 6 C. L. R. 439; 3 Shome L. R. 132; 3 Ind. Dec. (N. S.) 112.

RALU *v.* PHALLA.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2006 OF 1918.

March 31, 1919.

Present :—Mr. Justice Scott Smith.

RALU—PLAINTIFF—APPELLANT

versus

PHALLA—DEFENDANT—RESPONDENT.

Compromise—Consideration—Forbearance to sue, whether good consideration—Bona fide *cause of action.*

In order that a forbearance to sue should amount to a consideration for a compromise, some liability must be shown to exist, or to be reasonably supposed to exist, by the parties. If one of the parties to the compromise has no case and knows that he has none, the compromise would not be held binding. [p. 498, col. 1.]

Second appeal from the decree of the Additional District Judge, Hoshiarpur at Jullundur, dated the 10th January 1918.

Mr. *Fakir Chand*, for the Appellant.

Mr. *Badr-ud-Din*, for the Respondent.

JUDGMENT.—A preliminary objection is raised on behalf of the respondent to the effect that the appeal is barred by time. It appears that the parties were not present when the judgment was pronounced by the lower Appellate Court on the 10th January 1918, but a *parwana* intimating the result of the appeal was sent to the Munsif of Una on the 18th January. The District Judge's letter, which has been received in answer to an inquiry by this Court, shows that the *parwana* was not received back by the lower Appellate Court and, therefore, it is impossible to say whether the Munsif communicated the result of the appeal to the parties or not. The appellant has filed an affidavit to the effect that he only received the intimation of the result of the appeal one week before he filed the appeal in this Court. No counter-affidavit is put in by the other side and I am, therefore, of opinion that sufficient cause has been shown for entertaining the present appeal.

The facts of this case appear sufficiently from the judgment of Mr. Kennaway, District Judge, Hoshiarpur, dated the 23rd February 1917, whereby he remanded the case for fresh trial to the first Court. Briefly the facts are that Ralu, plaintiff-appellant, by a registered sale-deed, dated the 10th August 1912, sold his mortgage rights in three plots of land to Phalla, defendant respondent. Phalla re-transferred his rights in one of the plots to Gangu. Subsequently a dispute arose between Ralu and Phalla and the mutation was rejected, as Ralu said that there was no consideration for the sale. Subsequently Ralu and Phalla made a compromise and on the 12th June 1915 mutations were sanctioned giving effect to the compromise, by which the transfer of the plot to Gangu was confirmed and the remaining two plots were shared half and half by Ralu and Phalla. In the present suit Ralu seeks to avoid the transfer entered in those mutations and asks for possession of the whole of plot No. 3 and half of the other two plots on the ground that there was no consideration for the sale or for the compromise. The first Court held that there was no consideration for the original sale which was entered into to defraud the vendor's creditors and that as the vendee acquired no rights under the sale which was void for want of consideration, the compromise was also without consideration and could not be held to be binding. It accordingly decreed the plaintiff's claim. The District Judge said that he was prepared to agree with the lower Court's findings to the effect that the sale was without consideration, though in the latter part of his judgment he says that the passing of consideration is doubtful. There is, however, no contention before me that consideration for the sale passed and I may, therefore, proceed on the assumption that there is a concurrent finding of fact that the sale was without consideration. The District Judge at the same time was of opinion that consideration for the compromise consisted in relinquishment by the defendant, Phalla, of part of his rights in the land, to which rights he was entitled *qua* Rlau by virtue of his original sale deed. He goes on to say that Phalla forbore to exercise his rights, whatever they were, given him by that deed, which rights he was then entitled to urge in a Court and had urged in the first Court and in that Court, and compromising with respondent and Gangu, accepted something less than those rights. This, in the District Judge's opinion, constituted consideration *qua* plaintiff. He quoted the dictum, "A forbearance to sue, even for a short time, is consideration for a promise, although there is not waiver or compromise of the right of action." He accordingly accepted the appeal and dismissed the plaintiff's suit.

Plaintiff has preferred a second appeal to this Court, and it is contended that if there was no consideration for the original sale the

defendant acquired no rights thereby and, therefore there was no consideration for the compromise. The first Court has quoted authority in support of the proposition that in order that forbearance should be a consideration, some liability must be shown to exist, or to be reasonably supposed to exist, by the parties. It says that if one of the parties to the compromise has no case (and Phalla had none, as his sale-deed was without consideration), and knows that he has none (as Phalla knew), the agreement to compromise would not be held binding. See the remarks of Cockburn, C. J., in *Callisher* v. *Bischoffsheim* (1). In my opinion the view of the law put forward by the Subordinate Judge is correct. If Phalla had no rights and knew he had none under the deed of sale (and he had none, for it is found that the deed was without consideration), then he had no right to sue and his forbearance to sue amounted to nothing at all. Ralu in fact received no consideration for agreeing to the compromise, which is not binding on him.

I accept the appeal and setting aside the order of the lower Appellate Court decree plaintiff's suit for the land claimed, so far as it is in the possession of Phalla. Gangu has not been made a party to this appeal and, therefore, no decree can be passed against him. Phalla will pay costs to Ralu throughout.

Appeal accepted.

(1) (1870) 5 Q. B. 449 at p. 452; 39 L. J. Q. B. 181; 18 W. R. 1127.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 826 OF 1918.

April 11, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

YELLAVAJHULA SURAYYA—PLAINTIFF—APPELLANT

versus

YELLAVAJHULA SUBBAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Blindness—Rule of exclusion from inheritance on ground of blindness, whether obsolete—Tests for determining, whether rule has become obsolete—Reversioner, whether can sue for declaration as to limited nature of widow's estate—Will conferring absolute title and power to adopt on widow—Specific Relief Act (I of 1877), s. 42.

The rule of Hindu Law which prevents a person born blind from claiming interest along with his brothers as a co-owner in ancestral properties has become obsolete and cannot be enforced. [p. 512, col. 1.]

(Authorities considered.)

A mere contingent Hindu reversioner is entitled to sue, under section 42 of the Specific Relief Act, for a declaration as to the limited nature of the widow's title to her husband's properties where there is a Will giving absolute rights to the widow. It is not necessary, to found a cause of action under the section, that the widow should actively set up her title. The setting up by the widow of an authority to adopt, however, is not sufficient to found a cause of action for the reversioner.

Sheoparsan Singh v. *Ramnadan Prashad Narayan Singh*, 33 Ind. Cas. 914; 43 C. 694; 14 A. L. J. 466; 20 C. W. N. 738; 18 Bom. L. R. 397; 23 C. L. J. 621; (1916) 1 M. W. N. 419; 20 M. L. T. 1; 3 L. W. 544; 31 M. L. T. 77; 43 I. A. 91 (P. C.), distinguished.

Per *Sadasiva Aiyar, J.*—The exclusion of a blind man from inheritance was not based on his incapacity to perform Vedic ceremonies. [p. 508, col. 1.]

A rule becomes obsolete owing to change of time and circumstances, and the strict rules in the older Smritis have to be relaxed in this Kaliyuga owing to such changes. [p. 509, col. 1.]

If a rule of law has become obsolete, a Judge is not prevented from laying down the law as it exists merely because the obsolete rule is socially unjust and his decision negativing the old rule would also promote social reform and justice. As regards questions of Hindu Law, extreme conservatism is not to be commended so long as the Legislature is slow to move in the direction of recognising that customs have become obsolete or do require alterations. [p. 511, cols. 1 & 2.]

Per *Napier, J.*—In archaic conditions of life a blind man could not take his share in cultivation and in the protection of the family. It was, therefore, not unnatural that he should be excluded from a share in the property. In modern days, however, owing to improved methods of education there is nothing to prevent a person born blind from being taught how to transact business and to take his proper share in the responsibility of family affairs, and there is, therefore, no reason why such a disqualification should still continue. [p. 515, col. 1.]

Second appeal against the decree of the District Court, Kistna, in Appeal Suit No. 21 of 1917, preferred against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in Original Suit No. 22 of 1915.

This second appeal came on for hearing on the 23rd, 24th and 31st January and 14th, 18th and 19th February 1919.

FACTS.—*A* and *B* were two brothers of whom *A* was born blind. But it was proved that *A* was treated throughout as if *A* had no disqualification. Properties were acquired jointly in the name of *A* and *B* or in the name of *A* alone. *A* admittedly managed the properties even during *B*'s life and for more than 12 years after *B*'s death. *A* was

also well versed in the Puranas and Vedas and was earning as a Purohit. At his death *A* made a Will whereby he authorised *B*'s widow (the 1st defendant) to adopt and gave her full powers over the properties. The main question was whether the Will was operative, *A* having been born blind. The other questions were whether subsequent conduct amounted to estoppel and whether *A* had acquired rights by prescription. The suit was by plaintiff as reversioner for a declaration that the Will was inoperative. So there was another question whether such a declaration could be granted.

Mr. *P. R. Ganapathy Aiyar* for Mr. *V. Ramdoss*, for the Plaintiff-Appellant.—It is a uniform rule deducible from all the texts that blindness bars a man from inheriting. Manu (Chapter IX, 201, 202) refers to persons "born blind" as disqualified. Yajnavalkya, Chapter II, 140, 144; Colebrooke's Mitakshara, Chapter II, section 10; Smriti Chandrika, Chapter V (where all these texts are quoted). Saraswati Vilasa follows Smriti Chandrika.

[SADASIVA AIYAR, J.—Many of these texts do not refer specifically to blindness as a disqualification.]

Manu and others refer to it specifically and one or other of them is quoted with approval in all the subsequent texts. The enumeration is not exhaustive. Thus see the words "any" or "other" 'incurable disease."

[SADASIVA AIYAR, J.—Suppose a man is born blind but gets cured of it later on will the disqualification to inherit continue?]

It may not. But if the property has already been divided, vested rights can't be divested. But the present case stands on a different footing.

[SADASIVA AIYAR, J.—If the blind man begets a son, the law says that he can get his father's share.]

Yes, he can. That is distinctly provided for.

[SADASIVA AIYAR, J.—If a blind man can marry and beget children and even work and earn, what is the principle on which he is to be held to be prevented from taking a share?]

The texts say so. It may be that the disqualification is the punishment for the sins of a former birth, and that is the possible clue to why he is not allowed to share.

[SADASIVA AIYAR, J.—Suppose a man is outcasted, he is excluded from sharing, according to the texts. But he is not.]

Act XXI of 1850 is the special law. Hindu Law is put out.

Coming to decided cases, the Courts have uniformly held that blindness or congenital blindness is a bar. *Vallabhram Shivnarayan* v. *Bai Hariganga* (1), *Murarji Gokuldas* v. *Parvatibai* (2), where blindness supervenes; *Ananta* v. *Ramabai* (3), *Mohesh Chunder Roy* v. *Chunder Mohun Roy* (4). In *Krishna* v. *Sami* (5) there is a difference of view as regards divesting on the subsequent cessation of disqualification. But the bar is admitted. The same rule prevails also in cases of dumbness; *Charu Chunder Pal* v. *Nobo Sundari Dasi* (6), *Bapuji Lakshman* v. *Pandurang* (7) (where the disqualified man's son born after partition was not allowed to come in). See as to idiots and lunatics *Futtick Chunder Chatterjee* v. *Juggut Mohinee Dabee* (8), *Dwarkanath Byrack* v. *Denobundoo Mullick* (9), *Ram Sahye Bhukkut* v. *Lalla Laljee Sahye* (10), *Ram Soonder Roy* v. *Ram Sahye Bhugut* (11), *Ran Bijai Bahadur Singh* v. *Jagatpal Singh* (12). In *Venkata Subba Rao* v. *Purushottam* (13) non-congenital blindness was held to be no bar. See also *Velanayaga Mudaliaar* v. *Vedammal* (14), *Kayarohana Pathan* v. *Subbaraya Thevan* (15). The Privy Council have throughout laid down the same view. *Ramanand Kuar* v. *Raghunath Kuar* (16),

(1) 4 B. H. C. R. A. C. J. 135
(2) 1 B. 177; 1 Ind. Dec. (N. S.) 118.
(3) 1 B. 554; 1 Ind. Dec. (N. S.) 367.
(4) 23 W. R. 78.
(5) 9 M. 64 (F. B.); 3 Ind. Dec. (N. S.) 441.
(6) 18 C. 327; 9 Ind. Dec. (N. S.) 219.
(7) 6 B. 616; 7 Ind. Jur. 38; 3 Ind Dec. (N. S.) 966.
(8) 22 W. R. 348.
(9) 9 B. L. R. 198; 18 W. R. 305.
(10) 5 C. 149; 9 C. L. R. 457; 6 Ind. Jur. 306; 4 Ind Dec. (N. S.) 95.
(11) 8 C. 919; 7 Ind. Jur. 85; 4 Ind. Dec. (N. S.) 593.
(12) 18 C. 111 (P. C.); 17 I. A. 173: 5 Sar. P C. J. 590; Rafique & Jackson's P. C. No. 120; 9 Ind. Dec. (N. S.) 74.
(13) 26 M. 133; 12 M. L. J. 262.
(14) 27 M. 591.
(15) 19 Ind. Cas. 690; 38 M. 250; 25 M. L. J. 251; 13 M. L. T. 460; (1913) M. W. N. 642.
(16) 9 I. A. 41; 8 C. 769 (P. C.); 11 C. L. R. 149; 6 Ind. Jur. 328; Rafique and Jacksons P. C. J. 316; 4 Ind. Dec (N. S.) 496.

Sheo Singh Rai v. *Dakho* (17), *Durga Bakhsh Singh* v. *Muhammad Ali Beg* (18), and *Gunjeshwar Kunwar* v. *Durga Prashad Singh* (19). The last is a case of congenital blindness.

The law having thus been uniformly laid down, it is not open to the Courts to probe further and upset the law. See *Minakshi* v. *Ramanada* (20) as to functions of the judiciary. Therefore, the other questions in the case do not arise.

Mr. *Ramesam*, for Defendant No. 1.—The question of exclusion has no place in this case. The blind man has been admittedly in enjoyment throughout.

The texts nowhere say that a blind man can in no case be or become a co-parcener. They are too uncertain and vague to be relied on. Hindu Law is not the law of the books except so far as what is already adopted by Courts, as to which there is no use contending against. But the present question has not yet been set at rest by judicial decisions. So I submit that the texts should not be allowed to stand in the way of coming to a correct decision.

Again, what the texts intend is only protection of the disqualified man. If he is able to take care of himself, why should he not? This is not a case of bare maintenance. Every need of his is satisfied, *e.g.*, pilgrimage, marriage, ceremonies as regards children, doctor's fees for sickness and whatever is required for every ordinary man. Because he can't, by reason of natural disability, do these himself, the texts enjoin them upon the more blessed in the family as a burden and a duty. (Here the texts were dealt with in detail.) See Baudhayana, XIV, MaxMuller, pages 224, 230. The words used is Nirindriya * * * * *. It literally means only "devoid of sufficient strength." Some texts say "devoid of good qualities" and "those who are incapable of supporting themselves."

[NAPIER, J.—The texts nowhere say who the Judge is to be.]

Because the primary idea is only protection and never exclusion. Reference was made to Max Muller's Series, Volume II, Apasthamba, page 132; Volume V, Gauthama, page 306; Volume VII, Vishnu, page 64; Volume XIV Vasishta, page 89, Baudhayana, pages 224, 230, Volume XXXIII, Narada, page 194, Brihaspatti, pages 369, 376; Ghose's Hindu Law, Volume II, pages 350, 353; Smriti Chandrika (where Katyayana, Samkha Likhita and Devala are quoted), pages 15—16; Viswarupa; Mitakshara, page 263, Apararka; Saraswati Vilasa; Vyavahara Nirnaya and Parasara Madhaviya.

All these texts, no doubt, refer to the loss of a right, which at least does not negative the existence of the right to share.

The texts do not contain the living Hindu Law. They are obsolete (*e.g.*, the double share in cases of self-acquisitions). The decisions do not deny the right but say if the right is lost by reason of the disqualification what the disqualification ought to be according to the texts. See Sudder Decision 1857, page 210 (supervening leprosy no bar); *Muthuvelayuda Pillay* v. *Parasakthi* (21), followed in *Rangayya Chetti* v. *Thanikachalla Mudali* (22). In *Venkata Subba Rao* v. *Purushottam* (13) Bhashyam Ayyangar, J., clearly holds the texts to be obsolete. See also *Vedanayaga Mudaliar* v. *Vedammal* (14); Bhattacharya (Tagore Law Lectures), page 426 (1885); S. D. (1855), page 118; *Krishna* v. *Sami* (5); 5 Selected Decision (Mac. and Suth.); *Kalka Pershad* v. *Budree Sah* (23), *Gunjeshwar Kunwar* v. *Durga Prashad Singh* (19).

On the facts of the case the blind man was at no time treated as a disqualified person. He has acquired and held property in his name and jointly with his brother.

[SADASIVA AIYAR, J.—But if he can't inherit, he cannot be a member of a joint Hindu family.]

But he has been treated as such. And that has been held to be sufficient. See *Kedar Nath* v. *Ratan Singh* (24). If the

(17) 5 I. A. 87; 1 A. 688; 2 C. L. R. 193; 3 Sar. P. C. J. 807; 3 Suth. P. C. J. 529; 2 Ind. Jur. 396; 1 Ind. Dec. (N. S.) 48 (P. C.).

(18) 31 I. A. 235; 7 C. C. 287; 8 Sar. P. C. J. 725; 27 A. 1 (P. C.).

(19) 42 Ind. Cas. 849; 45 C. 17; 34 M. L. J. 1; 22 M. L. T. 403; 22 C. W. N. 74; 26 C. L. J. 557; 16 A. L. J. 1; 20 Bom. L. R. 38; (1918) M. W. N. 16; 7 L. W. 94; 4 P. L. W. 1 (P. C.); 44 I. A. 229.

(20) 11 M. 49 (F. B.); 11 Ind. Jur. 449; 4 Ind. Dec. (N. S.) 35.

(21) Mad. Sud. Dec (1860) p. 239.

(22) 19 M. 74; 6 Ind. Dec. (N. S.) 757.

(23) 3 N. W. P. H. C. R. 267 at p. 270

(24) 7 Ind. Cas. 648; 32 A. 415; 14 C. W. N. 995; (1910) 1 M. W. N. 311; 8 M. L. T. 193; 12 C. L. J. 225; 12 Bom. L. R. 656; 13 C. C. 332; 20 M. L. J. 900; 37 I. A. 161 (P. C.).

present suit had been brought by the deceased brother (*B*) in his life, he would have been estopped. The same estoppel binds the reversioners, who claim through him. See also Mitakshara, Chapter II, plac. 6, and *Gandla Pedda Naganna* v. *Sivanappa* (25). A gift to the blind man could have been validly made. The co-parceners could agree by a registered instrument to include the blind man as a full co-parcener and that would be valid.

In the present case the blind man has been in possession for over the statutory period and has perfected a title by prescription.

The suit for a bare declaration is not maintainable. Any reversioner cannot sue. See *Saudagar Singh* v. *Pardip Narayan Singh* (26), *Sheoparsan Singh* v. *Ramnandan Prashad Narayan Singh* (27), *Gangadhara Ramarao* v. *Surya Rao* (28), *Gunjeshwar Kunwar* v. *Durga Prashad Singh* (19), *Janki Ammal* v. *Narayanasami Aiyar* (29). Granting a declaration is in the discretion of the Court, *Jaipal Kunwar* v. *Indar Bahadur Singh* (30), *Parthi Pal Kunwar* v. *Guman Kunwar* (31).

Mr. *Ganapathy Aiyar*, in reply.—Prescription connotes intention to prescribe for an absolute estate or limited estate. He can't prescribe for a co-parcener's estate for the law forbids him from becoming a co-parcener.

[SADASIVA AIYAR, J.—But it may be by agreement.]

Then there is no question of prescription. See also *Lala Muddun Gopal Lal* v. *Khikhinda Koer* (32) and section 28, Limitation Act. *Kedar Nath* v. *Ratan Singh* (24) does not apply because this is not a case of family arrangement.

Declaration can be granted whenever the plaintiff's title will be clouded. See *Gangadhara Ramarao* v. *Surya Rao* (28) and *Saudagar Singh* v. *Pardip Narayan Singh* (26).

Exclusion on the ground of congenital blindness is based on well-defined principles.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. The material facts found are: The 1st defendant's husband Chinna Sambayya had two undivided brothers, namely, P. Sambayya and G. Sambayya. P. Sambayya was the eldest, G. Sambaya was the second brother, and the 1st defendant's husband C. Sambayya was the youngest. P. Sambayya died issueless about the year 1877. G. Sambayya, who was born blind about 1847, had, however, been invested with the sacred thread (the parties being Brahmins by birth) as if he had no such disability and lived in commensality with his younger brother C. Sambayya in undivided family communion after the death of the eldest bother P. Sambayya. G. Sambayya died in December 1911 when he was about 65 years old. His younger brother C. Sambayya, the 1st defendant's husband, had predeceased him in November 1906, leaving his widow the 1st defendant as his heir. Soon after the 1st defendant's husband's death on the 19th January 1907, the blind Brahmin G. Sambayya executed the Will, Exhibit VII, as follows: "I am now 60 years old. I am born blind. Your husband is my undivided brother. I am unmarried. My younger brother has no male issue. He left only two daughters. * * *. I execute this Will in a sound and disposing state of mind so as to make my entire property devolve on you after my death *with powers of alienation by gift and sale.* * *. For the continuation of the line, *you are authorised to adopt any boy whom you please whenever you desire.* If you do not desire to adopt, you should have the right of alienation by gift and sale, as you please, in respect of the entire pro-

(25) 26 Ind. Cas. 232; 33 M. 1162; 13 M. L. T. 310; 27 M. L. J. 520.

(26) 43 Ind. Cas. 484; 45 C. 510; 34 M. L. J. 67; 4 P. L. W. 52; 23 M. L. T. 31; 16 A. L. J. 61; 7 L. W. 145; 27 C. L. J. 186; 22 C. W. N. 436; (1918) M. W. N. 323; 20 Bom. L. R. 509; 45 I. A. 21 (P. C.).

(27) 33 Ind. Cas. 914; 43 C. 694; 14 A. L. J. 436; 20 C. W. N. 738; 18 Bom. L. R. 397; 21 C. L. J. 621; (1916) 1 M. W. N. 419; 20 M. L. T. 1; 3 L. W. 514; 31 M. L. J. 77; 43 I. A. 91 (P. C.).

(28) 49 Ind. Cas. 835; 36 M. L. J. 169; 9 L. W. 329; 25 M. L. T. 184; 42 M. 219.

(29) 37 Ind. Cas. 161; 39 M. 634; 31 M. L. J. 225; 20 M. L. T. 168; 14 A. L. J. 997; (1916) 2 M. W. N. 198; 20 C. W. N. 1323; 18 Bom. L. R. 853; 24 C. L. J. 303; 4 L. W. 530; 43 I. A. 207 (P. C.).

(30) 26 A. 233 (P. C.); 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 435; 14 M. L. J. 149; 8 Sar. P. C. J. 625; 7 O. C. 239.

(31) 17 C. 933 (P. C.); 17 I. A. 107; 5 Sar. P. C. J. 539; Rafique & Jackson's P. C. No. 113; 5 Ind. Dec. (N. S.) 1167.

(32) 18 C. 341 at 346 (P. C.); 18 I. A. 9; 15 Ind. Jur. 93; 5 Sar. P. C. J. 676; 9 Ind. Dec. (N. S.) 228.

perty mentioned herein. This Will is to take effect after my death." At the foot of the Will the particulars of the property bequeathed are given and they are said to be in the possession and enjoyment of the testator. One of the houses in Panduvva village is stated to have been purchased by the blind testator in November 1900 and to have remained in his possession.

The testator was 'an active and intelligent man taking part in all family transactions and contributing to the maintenance and improvement of the family.' As a matter of fact, 'he seems to have been entirely managing the family affairs during his lifetime and the 1st defendant's husband was a mere figurehead.' 'As a Vaidic Brahmin he would be officiating at ceremonies and going about for *Sambhavans and Dhakshinas* on marriage and other occasions not only when they took place in his own village but also in adjoining villages. His blindness, far from being a disqualification, was a recommendation to his being paid double the usual *Dhokshinas* paid to other Brahmins. He appears to have been well versed in the Brahminical Puranic and other religious literature,' and appears to have been 'in the habit of expounding them to the villagers. He took part in the cultivation of the lands and he sold lands, purchased lands, incurred debts by mortgaging lands, executed simple debt bonds and discharged them all on behalf of the family.' (See documents beginning in 1881, Exhibit II, and ending with Exhibit XIX, dated 1910). The 1st defendant has been in possession of the properties after the death of her brother-in-law (G. Sambayya) in 1911.

The plaintiff is the undivided agnate cousin of G. Sambayya and of C. Sambayya. He treated the blind man as the surviving full owner of the family properties after the death of the 1st defendant's husband. The plaintiff even got a decree against the blind man in 1910, the liability of the blind man being based on his ownership of his family lands.

The present suit was brought in July 1915 on the following averments:—

(*a*) The blind Sambayya had, according to Hindu Law, no ownership right in the plaint properties. His younger brother, who died in November 1906, was sole owner at his death. His widow, the 1st defendant, in 1906 inherited the properties with a widow's interest.

(*b*) The Will of blind Sambayya of January 1907 in respect of the properties, which did not, as above shown, belong to the blind man, giving the 1st defendant absolute powers of disposal by gift, sale, etc., cannot legally confer on her such powers and she can only have a widow's interest *as her husband's heir* in those properties.

(*c*) The authority to adopt given to her by such Will could not lawfully be given to her by the blind man.

On those averments, the plaintiff prayed for a declaration that the 1st defendant, "save a widow's estate to be enjoyed for life, has acquired no absolute rights of sale, gift, etc., in respect of the schedule properties under the Will alleged to have been executed" by the late G. Sambayya.

The plaintiff does *not* pray in the plaint for setting aside the Will nor does he seek a declaration that the power to adopt given by the Will is invalid. In paragraph 7 of the plaint, he says: "The 1st defendant not having as yet made any adoption in pursuance of the said authority, the plaintiff has *no relief* to seek for in this suit in that behalf."

Both the lower Courts dismissed the plaintiff's suit.

The Subordinate Judge framed six issues. He begins the 5th paragraph of his judgment by referring to issues IV and VI alone. The 6th paragraph professes to consider the first issue alone, and the 7th paragraph the second issue alone. The Vth issue is, "whether the suit is barred;" and I take it that the issue was not pressed by the plaintiff. The second part of the second issue raises the question whether some of the plaint properties were the self-acquisitions of Guddi Sambayya. But there is no express finding on that part of the issue. The third issue states the question of estoppel and though the third issue as such is not referred to in paragraph 7 of the judgment of the Subordinate Judge, I find that paragraph which professes to consider only the second issue, also gives a finding that the plaintiff is estopped by his conduct (in having brought the suit in which the plaint Exhibit XIX was filed and the decree Exhibit XV was passed) from asserting in the present suit that the blind Sambayya was not the sole

owner of the properties by survivorship on the death of Chinna Sambayya On the first issue, the Subordinate Judge held that the rule of exclusion of a born blind man from inheritance along with his brothers, and from co-parcenery with his brothers and from the right of survivorship had become obsolete. On the first part of the second issue, the Subordinate Judge held that by the assertion of joint ownership with his brother and by enjoyment accordingly as managing member, the blind Sambayya had acquired a prescriptive right as joint owner before Chinna Sambayya's death in 1906 (and hence had exclusive title by survivorship at Chinna Sambayya's death).

On the IVth and Vth issues, the Subordinate Judge held that the plaintiff, being merely a contingent reversioner to Chinna Sambayya's estate and having a mere *spes successionis*, had no right to sue for any declaration under section 42 of the Specific Relief Act unless waste or alienation by the widow is alleged and proved and that as no such waste or alienation is alleged in this plaint, the plaintiff was not entitled to maintain the present suit.

On appeal the learned District Judge agreed with the Subordinate Judge on all these points and dismissed the appeal.

The questions, therefore, for consideration in this second appeal are:—

1. Has the rule of Hindu Law which prevents a person born blind from claiming interest along with his brothers as a co owner in ancestral properties become obsolete?

2. Did Guddi Sambayya acquire by prescriptive enjoyment the right in the plaint properties as co-owner with his brother Chinna Sambayya and did he possess such co-ownership right on the date of the death of Chinna Sambayya and could he legally acquire by long enjoyment as co owner such a title?

3. Is the plaintiff estopped by his conduct from denying Guddi Sambayya's title as co-owner and also title as exclusive owner after Chinna Sambayya's death?

4. Is the plaintiff, as a mere contingent reversioner to Chinna Sambayya's estate, not entitled to sue for a mere declaration as to the limited nature of the 1st defendant's title in the plaint properties?

As regards the rule of Hindu Law itself, the most important text is that in Manu Smrithi, Chapter IX, § 201, Manu being recognised as the highest authority on Hindu Law next to the Sruti or Veda: "Eunuchs and outcastes, persons *born* blind or deaf, madmen, idiots, the dumb and 'Nirindriyas' are excluded from a share of the heritage." (I have not translated the word 'Nirindriyas' in the quotation. The English translators following some commentators have translated the word as meaning "such as have lost the use of a limb." I shall later on show that the interpretation and translation are wrong). Yagnavalkya, Chapter II, verse 140, excludes a blind man (*Andha*) and not merely a man *born* blind (*Jatyandha*). He also excludes a *Pangu* (crippled in both legs) and a man incurably diseased (*Avichikitsya Roga*) and adds "*Adyas*" (and the like persons). Verse 141 shows that the personal disqualification of a blind man does not stand in the way of his son sharing the inheritance in his place except in the case of the outcaste's son, who, in Yagnavalkya's days, would himself have been an outcaste. Not only is the son entitled to take his disqualified father's place but the disqualified man himself can re-open the partition (notwithstanding the rule that an estate once vested cannot be divested) if the ground of his disqualification is removed. The Mitakshara says: "If the defect be removed by medicine or other means * * * * the right of participation takes effect by analogy to the case of a son born after separation." The Vyavahara Mayukha says: "If after division, *virility* or the other absent qualification be regained by medicine or other means, the person will receive his share like an after-born son." [See Full Bench decision in *Kalidas Das* v. *Krishan Chandra Das* (33).] I need not consider whether the Mitakshara is right in saying that Yagnavalkya did not mean more than Manu and that he intended to exclude only persons *born blind* and not persons who were anyhow blind at the time of the partition. In *Murarji Gokaldas* v. *Parvatibai* (2) that very learned Judge, Westropp, C. J., (who consulted his equally eminent colleague West, J., before delivering judgment) quotes the text of Manu, 'the chief of the Rishis', and at page 185 he says: "The word 'nirindriya'

(33) 2 B. L. R. 103 (F. B.); 11 W. R. A. O. J. C. 11; 4 Mad. Jur. 296; 1 Ind. Dec. (N. S.) 639.

in that text, which Sir William Jones has rendered 'such as have lost the use of a limb.' Mr. Colebrooke has in his translation of the Mitakshara rendered thus: 'those who have lost a sense (or a limb).' * * * Vachaspati Misra in his Vivada Chintamani commenting on the text of Manu says:— '*Those who have lost the use of a limb* signifies those who have been deprived of *a* hand, *a* leg, or *any other* member of the body. Such persons are not competent to perform ceremonies *relating to the Vedas and Smriti*. They are consequently not entitled to inherit paternal property.'" Then Westropp, C. J., indicates his inclination on the matter thus: "*Even assuming* that Manu meant by 'Nirindriya' to indicate deficiency in a sense, organ, limb, or member * *." I take it that the learned Chief Justice was not prepared to agree with the commentators and translators that Manu used "Nirindriya" in that sense. This fortifies me in my opinion that 'Nirindriya' does not convey that meaning, but another meaning which I will mention later on. Then the learned Judge says, "Nilakanta, in the Mayukha, Chapter IV, section XI, quotes, amongst other texts, that of Manu,.....with this remark: that, as to the words 'have lost a sense (Nirindriya)' they mean 'deprived of the *nose* or the like.' The translator, Mr. Borrodaile (possibly following the Smriti Chandrika, Chapter V, pl. 61), after the word 'nose', adds in a parenthesis 'or smell', *but that is merely* conjectural. * * * * *. It is hardly probable that, if supervening deficiency in the more valuable senses of sight or hearing, or in the organ of speech, or in the reasoning faculty, were not permitted by Manu to work disherison, he regarded a deficiency in the minor senses of taste, touch, and smell as sufficient to produce that effect." At page 189, the learned Judge refers to a text of Brihaspati: "'Manu holds the first rank among legislators, because he has expressed in his code the whole sense of the Veda; no code is approved which contradicts the sense of *any law promulgated by* Manu' * * *. Upon a question as to which the Smritis vary so much as that of disqualification for inheritance, we think that the pre-eminence assigned by Brihaspati to Manu should not be forgotten."

The learned Chief Justice finally concludes that *congenital* blindness alone is a disqualification according to the highest authority (Manu) and as, in that case, the blindness was not congenital the blind testatrix did inherit her husband's estate and the legatees of the blind testatrix accordingly succeeded in the appeal. Of course, the direct point decided in that case was that a person *not congenitally* blind could inherit. The question whether a person congenitally blind could inherit according to the Shastras and even if he could not, whether that rule of the Shastras had become obsolete, was not directly decided though it was unhesitatingly assumed that the rule according to the Shastras was that a person born blind was incapable of sharing the inheritance.

Now comes the question whether that rule is obsolete. I need not say that a rule becomes obsolete when the reason of the rule disappears through change of circumstances and environments in the society which was governed by that rule. Now what is the reason for the exclusion by Manu and other Smriti writers of a born blind man? Manu refers to a man born blind and a man born deaf by the Dwandva Samasic phrase "*Jathyandha Badhirau.*" He classes them along with eunuchs, outcastes, madmen, idiots, dumb and Nirindriyas, but does *not* state that the latter should be such by "birth". In fact, madmen and outcastes need not at all be by birth. It is also impossible to give any plausible reason for giving a share to a man who was incurably idiotic or lunatic on date of partition while refusing it to one who was such from birth. Before going further, I shall at once deal with the meaning of the expression 'Nirindriyas'. The word is clearly taken from the Vedic text, which says that Soma should not be given pure to women as they are Nirindriyas. The text occurs in Taitt: Samhita VI Kanda, V Prapathaka, 8th Anuvaka: "Soma when taken to women did not manifest himself. Then by means of clarified butter they attacked him. By this attack, Soma became destitute of Indriya (virility, strength to breed) and they took this weak Soma for the Patnivat Agni. Hence women are unvirile (Nirindriya) and destitute of inheritance." It will be seen that the text itself was not intended to lay down any rule of inheritance but to lay down that women should not be given pure Soma but Soma

weakened by Ghee (just as the Kshatriya was given Nyagrodha juice instead of Soma and so on). The statement in the Veda is not an injunction about inheritance according to the Memamsa rules of interpretation but is a Nityanuvada (the statement of a known fact or established convention) justifying the real injunction. Baudhayana quotes this text in his Sutra "(*Arhati Stree*) *Na dayam nirindriya Adayascha Striyo Mathayiti Srutheh.*" The meaning is that a woman is not entitled to inherit because a text of the revelation says "females are Nirindriyas and are incompetent to inherit." Here the word "Nirindriyas" can never mean "devoid of sight, hearing, touch, smell or taste or mind," as women generally possess these. Every translator has translated it as meaning that females are devoid of sufficient *strength or prowess or capacity* in their senses. I shall in this connection quote another text of the Sruti found in the Kathopanishad: "*Peethodaka Jagdhatrhah Dugdha doha* '*Nirindriya*', *Anandanamathe Lokah Tan Sa gachati Ta dadat.*" Nachikethas finds fault, in this Upanishad text, with his father who made useless gifts because the gifts were of "*Nirindriya*" cows which had become too old (they were incapable of yielding milk or manure) and were too feeble to take food and drink. In this text "Nirindriya" clearly means (as in the other Vedic text) "wanting in the required vital strength to be indicated by vigour of activity of the five senses of perception and five senses of action and the unifying eleventh sense of mind." It is also to be noted that if 'Nirindriya' in the texts of Manu and Yagnavalkya means "devoid of *any* sense or organ of sense" (including "sense" of action), it will be a tautology as pointed out by Westropp, C. J., because the deaf and the blind had been mentioned just previously. I am also very glad to have some support from Dr. Jolly in this matter. He says (Tagore Lectures of 1883, page 272): "Another difference of opinion, besides the one resting on the varying number of texts quoted in each digest, has been called forth by the philological difficulties besetting the interpretation of some of the terms used in the old texts on exclusion from inheritance. *No other among those terms is so ambiguous as the phrase 'those who are Nirindriya any how'* in a text of Manu (IX, 201), which is quoted in all digests. Occurring as it does, at the close of a list of excluded persons, the word 'Nirindriya' may be supposed to be a general term denoting bodily infirmities or defects of every other kind than those specifically mentioned in the previous list. Thus, in another text of Manu (IX, 18) *the same word 'Nirindriya' is used with reference to women, and means 'destitute of strength.'*" I feel, therefore, no hesitation in saying that 'Nirindriya' means 'devoid of sufficient capacity and vital strength in the organs of sense.' In fact, the exclusion of women from inheritance (except the wife, the daughter and the mother who were afterwards brought as favoured by special texts) has been expressly based on the above text of Veda, which speaks of women being 'Nirindriyas' (and not because they cannot perform Vedic rites as they *are* entitled, at least, to join their husbands in performing such rites). The very name of a woman in Sanskrit is '*Abala*' or 'one without strength.' Barring exceptional amazons and geniuses, women were, till quite recently, known as the "weaker sex" and the "frailer" sex and just as the "right hand" is the strong hand employed in useful activities, (the left hand being merely used as supplemental), so women were to be protected and cherished but prohibited from being entrusted with any responsible work. "Women were regarded under the Teutonic laws as necessarily dependent and the traces of this order of ideas still remain in the English law. The proper guardian was the husband, father, brother or son, the nearest agnate or the king's Court." (The well-known text of the Smritis that a woman is unfit during her whole life period to be independent and that father, husband and sons control her till death may be recalled in this connection.) "(So under the early Roman Law. See Mommsen's History of Rome, Volume 1)" Impotent persons, outcastes, madmen, idiots and the born blind and deaf were persons generally incapable and even *unwilling* to transact business or to manage property, and the exclusion of all these was based clearly on their presumed *incapacity*. There are many other grounds for exclusion from

inheritance mentioned by Manu, Yagnavalkya, Brihaspati, Apasthamba, Narada and Devala. One ground was "affliction with an incurable disease." Two others were "irreligion and being guilty of degrading sins." Manu says in Sloka 214: "All those brothers who are addicted to vice, lose their title to the inheritance." Narada says: "An enemy to his father and one who is addicted to vice take no shares of the inheritance even though they be legitimate." Manu says in Sloka 202: "But it is just that the heir who knows his duty, should give all of them food and raiment for life without stint, according to the best of his power. He who gives them nothing sinks assuredly to a region of punishment." Sloka 202 says: "If the eunuch and the rest should at any time desire to marry, the issue of such as have children, shall be capable of inheriting." That the deaf and the dumb were assumed to be defective in mind also (owing to the best avenues of knowledge being closed to them) till very recent times is, if I may say so, notorious. That eunuchs were as a class content to be slaves obeying their masters' orders provided food and raiment were given to them is also well known, but according to Manu if a eunuch was desirous of marrying and married accordingly and then raised progeny on his wife by another (as was allowed in olden times), his son was entitled to share in the inheritance in his place. The Smrithi Chandrika and the Saraswathi Vilasa have attempted to base the disqualification of heirs on the ground of the disqualified's incapacity to perform religious rites prescribed by Vedas and Smritis. Surely, Sudras were never entitled to perform Vedic ceremonies nor Chandalas and other depressed classes. The laws of inheritance and exclusion from inheritance apply not only to the three castes of Dwijas (entitled to perform Vedic ceremonies) but to all Hindus. It, therefore, seems impossible to base the exclusion on incapacity to perform Vedic ceremonies.

As regards agamic religious practices, surely a blind man is not excluded by the Sastras from singing devotional songs or weaving garlands for temple worship and so on. The man born blind is not necessarily or usually an idiot. Manu has no doubt said in Chapter II, Sloka 99, that even when one among the organs of a Vedic student fails, his divine knowledge passes away as water flows through one hole in a leathern bottle. But blind boys are studying and have studied the Vedas and Sastras (like Dirghatamas of old and the blind Pandit of phenomenal learning and memory of very recent times who a few years ago dictated the *Franava Veda* to the well-known Benares scholar Babu Bhagavan Doss), and in modern days there is no difficulty in teaching the blind to read. In this case itself, Guddi Sambayya was not excluded from Vedic rites or social intercourse or from the management of affairs. Some orthodox commentators excluded persons suffering from elephantiasis, atrophy and marasmus from inheritance, but no Hindu would suggest in these days the exclusion from inheritance of a man suffering from elephantiasis, etc., nor would the Court uphold such a contention. In the same way Apasthamba and Gautama exclude from inheritance sons who acquire wealth by following irregular professions and Devala excludes a hypocrite and an impostor. As Jolly says at page 281: "In a primitive state of society, in which collective forms of property were generally prevalent, a natural reluctance would be felt against recognising a disabled family member out of whom no work could be got as an equal sharer with his capable co parceners. A wide extension of the reasons for exclusion from inheritance is common to several archaic legislations. I will terminate this lecture with a summary of an interesting analogy to these archaic provisions in our law. In the rules of the Sachsenspiegel on this head, as in that old North German law book, the contents of which are closely analogus to the old laws of the Anglo-Saxons, an interesting analogy to these old archaic provisions in our laws is to be found:—

1. Outcastes, illegitimate children, monks and nuns, one who has killed his father or other relative, whose presumptive heir he is, or who has forcibly dispossessed him, or robbed him of his property; these persons are entirely incapable of inheriting.

2. Dwarfs, helpless cripples, persons of neutral sex, and lepers are equally disqualified, but their next-of kin have the duty of maintaining them.

3. The deaf, the dumb, the blind and the lame, as well as those who have no hands or feet, may inherit ordinary property, but they cannot succeed to any feudal estate.

The analogy of these rules with the corresponding provisions of the Indian Law is self-evident."

Further, even in old times the blind and lame men were not incompetent to perform religious works. Apararka, the well known commentator on the Mitakshara, says at page 264: "Though there is incompetence to perform religious works of the Patita, *there is no such incompetence* of the blind, the lame and others. They have no right to perform special rites, which include parts requiring seeing the sacrifice and the like, still there is no general incompetence to perform all religious works. They surely have the right mentioned in the Gribya Sutras to *Ishta* works (that is, works performed with fire consecrated according to Vedic or Smriti rules). They can be married." "From this text (Manu's text) showing the marriage of the impotent, etc., *their investiture with the sacred thread is understood*" * * "Supposing that the born blind, etc., have no right to perform *Ishta* ceremonies, because of want of marriage and Upanayanam, still they have right to *Poorta* or conservatory works (such as digging tanks) like the Sudras. *Therefore, these persons are not disqualified because of their incompetence to perform religious works but because of special texts.*" Viswarupa says: "Some say, the word 'Pangu' and the rest are used as illustrative of all persons incompetent to perform *Agnihotra* and the like sacrifices. *That is wrong*, as wealth is the subject of human purpose and because we find the capacity of the unlearned who are incompetent (to perform the above sacrifices) declared. Therefore, these are disqualified to take shares because of express texts denying their rights. *Their disqualification to take a share is not because of their incompetence to perform sacrifice, etc.*" I think this completely disposes of the theory of exclusion being based on incompetence to perform religious works.

Then, it was argued that because the blindness was due to sin in the former birth and it has not been expiated, therefore, there is exclusion from inheritance. This again cannot be the true ground of exclusion, as the adoption of a religious order (like Naishtika Brahmachariya, Vanaprastha or Sanyasa) also excludes from inheritance according to Devala, who includes such a Lingee along with a madman and a blind man. Viswarupa in his commentary on Yagnavalkya says, "the disqualification to take a share is *not* * * because they bear the sign of grave sin in a previous birth. According to tradition, the blind and the rest who are not *Patita* may take grand-paternal property. The incompetency to give more than what is necessary for maintenance when one is able to do so should be understood to be a mere declaration of what is proper and *not a rule.* To that effect is the text of Manu: 'if the eldest or youngest of several brothers is deprived of his share or if either of them dies, *his share is not lost.*' This shows that because of the incompetency of a disqualified person *to dispose of shares obtained by him*, there is resumption of what is properly obtained by him. Therefore, his share is not lost. Thus these persons are themselves alone disqualified. But if there are Aurasa and Kshetraja sons, these are entitled to allotments if free from similar defects. Their daughters must be maintained likewise until they are made over to their husbands." (Yajnavalkya II, 142). I cannot conclude this subject better than by quoting from that very learned and very level-headed text-writer Jagadis Chandra Ghose (who is fortunately or unfortunately not a Brahmin by birth). "The rule probably owed its origin to the difficulty of keeping the property from the attacks of the strong in those troublous times when might was right. * * * But the old rule of exclusion on the ground of physical deformity was limited by these three ancient law givers" (Gautama, Vasishta and Apastamba the Sutra writers) "to the case of the insane and of the Kliba or one of a neutral gender according to the interpretation of Vignaneswara" (*These three did not mention the blind*). "*These persons were placed in the category of minors, and others incapable of transacting legal business.* * * * * * Now, it is quite possible that during the long centuries when Buddha's rational and merciful religion prevailed in India

all these theories" (incapacity to perform rites, former sins, etc.) "fell into disrepute except the doctrine that natural deformities were the consequences of grave sins in past existences. We find that during these times and in the times following them, the rule was as is laid down by Gautama, Vasishta and Apastamba that *only* the insane, the Kliba and the Patita or outcast for grave sins only, were excluded." "The Burmese Manu also lays down, that if one 'shall have a severe disease, shall be unable to walk, shall stutter or be dumb, let the share such child is entitled to, *be set aside*, and let its relations support it. *If he be blind or deaf, but perfect in his intellect*, let him have his proper share. But as mad, dumb and lame people, and those who have disease of the eyes, may be relieved by medicine, let their portion be regularly set aside for them.'" * * * "Several commentators, such as Medatithi and Vachaspati Misra, have laid down, that persons excluded from inheritance are those who are excluded from Vedic as well as Smarta ceremonies, and *are thus incapable of marrying*. The Saraswati Vilasa says in this connection, 'the inner meaning is, that deformed persons, if they are *eligible for marriage*, are share-takers.' * * * Therefore, the proper way to determine, whether a person is excluded from inheritance, is to ascertain whether he is debarred from marrying." As the prohibition of marriage of blind persons became obsolete long ages ago, it would naturally follow that their exclusion from inheritance must have likewise become obsolete long ago. Now, this is the view of the Subordinate Judge (an experienced Hindu Judge).

As Macnaghten says at page 133: "It will be seen from the above specimens, that questions connected with loss of caste and consequent privation of the right of inheritance, are not by any means frequently litigated. I do not recollect having met with any others. Were these disqualifying provisions indeed rigidly enforced, it may be apprehended that but very few individuals would be found competent to inherit property, as there is hardly an offence in jurisprudence, or a disease in nosology, that may not be comprehended in some one or other of the classes. A cursory inspection of the subjoined catalogue of disqualifications will suffice to verify this assertion." And then he gives the disqualifications, which include 'a man destitute of virtue, a son who has no sacred knowledge, nor courage, nor industry, nor devotion, nor liberality, and who observes not immemorial good customs, one who neglects his duties' and so on. It seems to me that the principle of exclusion is conclusively indicated by Viswarupa, "incompetency to dispose of his" proper share, and especially by the text of Baudhayana which says "*persons incapable of transacting* business, blind men, idiots, those who were immersed in vice or afflicted by incurable diseases and those who neglect their duties, let the heirs supply with food and apparel." Further, Deepakalika (another commentator on Yagnavalkya) says that a *Jada* (one of the excluded heirs) means "one *without energy to perform the duties of his own station* in life." According to Apastamba, a son who "dissipates wealth by his vices should be debarred from participation even though he be the first born." I do not think it necessary to pursue this further. It is well known that commentators give all sorts of fanciful reasons as the reason of a rule of law while the real reason stares them, so to say, in the face. The strict injunction to maintain and protect disqualified heirs and the rule that their sons become sharers, show that the exclusion was not intended as a punishment but as a protection to persons incapable of or unwilling to manage property and to deal in secular affairs with others (outcastes being incapable of dealing with their fellow beings) *and also in order to prevent vicious persons from squandering wealth in Adharma*. Giving shares to such persons would only lead to the property given to them being soon lost to them through their incapacity and unwillingness to hold it or to its being used in the promotion of Adharma.

As I said before, whether having regard to the reason of the rule and the change of environments and circumstances, the rule in question was likely to have become obsolete would form an important consideration for arriving at the right conclusion in this matter. The days when large families (consisting of all the agnates and their wives) lived undivided under the protection of a Kulapathi and patriarch passed away long ago. The text of Manu as now found

was not as Manu pronounced it, but as Bhrigu (to whom he gave the general principles) expounded it to other Rishis. Most of the Slokas of even Bhrigu's dictation have been lost and many "pious" forgeries have crept in through medieval priestcraft. These texts as to exclusion clearly date from the patriarchal days. That many blind men, though born blind, have become capable of managing affairs and were married with all Vedic and other rites is shown by the life of the King Dhritharashtra and of the Rishi Dhirghatamas. The duty of maintaining a disabled agnate (however remotely connected) must have gradually decreased in strength from the date when Manu gave his original injunctions. On this question of a rule becoming obsolete owing to change of time and circumstances, I shall only say that it has been acknowledged by numerous later writers that the strict rules in the older Smritis have to be relaxed in this Kaliyuga owing to such changes. Thus, though according to the older Smritis a man who hates his father is excluded from inheritance, nobody will dream of denying that that rule has become obsolete and later commentators have tried to explain away the rule as restricted to a man whose hatred extends to attempts on the life of his father. Manu says in Chapter II, Sloka 103, that a Brahmin who stands not repeating his Gayatri in the morning twilight and sits not repeating in the evening twilight must be precluded like a Sudra from all sacred observances. That is of course obsolete. According to Manu, Chapter III, Slokas 17 and 19, a Brahmin who takes a Sudra woman to his bed and begets a child by her loses his caste as a Brahmin and "the law declares no expiation" for his sin. This is, of course, now obsolete, as concubinage with dancing girls and Sambandams with Nair ladies (the latter being, of course, not at all morally culpable if monogamous) cannot be said to be unknown or even uncommon and no Brahmin loses caste thereby. Exclusion from inheritance on account of vice or extravagance is, of course, now obsolete. Outcastes, etc., and similar persons are now entitled to inherit by Act XXI of 1850, which shows that the British Legislature moved with the times 70 years ago, the old days when outcastes from Hinduism were necessarily excluded from all secular activities having become obsolete after the numerous foreign invasions. Of course, nobody will now think that the loss of a limb or a sense by a soldier or a hero will have the effect of excluding him from inheritance, even if that rule was ever in force. If all incurable diseases were really causes of exclusion from inheritance, chronic consumption and diabetes have been and are probably even now such diseases, but nobody would think of holding that exclusion for such causes is not obsolete. In *Venkata Subba Rao* v. *Purushottam* (13) it was argued by Mr. Ramesam (who unsuccessfully appeared for the respondent) that lameness which is subsequently acquired is a ground of exclusion, relying upon the Mitakshara and Yagnavalkya, who excluded a *Pangu* or "cripple" without the qualification "by birth" from inheritance. Bhashyam Iyengar, J., interjected the following remarks in the course of his argument: "Have you found any case in which the point was raised?" and when he got the answer "none" and that in *Fittick Chunder Chatterjee* v. *Juggut Mohinee Dabee* (8) the point was not raised but conceded, Bhashyam Iyengar, J., again remarked: "That shows that it is obsolete as a ground of exclusion. What do you say as to one who is an enemy of his father?" Then in the judgment, the learned Judges (Bhashyam Iyengar and Moore, JJ.) say: "*Even assuming* that under the Hindu Law texts in case the lameness was congential there would be a bar, *a matter regarding which we give no opinion*, it is admitted in the present case that the lameness was not congenital" "No case has been quoted where any Court has held that lameness congenital *or otherwise* is a bar to inheritance"; and then the learned Judges reversed the decision of the lower Courts. The learned Judges, while inclined to hold that even as regards a cripple *from birth*, the rule was obsolete, got over the difficulty by following *Fittick Chunder Chatterjee* v. *Juggut Mohinee Dabee* (8), where lameness was held to be no bar unless it were proved that the person proposed to be excluded was a cripple from birth. In *Vedanayaga Mudaliar* v. *Vedammal* (14) Subramania Aiyar, J., says: "Acts or omissions which entailed degradation under the Hindu system of life were indeed many. They included not only heinous sins and crimes but numerous other things which are look-

ed upon as innocent or are tolerated in these times. It may well admit of doubt whether the injunctions connected with degradation (such as loss of the right of inheritance) were *ever* enforced otherwise than by expulsion from caste now relieved against by legislation. However this may be, it is quite certain that even so far back as the days of the Dayabhaga commentator, Srikrishna Tarkalankara, loss of proprietary rights as an incident to degradation had begun to disappear. (See Tagore Law Lectures for 1884-85, page 426.) Since the establishment of British rule in this country, no one seems to have ventured to suggest in judicial proceedings that the sin attaching to the commission of even such serious crimes as robbery, murder, etc., entailed by itself forfeiture of civil rights as a matter of Hindu Law, for though innumerable persons have from time to time been convicted by the Courts of such offences, the reports contain no case recognising any such doctrine." [I must, however, state that there is one case reported in Sudder A. Reports 188 and decided in August 858, [*Choondoor Lutchmeedavee* v. *Narasimmah* (34)], where exclusion was not only suggested but was argued and where three Judges including T. L. Strange stated, (1) "that mere conviction for theft, though it excluded from inheritance under the Hindu Law, would not carry that civil penalty in a British Court of Justice because the British Criminal Code sufficiently punished the offence with distinct penalties, and (2) that theft by plaintiff of part of the ancestral property to be divided disentitled him to share." I am very doubtful if the decision will be followed now on the 2nd point, which the Judges decided on the strength of the opinion of the Junior Pandit ignoring that of the Senior Pandit. The N. W. Provinces High Court in *Kalka Pershad* v. *Budree Sah* (23) (decided in 1871) refused to lay down that a man became disqualified because he wrongly misappropriated to his exclusive use part of the joint property or because he was addicted to vice or hostile to his father. At page 270 occurs this significant passage: "the texts quoted by the Subordinate Judge *which are understood to have become obsolete in practice*," *etc.*] To resume the quotation from *Vedanayaga Mudaliar* v. *Vedammal* (14), "Plaintiff's case, therefore, derives no support from the rules dealing with the matter of degradation which, even assuming that they were at one time more than mere moral injunctions, *cannot now be treated as otherwise than obsolete*" I might state in this connection that there seems to have been no case in which the Courts have *decided* (as distinguished from assuming or opining or as having taken it as conceded in argument) that congenital blindness does exclude from inheritance in these days. In other words, there is no case in which a congenitally blind man has been made to lose his inheritance by the decision of a Court.

In *Kayarohana Pathan* v. *Subbaraya Thevan* (15) decided by Benson and Sundara Aiyar, JJ., the following passages occur in the judgment: "It must be noted that the ancient writers excluded various other persons from inheritance to the paternal estate along with those specifically enumerated in the Mitakshara." "How wide the reasons for exclusion were will appear from Colebrook's Digest, Volume II, pages 424 to 435. *Many of the grounds of exclusion would not now be enforced by the Courts, and are practically obsolete.*" (Neglect of obsequies and duties towards ancestors were also grounds of exclusion.) "It is doubtful how far the injunctions contained in the books are now actually enforced in different parts of the country. In Steel's Law of Castes it is observed that the rules of exclusion are largely qualified by custom, and that in seventy two castes at Poona it was found that insanity excluded only unmarried persons, and that in eighty-three castes blind persons married and having families might inherit." As regards the incurable disease of leprosy, the case in *Kayarohana Pathan* v. *Subbaraya Thevan* (15) following *Rangayya Chetti* v. *Thanikachalla Mudali* (22), *Ananta* v. *Ramabai* (3) and *Janardhan Pandurang* v. *Gopal* (35)] confined exclusion to the case of leprosy of the "agonizing, sanious or ulcerous type." This case was followed in *Raju* v. *Ramaswamy Naicken* (36) decided by the learned Chief Justice

(34) S. A. R. (1858) 188.

(35) 5 B. H. C. R. A. C. J. 145.

(36) 25 Ind. Cas. 968; 16 M. L. T. 254; 1 L. W. 715.

and Sesbagiri Aiyar, J. (Sundara Aiyar, J., based the rule of exclusion on the ground of unfitness for social intercourse which unfitness is not caused by the milder forms of leprosy). I might add here that unfitness for social intercourse caused in former times unfitness for the proper management of property and this latter is, as I have already shown, the real reason (or rather one of the two reasons) for the ancient rule.

In the view, therefore, of very learned and orthodox Brahmin Judges of the Madras High Court beginning from Subramania Aiyar, J., many grounds of exclusion have become obsolete owing to change of time, circumstances and environment.

Mr Ganapathi Aiyar quoted a passage from an old judgment of a very learned Hindu lawyer that a Judge ought not to alter the existing law on account of any inclinations towards social reform. I entirely agree. But if a rule of law has become obsolete, I do not think that a Judge is prevented from laying down the law as it exists merely because the obsolete rule is socially unjust and his decision negativing the old rule would also promote social reform and justice. I do not deny that Judges are human and may be unconsciously biassed in their decisions either by their conservatism in social and political matters or by their radicalism in such matters. Even the tendency of their particular religious, philosophical and cultural views might unconsciously affect their view of legal principles and questions. Owing to this, Judges of the nationality of the litigants and acquainted with the customs and social habits of the litigants are partly in a position of advantage and partly in a position of disadvantage as compared with Judges of a different nationality. When the English Common Law became a "wooden" system in many respects, the introduction of the "human" element by the Lord Chancellors in the Courts of Equity cannot be considered to have been an undesirable innovation. Even now when equity and law have become combined, the ideas of "justice, equity and good conscience," which vary with individual Judges, do have an important part in the unconscious and gradual development of law. As regards questions of Hindu Law, I do not think that extreme conservatism is to be commended so long as the Legislature is slow to move in the direction of recognising that customs have become obsolete or do require alterations. It is well known that while the Indian Legislature was reasonably progressive in these matters till the days of the Age of Consent Act (passed during the time of Lansdowne), it has since been afraid to move with the times and to suit itself "to the changing needs of society and custom in modern times."

Even Sir Bhashyam Iyengar was unable to have a Sister's Inheritance Bill (long overdue) passed in the local Legislature. While extreme conservatism may be a virtue in Judges where the Legislature is capable of moving with the times, I do not think that it is going outside his functions for a Judge, who finds that a rule or custom has become obsolete, to declare and decide accordingly, especially where, as in this country, the Legislature is, for well-known reasons, tardy in such matters. It cannot be deemed that their Lordships of the Privy Council have by their decisions *gradually* developed the law as to alienations by a managing member or by a father in a Hindu family. They have recognised that the growth of the law by judicial decisions in the several High Courts on this question and allied questions has not been uniform owing to the Judges presiding over the respective High Courts having taken different views. (See, for example, the judgment of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (37)]. The rights of contingent reversioners to bring suits as regards adoptions and alienations by Hindu widows have also been gradually developed. It has not been a matter of strictly following precedents, but of "broadening" the law from precedent to precedent and it may even be (where the process of such broadening has gone on too far) of reacting occasionally. (The Malabar Law as to the rights of maintenance of junior members living apart from the Tarwad house is

(37) 5 C. 148 (P. C.); 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 539; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. s.) 705.

still in a fluid state and is broadening from precedent to precedent).

Coming back to the question now under consideration, most of, what I may call, the antediluvian rules of the Hindu Law of exclusion from inheritance jar not only on the minds of persons educated in English but, so far as I know, on every ordinary Hindu mind and hence a large proportion of those rules dealing with extravagance, non-performance of religious or caste duties, etc., became obsolete long ago. Under these circumstances, the finding of the Subordinate Judge (accepted by the District Judge) in this case that the rule of exclusion through blindness, though congenital, is obsolete cannot be said to be due to an unconscious bias in the mind of the Subordinate Judge in favour of social reform. I would, therefore, decide the first question in favour of the respondent.

On the 4th question as to the right of the plaintiff to bring this suit as a person having a legal character or right against a person interested to deny it (see section 42 of the Specific Relief Act), I entirely agree with the opinion to be delivered just now by my learned brother and have nothing to add. It becomes unnecessary to consider the other two questions (2) and (3).

In the result, the second appeal is dismissed with costs.

NAPIER, J.—My learned brother has set out the facts in this case and also the questions that arise for decision. I will deal with the fourth question first, namely, 'is the plaintiff as a mere contingent reversioner not entitled to sue for declaration as to the limited nature of the 1st defendant's title.' It is contended for the respondents that as the widow is admittedly entitled to a widow's estate and as there is no allegation of waste or improper alienation, the suit does not lie. This difficult question has been the subject of several decisions both in the Privy Council and in this Court, and it must be admitted that it is not easy to reconcile them all. It seems to me that there are two questions involved which it is best to keep separate for the purpose of arriving at a decision in any particular case. The first is whether a person in the position of this plaintiff is a person entitled to assert his right, and the second is whether any cause of action has arisen. In this case, the first question is, has a reversioner such a position that he can assert his status in any suit other than those specifically provided for in illustrations (*e*) and (*f*) of section 42 of the Specific Relief Act, namely, where a widow alienates property or adopts a son. The second is, whether the existence of a Will conferring absolute title on a person otherwise only entitled as a widow gives a cause of action. In *Venkatanarayana Pillay* v. *Subbammal* (39) it was held by the Privy Council that the reversionary right is during a widow's lifetime a mere *spes successionis*, and that where the Indian law permits the institution of a suit, the right to sue is based on the danger to the inheritance common to all the reversioners which arises from the nature of the right. It would follow from this view of their Lordships that no such person can bring a suit except under the provisions of the Statute. In *Janki Ammal* v. *Narayansami Aiyar* (29) the Board uses slightly different language, for the judgment contains the following passage :—'It is also true that a reversionary heir, although having only those contingent interests which are differentiated little, if at all, from a *spes successionis*, is recognized by Courts of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.' There is another decision of the Board in the same year, *Sheoparsan Singh* v. *Ramnandan Prashad Narayan Singh* (27), where their Lordships consider section 42 of the Specific Relief Act with reference to the position of the alleged reversioner. But when that case is examined, it is clear that the decision of their Lordships against the reversioners' right turned on the fact that the Will which they sought to avoid had been affirmed in a Court exercising appropriate jurisdiction and the propriety of that decision could not be impeached in those proceedings. The Court, therefore, held that there was in fact no intestacy and so the plaintiffs were not reversioners, and so could not sue. The next decision of the Privy

(33) 29 Ind. Cas. 298; 38 M. 406; 28 M. L. J. 535; 21 C. L. J. 515; 19 C. W. N. 641; 17 Bom. L. R. 463; 17 M. L. T. 435; 2 L. W. 596; (1915) M. W. N. 555; 42 I. A. 125 (P. C.).

Council is reported in *Saudagar Singh* v. *Pardip Narayan Singh* (26). That was a suit by a reversioner against a Hindu widow for a declaration that a deed executed by her, under which she purported to convey the absolute interest in the property to another reversioner who ranked equally with the plaintiff, was invalid. In holding that the suit lay, their Lordships use the following language: "In these circumstances it appears to their Lordships that this is an exact illustration of that which section 42 of the Specific Relief Act was meant to provide for." It appears to me that the head note* to this case is wrong. The head note is that under section 42, illustration (*e*), the plaintiffs were entitled to the declaration. Their Lordships of the Privy Council do not say so. Illustration (*e*) deals with alienations made without legal necessity and has reference to the ordinary class of alienations for the widow's own benefit and not to what was in that case a surrender to one of the nearest reversioners. Their Lordships say that the objection that it involves a finding that the plaintiffs in this case are reversionary heirs will not prevent such a suit lying because such a declaration must be given in a case falling within illustration (*e*). But they do not say that this particular case is within illustration (*e*). The result of these decisions of the Board seems to me to be that a reversioner, although he only represents the whole body of possible reversioners and although their interest is possibly only a *spes successionis*, has on their behalf a legal character within the meaning of section 42 of the Specific Relief Act and is, in a proper case, entitled to sue.

This seems to be the view taken by this Court in the majority of cases. It was expressly so decided by a Bench in *Puttanna* v. *Ramakrishna Sastri* (39), where the learned Judges say that the illustrations do not limit the scope of the section. This was followed in *Padmanabhudu* v. *Buchamma* (40), the learned Judges assuming that the brother of a testator had the necessary legal character. We have been referred to a recent decision, *Gangadhara Ramarao* v. *Surya Rao* (28), in which Seshagiri Aiyar, J., has used language which seems to throw doubt on this proposition. If the learned Judge really intended to hold that a reversioner has not that character, it seems to me to be at variance with the decisions of the Privy Council and of this Court, which are binding on me.

The next question is in what circumstances is he entitled to sue. The first decision I would refer to is that of the Privy Council in a case reported as *Sheo Singh Rai* v. *Dakho* (17). There the question considered by their Lordships was as to the effect of a nuncupative Will giving power to adopt and a subsequent adoption by the widow as against the claim of the widow's husband's brother. This aspect of the case had not been presented to the lower Courts and their Lordships, therefore, declined to give a definite judgment on that point. But they use the following language:—'It would not probably be disputed that, if a fictitious Will in writing be set up, the heir, upon a proper case being made, might claim to have the document cancelled'. For 'a claim under such a Will is not a bare assertion of title, but the setting up of a specific act by which title to property may be conferred.' This observation is *obiter* certainly, but it covers the present case exactly, for a title to the property purports to have been conferred and to be vested in the defendant in this suit by virtue of the Will. In *Jaipal Kunwar* v. *Indar Bahadur Singh* (30) another decision of the Privy Council has been relied on as inconsistent with that view. There a widow executed and registered a Will purporting to dispose of the absolute estate of her deceased husband. The Privy Council doubted whether this was a proper case for a declaration but declined to interfere. It seems to me that this case does not help the respondents; for a Will is revocable and until the death of the testator it does not pass any property. No interest has vested or been divested. Then as to the decisions of this Court in *Sreepada Venkataramana* v. *Sreepada Ramalakshmamma* (41) it was held that the mere fabrication of an authority to

(39) 30 M. 195; 17 M. L. J. 374.
(40) 47 Ind. Cas. 702; 35 M. L. J. 144; 8 L. W. 335.

(41) 12 Ind. Cas. 176; 35 M. 592; (1911) 2 M. W. N. 194.

*Refers to 45 C. 510.—*Ed.*

adopt will not entitle a reversioner to claim a declaration that the authority is not genuine, the reason given by the Bench being that the document in question merely conferred a power on the defendant which may or may not be exercised by her. She may change her mind and refuse to act according to the document.

I think that this is in entire accord with the principles enunciated in *Jaipal Kunwar* v. *Indar Bahadur Singh* (30). It was, however, held by another Bench of this Court in *Padmanabjudu* v. *Buchamma* (40) that such a suit does lie. Seshagiri Aiyar, J., rests his decision on that of the Privy Council in *Soudagar Singh* v. *Pardip Narayan Singh* (26), but with great respect, the learned Judge does not notice that in the Privy Council case the widow had actually surrendered the property to one of the reversioners so that there was, as in the case in *Sheo Singh Rai* v. *Dakho* (17), complete vesting of title. *Venkatanarayana Pillay* v. *Subbammal* (35) was a suit to set aside an adoption which, of course, falls within the specific provision of illustration (*f*) of section 42. The case relied on by the respondent, *Sheoparsan Singh* v. *Ramnandan Prashad Narayan Singh* (27), as one in which relief against an actual Will was refused; has already been explained as founded on the validity of the Will having been established by a competent Court.

On these cases it seems to me that a distinction may be drawn between cases where title is alleged to have vested and where there is only a power given or a right claimed, the actual exercise of which would divest the reversioners. It certainly may be that the setting up by the widow of an authority to adopt is not sufficient to found a cause of action in a reversioner, and I am inclined to that view myself. But whether that is so or not, where the testator has devised the whole interest of his property to a widow, the Will operates at death to vest the property in her, with the result that though she may not be exercising powers higher than that of a widow, she has an absolute title. It seems to me that it is not necessary for her to set up actively her title. The language of the section is: 'Any person denying or interested to deny', and it cannot be disputed that the widow in such circumstances is interested to deny. I am, therefore, of opinion that in the present case the suit lies, and that the appellant's contention on this point must prevail.

Coming now to the main question in the case, my learned brother has formulated it as follows: "Has the rule of Hindu Law which prevents a person born blind from claiming interest along with his brothers as co-owner in ancestral properties become obsolete?" My learned brother assumes that there was at one time a definite and well-established rule to that effect. The case was elaborately argued before us by Mr. Ganapathy Aiyar and Mr. Ramesam, and our attention has been invited to the doctrine laid down by all the sacred writers from Manu to Brihaspati and by the commentators from Viswarupa to the author of the Smriti Chandrika. I agree with my learned brother that the proposition has been established. There remains, therefore, only the question whether the rule has become obsolete. Mr. Ganapathy Aiyar suggested that the rule is founded on three propositions. The first is religious, namely, that such blindness is punishment for unexpiated sin; the second is ceremonial, that such persons are not fit for religious ceremonies; the third is social, that they are incapable of transacting affairs. I have had the advantage of reading my learned brother's exhaustive judgment on the points and, as I agree with it entirely, I will add only a few words.

He has dealt with all the three aspects and has applied these tests to other supposed disqualifications. He has shown that the religious basis has not been uniformly applied to all disqualifications, and has further demonstrated that such religious disqualifications can no longer be held necessarily to affect rights of property. With regard to the second, he has pointed out that in fact the various supposed disqualifications have not prevented the performance of religious ceremonies. There only remains, therefore, the theory that such persons are incapable of transacting affairs. As a basis for deprivation of property this supposed disqualification fails by not being comprehensive, and secondly, is contradicted by experience. It is not comprehensive, because admittedly the dis-

qualification does not cover the case of a child who loses its sight after birth, and is not true in fact because persons suffering from this as well as the other disqualifications to be found in the sacred writings are admittedly perfectly capable of looking after their own affairs. From a social point of view the rule was doubtless of sound application in a primitive state of society, and was as much for the benefit of the person who suffered as for the other members of the family. In archaic conditions of life a blind man could not take his share in cultivation and in protection of the family. It was, therefore, not unnatural that he should be excluded from a share in the property. It was essential, however, that he should not be allowed to starve and, therefore, the rule which required that he should be maintained by the family was a necessary and proper provision. In modern days, however, owing to improved methods of education there is nothing to prevent a person born blind from being taught how to transact business and to take his proper share in the responsibility of family affairs, and there is, therefore, no reason why such a disqualification should still continue.

Our attention has been invited to a number of cases where the various disqualifications have been considered by the Courts in India, and we have been pressed with *dicta* to be found in those cases. It is a most noticeable fact, however, that in very few cases has an alleged disqualification been upheld and those chiefly where the disqualification is real in fact, such as the case of a deaf-mute from birth, the Courts have always been astute to distinguish. Further than that, we have *dicta* of learned Hindu Judges in cases that have been before this Court in late years. I refer especially to the decisions in *Venkata Subbi Rao* v. *Purushottam* (13), *Velanayaga Mudaliar* v. *Vdammal* (14), *Kayarohana Pathan* v. *Subbaraya Thevan* (15). The view uniformly expressed by these Judges has been that some ancient disqualifications can be held to be now obsolete. I entirely agree with my learned brother that it is open to this Court to enunciate this view. In so doing Judges are only following the example of eminent Judges in England, who have from time to time declared some old rules of the Common Law to be now obsolete, and as my learned brother has pointed out, there are observations in judgments of the Privy Council tending in the same direction. In my opinion, now that the question has been raised and argued before us at great length with full citation of all the texts and decisions, the time has come for this Court to declare the rule obsolete.

In this view it becomes unnecessary to consider the questions of estoppel and artificial co-ownership, though much might be urged on both those points. I agree, therefore, with my learned brother that the second appeal must be dismissed with costs.

Appeal dismissed.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1347 OF 1917.

March 28, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Panton.

AHAMAD BISWAS AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

BENOY BHUSAN GUPTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 158B (2)—Sale of holding for arrears of rent—Notice to co-sharer landlords, failure to give, effect of—Sale, validity of.

The provision of sub-section (2) of section 158B of the Bengal Tenancy Act as to the giving of notice to the co-sharer landlords before the sale of a holding is mandatory and not directory and the provision must be complied with before a co-sharer landlord can bring a tenure or holding to sale in execution of a rent decree, and the failure of the Court to serve such notice would render the sale invalid. [p. 517, col. 2.]

Appeal against the decree of the Additional District Judge, Backergunge, dated the 5th of February 1915, reversing that of the Officiating Munsif, Patuakhali, dated the 22nd of April 1914.

FACTS.—This appeal arises out of a suit for rent brought by the plaintiffs claiming rent against defendants Nos. 1 to 9. The plaintiffs were co-sharer landlords,

the other co sharers being defendants Nos. 10 to 13. Defendants Nos. 10 to 13 brought another suit for rent against the tenant defendants making the present plaintiffs parties to the suit. The suit was framed under section 148A of the Bengal Tenancy Act and a decree was obtained by defendants Nos. 10 to 13 against the tenant defendants in that suit. In execution of the said decree the defendants Nos. 10 to 13 brought the present holding of defendants Nos. 1 to 9 to sale under section 158B of the Bengal Tenancy Act; but no notice was served on the present plaintiffs as required under section 158B sub-section (2) of the Bengal Tenancy Act. The holding was purchased in execution of that decree by defendants Nos. 10 to 13 and the tenant-defendants took a lease from the defendants Nos. 10 to 13 and began to occupy the land as before. In answer to the present suit for rent by the plaintiffs the tenant defendants pleaded that no relationship of landlord and tenant existed as between them and the plaintiffs, as their holding had been sold by the previous execution sale. The first Court gave effect to the defendants' contention but the lower Appellate Court gave the plaintiffs a decree. The defendants Nos. 1 to 2 appealed to this Court.

Babu *Upendra Lal Roy* (with him Babu *Jitendra Kumar Sen Gupta*, for Babu *Bepin B. Biswas*), for the Appellants.—The previous decree obtained against the tenant defendants by the defendants Nos. 10 to 13 had the effect at a rent decree, as the suit was framed under section 148A of the Bengal Tenancy Act and the present plaintiffs were parties to that suit. By sale in execution of the rent decree thus obtained the holding of the tenant defendants passed to defendants Nos. 10 to 13. The appellants cannot, therefore, now be made liable for rent to the plaintiffs. Sub section 2 of section 158B of the Bengal Tenancy Act cannot be mandatory, and non compliance with it cannot make the whole sale invalid. It was the Court's duty to send the notice of application for execution to the present plaintiffs and if the Court has not done that, it may be said that there was an irregularity which does not make the sale a nullity but merely makes it liable to be set aside. In connection with the similar section of the Civil Procedure Code, old section 248 (now Order XXI, rule 22), the Privy Council in the case of *Malkarjun* v. *Narhari* (1) held that non-issue of notice was an irregularity which cannot strike at the root of the sale.

My next point is that section 158B of the Bengal Tenancy Act applies only where the holding is sought to be sold, but it must be held that by the previous sale at least the right, title and interest of the defendants Nos. 1 to 6 in the holding passed and as the said defendants have no interest in the holding, it ought to be held that they are not liable for payment of rents.

Babu *Bimal Ch. Das Gupta*, for the Respondents—The case in *Malkarjun* v. *Narhari* (1) has been distinguished by the later Privy Council case of *Raghunath Das* v. *Sundar Das Khetri* (2), in which it has been held that unless notice is issued under section 245 of old Civil Procedure Code, the sale is a nullity. That case has been followed in several cases of this High Court, one of them being *Syam Mandal* v. *Sati Nath Banerjee* (3). Besides, the decision of this Court in *Sarip Hochan* v. *Tilakmani Debi* (4) is in point. As regards the second point it is surely not the case of the tenant defendants that they have abandoned the holding. In such a case the landlord would get the right of *khas* possession. But as long as the tenants do not abandon, the landlord is entitled to sue the tenants for rent.

Babu *Upendra Lal Roy* briefly replied.

JUDGMENT.—This appeal arises outof a suit for rent brought by the plaintiffs against the defendants Nos. 1 to 9, who are the appellants.

It appears that a suit for rent of the holding was brought by the defendants Nos. 10 to 13 who were the co-sharers of the plaintiffs in the year 1911, and that suit was framed as a suit under section 148A.

(1) 25 B 337; 10 M. L. J. 368 (P. C.); 27 I. A. 216; 5 C. W. N. 0; 2 Bom. L. R, 927; 7 Sar. P. C. J. 739.

(2) 24 Ind Cas 704; 42 C. 72; 17 M. L. J. 150; 18 C. W. N. 1053; 16 Bom L R 5 4; 13 A. L. J. 154; 41 I. A. 2[illegible] P. C.); 1 L. W 867; 16 M. L. T. 353; (1914) M. W. N. 747; 20 C. L. J. 555.

(3) 8 Ind. Cas. 495; 24 C. L. J. 523; 21 C. W. N. 776; 44 C. 954.

(4) 43 Ind. Cas. 3.

The present plaintiffs had been made parties to that suit. In execution of the decree obtained in that suit, the holding was put up to sale but the notice as required by section 158B, sub-section 2, was not served on the present plaintiffs, the co-sharer-landlords. The defendants Nos. 10 to 13, decree holders in that suit, purchased the holding at the sale.

The plaintiffs brought the present suit for recovery of rent. The tenant defendants pleaded that the holding had passed by the sale to the defendants Nos. 10 to 13, that they had taken a settlement from the latter and were in possession, that there was, therefore, no relationship of landlord and tenant between them and the plaintiffs and that the suit for rent could not be maintained.

The learned District Judge was of opinion that the Court had no jurisdiction to sell without the notice required to be served under section 158B and that the sale was of no effect. The suit for rent was accordingly decreed against the tenant defendants.

The tenants have appealed to this Court and it is contended on their behalf that the omission to serve the notice did not render the sale void but that it was a mere irregularity in conducting the sale. Reliance was placed upon the decision of the Judicial Committee in *Malkarjun* v. *Narhari* (1).

In that case the sale took place after service of notice under section 248, Civil Procedure Code, upon a person who was not the legal representative of the judgment-debtors. It was held that the judicial sale was not a nullity and although it might be irregular, the sale held good unless proceedings were taken for setting it aside.

The learned Pleader for the respondents relied upon a later case of the Judicial Committee [*Raghunath Das* v. *Sundar Das Khetri* (2)]. In that case their Lordships observed that a notice under section 248 of the Code was necessary in order that the Court should obtain jurisdiction to sell the property by way of execution as against the legal representatives of the deceased judgment-debtor. Their Lordships distinguished the case of *Malkarjun* v. *Narhari* (1) on the ground that in that case "a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had, therefore, jurisdiction to sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it were set aside by appropriate proceedings for the purpose." These decisions have reference to section 248, Civil Procedure Code.

The question which we have to consider in the present case is, what is the effect of an omission to serve a notice under section 158B, sub-section (2).

That sub-section lays down: "When one or more co-sharer landlords, having obtained a decree in a suit framed under sub-section (1) or under subsection 148A, applies, or apply, for the execution of the decree by the sale of the tenure or holding, the Court shall, before proceeding to sell the tenure or holding, give notice of the application for execution to the other co-sharers."

The Act makes a special provision for a case where some of the co-sharers obtain a decree for rent under section 148A and proceed to sell the tenure or holding. Sub-section 2 of section 158B expressly provides that before proceeding to sell the tenure or holding, the Court shall give notice of the application for execution to the other co sharers. Having regard to the wording of the section, and to the fact that a special procedure is prescribed by it, we think that the provision is mandatory and not directory. We are of opinion that if a co-sharer landlord wants to have the sale of a tenure or holding, the provision of the sub-section must be complied with before there can be a sale.

In the case of *Sarip Hochan* v. *Tilottama Debi* (4) Fletcher and Newbould, JJ. also held that "the provision in section 158B (2) of the Bengal Tenancy Act as to the giving of notice to the co sharer landlords before the sale of a holding in execution of a rent decree obtained by one co-sharer is mandatory and not merely directory, and the failure of the Court

to serve such notice renders the sale invalid".

It is next contended that even if the sale did not pass the holding by reason of non-compliance with the provisions of that sub-section, the right, title and interest of the tenants passed to the defendants Nos. 10 to 13 who purchased the holding at the previous sale and as the tenant defendants had not got that sale set aside, the sale was operative as against them. But the sale was of an entire holding and the plaintiffs did not consent to the sale. The position of defendants Nos. 10 to 13, therefore, was that of an ordinary purchaser under a money decree.

It is unnecessary to consider whether the plaintiffs were entitled to *khas* possession of the land to the extent of their share; because they have chosen to treat the holding as still subsisting and they claim their share of the rent from the tenant defendants. The tenant defendants never abandoned their land; they have continued in possession notwithstanding the sale and we think that, in these circumstances, the relation between the plaintiffs and the tenants did not come to an end, the sale at which the defendants Nos. 10 to 13 purchased the holding being inoperative against the plaintiffs.

The result is that the decree of the lower Court is affirmed and this appeal dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 36 OF 1919.

July 31, 1919.

Present:—Mr. Justice Heaton and Mr. Justice Marten.

MULCHAND RAICHAND—DEFENDANT—APPELLANTS

versus

GILL & Co.—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 10, applicability of—Stay of suit, when can be ordered—Injunction—High Court, power of, to restrain a party before it from prosecuting suit in Mofussil Court.

Before an order staying a suit can be made under section 10 of the Civil Procedure Code there must be substantial identity between the matter in dispute in the second suit and the matter or some of the matter in dispute in the first suit; and there must be a similar substantial identity in the matter of parties. [p. 519, col 2; p. 520 col 2.]

A Judge sitting on the Original Side of the Bombay High Court has jurisdiction to issue an injunction restraining the defendant in a suit before the High Court from proceeding with a suit instituted by him in a Mofussil Court in such a way as to delay or embarrass the trial of the suit in the High Court. [p. 520, col. 2; p. 522, col. 2.]

Appeal from the following order of

MACLEOD, J.—The plaintiffs are a firm carrying on business as merchants and commission agents in Bombay. The defendants carry on business as cotton merchants at Bijapur. They consigned cotton to the plaintiffs for sale in Bombay and obtained advances on the cotton so consigned. The market having fallen, the value of the cotton remaining in the hands of the plaintiffs was far less than the amounts due to them by the defendants. Accordingly, on the 25th of March 1919, they filed this suit against the defendants, claiming a sum of Rs. 82,372-1 0 as being due to them.

The defendants now apply that this suit should be stayed under section 10 of the Civil Procedure Code, on the ground that they have filed a suit at an earlier date in the Subordinate Judge's Court at Bijapur against the plaintiffs, in which the matter in issue is identical with the matter in issue in the plaintiffs' suit filed in this Court. On reading the plaint filed in the Bijapur Court, I find there are, besides Messrs. Gill & Co. plaintiffs in this Court, seven other defendants and the plaintiff there prays *inter alia* as under: (*a*) that the accounts between the plaintiff and the defendants Nos. 1 to 8 respectively be taken after determining the rate at which the bales in suit should be valued for the purposes of the account; (*c*) that a decree be passed against the several defendants awarding the plaintiff such amounts as may legally and properly be found due from the several defendants respectively on the plaintiff paying the proper Court-fee stamp; (*e*) that the costs of the suit be awarded against the de-

fendants or such of them as may be found liable.

It appears, on the face of it, that the previous suit is not between the same parties, and on that ground it would be sufficient to refuse the defendants' application. It has been mentioned to me that, as a matter of fact, these other seven defendants in the Bijapur suit are not necessary parties, and that the real dispute has to be fought out between Messrs. Gill & Co. and the plaintiff in the Bijapur suit. Then assuming that section 10 of the Civil Procedure Code does apply, Mr. Kanga for the plaintiffs has asked me to make an order *in personam* against the defendants here restraining them from proceeding with the suit in the Bijapur Court. He refers to the decision of *Mungls Chand* v. *Gopal Ram* (1), where Mr. Justice Sale restrained the defendant from proceeding with the previously instituted suit in the Court of Bareily on the ground that justice required that step. Against that it has been urged that the effect of restraining the defendant from proceeding with the Bijapur suit would be to stay the proceedings, and, under section 56 of the Specific Relief Act, an injunction to stay proceedings can only be granted when such restraint is necessary to prevent a multiplicity of proceedings, and the argument proceeds that if section 10 of the Civil Procedure Code applies then this suit will have to be stayed, and, therefore, there will be no multiplicity of proceedings.

I am prepared to hold that section 10 does not apply in this case from the nature of the suit which the plaintiff in the Bijapur Court has filed, and I am also prepared to hold that in the circumstances of this case justice requires that an order should go against the defendants in this Court *in personam* from proceeding with the suit in the Bijapur Court. All the evidence required for the purpose of deciding the dispute would be in Bombay, for the defendant's chief objection against the conduct of the plaintiffs is that he was urging the plaintiffs to sell and the plaintiffs declined to listen to his request for sale, so that in the falling market the cotton was not sold and a far greater loss has occurred than would otherwise have occurred. In fact I presume the defendants here will claim that if the plaintiffs had performed their duty the cotton would have been sold at a sufficient rate to cover all the advances made by them.

However that may be, it is quite clear that this case should be tried in Bombay. It would be a most undesirable precedent that commission agents in Bombay, who make advances to up-country merchants on their cotton, should be dragged to up-country Courts in cases of dispute which may occur between them on these transactions.

Therefore, in my opinion, the right order to make is that the defendants be restrained from proceeding with the suit in the Bijapur Court as regards the first defendant. There is no objection to their proceeding against the other defendants. Defendants to put in their written statement within a month. Costs to be costs in the cause.

Mr. *Desai*, for the Appellants.

Mr. *Coltman*, for the Respondents.

JUDGMENT.

HEATON, J.—A Bijapur firm filed a suit in the Court of the first class Sub-Judge at Bijapur against Gill & Co. of Bombay. Shortly afterwards Gill & Co. filed a suit in the High Court against the Bijapur firm. The latter applied that the proceedings in the High Court suit should be stayed under section 10 of the Civil Procedure Code, and Gill & Co. retorted by asking for an injunction restraining the Bijapur firm from proceeding with the suit in the Bijapur Court. The Judge of this Court, who heard the matter, held that section 10 of the Civil Procedure Code did not apply and that an injunction should be issued as asked for by Gill & Co. He ordered accordingly, and the Bijapur firm have appealed.

If section 10 of the Code of Civil Procedure applies then the Bijapur suit must proceed, for it was first filed, and the High Court suit must be stayed. Does section 10 apply? In order that it may apply, there must be substantial identity between the matter in dispute in the second suit and the matter or some of the matter in dispute in the first suit;

(1) 34 C. 101.

and there must be a similar substantial identity in the matter of parties. There will be found cases where it is clear that the section applies and cases of doubt. This, I think, is a case of doubt, not a clear case. We have to decide the matter on a comparison of the two plaints, for there are no written statements on the record and no issues. The earlier suit is of a complicated character and may have to be greatly modified both as to parties and as to matter. The second suit is simple and undoubtedly the matter it relates to is involved in the earlier suit. But it is so involved that it will have to be disentangled before the Bijapur suit can proceed. It might be disentangled by separating the dispute between the Bijapur firm and Gill & Co. from numerous other claims which do not concern the dispute with Gill & Co. It might be disentangled by omitting the latter altogether and confining the Bijapur suit to the other disputes or some or one of them. We do not know how it will be disentangled, so at the present stage I am not prepared to say that section 10 does apply. I say this on a consideration of the circumstances of this particular dispute and not because I find any great difficulty in apprehending the general purpose of section 10

That being so, we have to consider whether the Judge had power to direct that the Bijapur firm should refrain from proceeding with the Bijapur suit. It seems to me to matter very little whether the injunction remains or is dissolved, for, even in the latter event, I feel very little doubt that the suit in the High Court will be finished before the suit in the Bijapur Court comes to trial. That, however, savours of prophecy; so we must consider the question whether the Judge had power to make the order. The point was not raised in the lower Court or in the memo. of appeal but it has been argued. The appellants' Counsel admits that the Judge has complete jurisdiction over the High Court suit; he can try it and dispose of it. If so, it seems to me the Judge has complete jurisdiction to make all orders appropriate to the trial and progress of the suit. I am unable to understand on what principle he can have only a partial jurisdiction for that purpose. The English Law on the power of a Court of Equity to issue injunctions against persons outside the jurisdiction does not appear to limit the power, where it is to be used against a person who is properly a party to and freely contests the suit. The Calcutta cases to which we have been referred [*Mungle Chand* v. *Gopal Ram* (1), *Vulcan Iron Works* v. *Bissumbhur Persad* (2) and *Jumna Dass* v. *Harcharan Dass* (3)] were decided by single Judges and the decisions were not uniform. The Bombay case, *Narayan Vithal Samant* v. *Jankibai Sitaram* (4), only decides that a Judge sitting on the Original Side of the High Court cannot order a Mofussil Court to say proceedings, it leaves open the question whether he can order a party to the suit before him to refrain from prosecuting a suit in a Mofussil Court.

Therefore, it seems to me, we have to decide the point by reason and not by authority, for there is not a clear authority though the general trend of the English cases shows that a Judge has full power over the parties properly before him.

The Judge must have that amount of power over the parties which is essential to a prompt and complete disposal of the suit before him. If one of the parties can obtain the production of the accounts, documents, etc., in the Bijapur Court, that will greatly hamper and embarrass the trial of the Bombay suit. Therefore, the Judge must have power to prevent this. The simplest and most complete method of preventing it is by an injunction against the party. But it should, I think, be in a slightly modified form and should only restrain the defendant from proceeding with the Bijapur suit in such a way as to delay or embarrass the trial of the Bombay suit.

Since we heard the arguments it has, in another appeal, been decided that an appeal does not lie against an order refusing an injunction. It was not argued that an appeal does not lie in this case, and as we are dismissing the appeal it does not greatly matter whether it does or does not lie.

Substantially the appeal is dismissed and with costs.

I agree with my learned brother's suggestion as to the date on which the suit should be restored to the Board.

(2) 1 Ind. Cas. 927; 36 C. 233; 13 C. W. N. 343.
(3) 11 Ind. Cas. 416; 38 C. 405; 16 C. W. N. 4.
(4) 30 Ind. Cas. 560; 39 B. 654, 17 Bom. L. R. 655.

MARTEN, J.—On the first point I am of opinion, after comparing the plaints in the two suits, that the matters in issue in this suit are not "directly and substantially in issue in the previously instituted suit" within the meaning of section 10 of the Civil Procedure Code. I leave open the question whether under section 10 the words "the same parties" mean that the parties in the two suits must be the same, namely, no more and no less. If it had been necessary for me to arrive at a conclusion on this question, I should have had to take into consideration the similar words which are used in section 11 with reference to *res judicata*.

The second point taken by the appellants is that there was no jurisdiction to order them not to proceed with the Bijapur suit as against the respondents. In my opinion that point is not now open to the appellants. It was not raised in the Court below, nor is it raised in the memo. of appeal and on the merits of the case—so far as they are at present before us—I see no sufficient reason why the appellants should be granted any indulgence. I would, therefore, decide this point against them on this preliminary ground alone.

I cannot, however, entirely ignore the proposition which was urged at considerable length by their Counsel, namely, that the Court of Chancery had no jurisdiction to grant an injunction, unless the defendant either resided or carried on business within the jurisdiction. One short answer to this proposition is that it cannot apply where, as here, the defendants have been served and have appeared in the suit without protest. Thus, in Halsbury's Laws of England, Volume XVII, page 263, Note (*g*), it is said:

"A foreigner who has appeared to an action in an English Court gives jurisdiction to the English Court to restrain him from proceeding to litigate the same subject-matter in the Courts of his own country."

The authority cited in support of that proposition is *Dawkins* v. *Simonetti* (5), a decision of the Court of Appeal in England. That was a case where there were two suits pending for Probate of the Will of a deceased lady, one in England and the other in Italy. The applicant in the Italian suit was the defendant in the English suit; and in the course of his judgment the Master of the Rolls, Sir George Jessel, said as follows:—

"The defendant, after the commencement of this action in England, has begun a litigation in Naples for the purpose (so to speak) of obtaining Probate in solemn form of the Will of 1872. The plaintiff has, under these circumstances, moved to restrain the defendant from proceeding with his action in the foreign Court.

"The question arises whether there is any jurisdiction at all to do so. I am far from saying that where a man has appeared in an English suit he has not thereby given the Court jurisdiction to grant any proper application against him. Therefore, although it might be improper in other circumstances, it may not be improper in this suit. To what sort of cases then is this jurisdiction applicable? Certainly, I think, in a case of 'double vexation'. Under the old practice, when a man was sued in equity as well as at law, the plaintiff was put to his election; and it was just the same where one suit was in an English Court and the other suit in a foreign Court. The practice was to move to stay the proceeding either in the foreign Court or in the English Court. In dealing with such a question the Court prevented double vexation, but it always exercised a discretion. Where there appeared to be good ground for continuing two actions, the Court did not interfere.....It comes to this, then, that it is a matter of discretion, even assuming that we have jurisdiction."

Then, after considering the matter of convenience, the Court came to the conclusion that the Italian suit ought not to be stayed.

I may also refer to Dicey's Conflict of Laws (1903 Edition), page 44, where the learned author considers the following general principle to be sound, although he says "its truth cannot be dogmatically laid down" (page 45), *viz*:—

'The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction, or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction."

(5) (1881) 29 W. R. 228 at p. 229; 50 L. J. P. 30; 44 L. T. 266.

Then, at page 43, speaking of actions *in personam* where the defendant is not in England, he says:

"The Courts of Common Law and of Equity have further always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought, an action or suit. This again is in strict conformity with the principle or test of submission."

So, too, the Civil Procedure Code refers in section 20 (*b*) to the acquiescence of a defendant to the institution of a suit, although he may not reside or carry on business within the local limits of the Court's jurisdiction.

It seems to me, therefore, that it is erroneous to argue this case on the same lines as if the defendant had not appeared in this action, or, on the other hand, had appeared under protest and moved to set aside the service of the summons upon him.

The appellant based his argument on *Carron Iron Company* v. *Maclaren* (6), but there the Scottish respondents were not parties to the English action, nor had they come in and claimed the benefit of the English administration decree. They had only been served with a notice of motion in the English action just as any third party might be, who, for instance, interfered with a Receiver appointed in an administration action. As to proceeding in this way by motion in the suit instead of by a separate suit, the Lord Chancellor said at page 441: "The practice is fully established: its orgin is matter rather of curious speculation than of practical importance."

What Professor Dicey has said as to submission must, of course, be read with his warning at page 212 that "submission cannot give the Court jurisdiction to entertain an action or other proceeding which in itself lies beyond the competence or authority of the Court." It is jurisdiction in this sense to which the Court refers when it considers whether it has any power to authorise a departure from the trusts of a trust deed, and if so, under what circumstances and to what extent [see *New's Settlement, In re, Langham* v. *Langham* (7)].

(6) (1855) 5 H. L. C. 416 at p. 441; 24 L. J. Ch. 620; 3 W. R. 597; 10 E. R. 961; 101 R. R. 229.

(7) (1901) 2 Ch. 534; 70 L. J. Ch. 710; 85 L. T. 174; 50 W. R. 17.

But that warning does not apply to the Bombay suit itself, for that is an ordinary suit brought by commission agents with leave under clause 12 of the Letters Patent. Nor does that warning apply, I think, to the particular relief now under discussion, *viz.*, an injunction (in effect) to prevent interference with the speedy prosecution of the Bombay suit.

Even, therefore, if I had considered the point as to jurisdiction was still open to the appellants, I should have decided it against them in this particular case.

The third and the last point is whether the jurisdiction has as a matter of discretion been properly exercised here. As to this, I see no reason to interfere except that I agree in the variation of the form of the injunction which my brother Heaton has stated. The Bombay case came on for hearing as a short cause in the vacation. The defendant did not put in his affidavit till the day of the hearing: and his Bijapur suit with its eight defendants and vague allegations would seem to offer good opportunities for vexation and delay. Under these circumstances, I can well understand an injunction being granted to restrain that vexation and delay so far as practicable.

The Bombay suit was directed to be replaced on Board on 9th June after the defendant had filed his written statement. We can now direct the Prothonotary to effect this for the 5th or 12th August.

In the result, I agree that this appeal should be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 19, 1919.

Present :—Viscount Cave, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

THE PORT CANNING AND LAND IMPROVEMENT CO., LTD.—APPELLANTS

versus

Srimati KATYANI DEBI—RESPONDENT.

Bengal Tenancy Act (VIII B C. of 1885), *ss.* 6, 7, 8, 9

PORT CANNING AND LAND IMPROVEMENT CO. LTD. *v.* KATYANI DEBI.

—Landlord and tenant—Rent, enhancement of—Reclamation lease—Provision for future enhancement of rent—Presumption that maximum rent provided for is to be fixed rent.

When land is let in Bengal upon a lease for the purpose of clearing jungle or other reclamation, and provision is made for a gradual enhancement of the rent up to a prescribed maximum, a presumption arises that the maximum so prescribed is to be the full rent as long as the tenure subsists The general provisions for enhancement of rent contained in the Bengal Tenancy Act do not apply to such a case. [p. 626, col. 1.]

Appeal from a decree of the Calcutta High Court (Mookerjee and Beachcroft, JJ.), dated March 9, 1914, reported as 25 Ind. Cas. 274, reversing a decree of the District Judge, 24-Pergannahs, and restoring a decree of the Subordinate Judge, Alipur.

FACTS.—The appellants were a Company with registered office at Bombay, the object of which was to reclaim lands in the Sunderbans of Bengal. They carried on their work through an agent named Cowasjee, who in 1885 granted the respondent's predecessors a lease or settlement of 1,000 *bighas*, subsequently divided into portions, one of which the respondent held. In 1910 the appellants sued to enhance the rent of the land, for which respondent then and for many years previously had been paying 17 annas per *bigha*. Respondent contended in her written statement that the lease by Cowasjee was a permanent *mourasi mokurrari* one, and the rent, therefore, not liable to enhancement. She produced a printed form purporting to be granted by Cowasjee (hereinafter referred to as the memorandum) in which it was so described. Plaintiffs denied the genuineness of this, and also alleged that Cowasjee exceeded his powers if he gave a lease on such terms. They also contended that the document was inadmissible in evidence, as being neither stamped nor registered. The plaintiffs' books contained entries of the terms of the tenure agreeing with those in the memorandum.

The Subordinate Judge admitted the document in evidence, holding that it was not a lease or an agreement for a lease, but merely a record of a previous completed transaction. He dismissed the suit.

On appeal, however, his decision was reversed by Mr. Duval, District Judge of the 24-Pergannahs, the material part of whose judgment was as follows:—

"The plaintiff's case is that the rent was not fixed in perpetuity at Re. 1 1 0 and so that it is liable to enhancement. The defendant mainly relies on a memorandum of arrangement, dated Canning the 8th March 1885 and signed by Dwarka Nath Roy, Superintendent, and Cowasjee Edaljee, agent, under which it is stated that the rate, Re. 1-1 0 per *bigha*, is to be the maximum rate of rent under a *mokurrari mourasi* tenure. The Company denied the genuineness of this memorandum. They stated that Cowasjee Edaljee, their agent, had no authority to create *mourasi mokurrari* tenures. It is admitted that this memorandum was not stamped or registered. There is, therefore, no lease or *pottah*. It deals with the whole 1,000 *bighas*, and not the tenures now held by the defendant alone. It further appears in respect of some of the lands within the 1,000 *bighas*, which have now fallen into the share of other members of the original Syndicate or their successors-in-interest, that subsequently *mokurrari mourasi pottahs* have been granted, but in these *pottahs* the expense of clearing the land has been thrown on the tenants and is not to be borne by the Company. (Compare Exhibits J and K.) It also appears that under the power-of-attorney granted by the Company, Cowasjee Edaljee had no authority to create *mokurrari mourasi pottahs*. The learned Subordinate Judge has found that this memorandum of arrangement cannot be held to be binding, but he has found that, as a matter of fact, the Company, though it did not treat this holding in its inception as a *mokurrari mourasi* one, has by its subsequent conduct bound itself never to enhance the rent. On the facts I do not agree with the learned Subordinate Judge. It appears that the two tenures when still held as one fell into arrears of rent and sale proclamation was issued in respect of it in the year 1895. In that proclamation the judgment-debtor's right was described, no doubt, as *mourasi*. This fact, however, does not make it *mokurrari*. The learned Subordinate Judge finds that the rent is not enhanceable as there was progressive rent and *mourasi* settlement, and land had to be cleared. The facts, however, are that the land was cleared at

the expense of the Company and not, as happens in jungle-*bari* leases, at the expense of the tenant himself. I, therefore, distinguish the position of the defendant in this case from the position of persons who take land on increasing rental and have to pay the cost of clearing the jungle themselves. Compare *Huro Prasad Roy Chowdhury* v. *Chundee Churn* (1).

"On my finding of the facts I must come to the conclusion that Cowasjee Edaljee had no authority to execute a *mokurrari mourasi* lease. No lease was created and the unstamped and unregistered memorandum of arrangement signed by Cowasjee Edaljee, the genuineness of which I do not doubt, cannot be binding on the plaintiff Company. I find, therefore, on these facts that the most that has ever been admitted or proved is that the defendant has a permanent right in the land but not at a fixed rate of rent; she is, therefore, liable to pay rent on the excess area and to pay a fair and equitable rent."

The District Judge remanded the case to the Subordinate Judge for a finding as to what enhancement, if any, should be granted.

The High Court in second appeal restored the decree of the Subordinate Judge.

On the present appeal

Mr. *DeGruyther*, *K. C.* (with him Mr. *Eddis*), for the Appellants, submitted that the rent was enhanceable under the ordinary provisions of the Bengal Land Law, which there was nothing to exclude. Respondent was a tenure-holder: section 7 of the Bengal Tenancy Act applied. Respondent's contention that the tenure was *mourasi mokurrari* was not made out. The *pottah* on which she relied, not being registered, was inadmissible in evidence under sections 17 and 47 of the Indian Registration Act. Cowasjee had no power to grant such a *pottah*.

Dr. *Eddis* followed.—The argument from respondent's long payment of 17 annas per *bigha* that her rent is not enhanceable has no force. Under section 9 of the Bengal Tenancy Act her rent could not be enhanced by the Court till 15 years after the last enhancement by contract.

Sir *W. Garth*, for the Respondent.—The plaintiffs admit that defendant is their tenant: it was through Cowasjee she obtained possession. Cowasjee's power of attorney authorises him to clear land, and he must incidentally have power to grant such leases as are usual for that purpose. All leases in the Sunderbands are *mourasi mokurrari*. The document described as a *pottah* was not a lease strictly so called: a lease was to follow, although not actually given. Formal leases were later on given to two other persons who had other parts of the 1,000 *bighas*, and in each case they were *mourasi mokurrari*. The plaintiffs' books also support our case as to the terms of the tenure. The contract here was made before the Bengal Tenancy Act, so no argument can be based on section 9. The fact that we have paid 17 annas for so many years goes far to show that the rent is fixed. In cases like this, where a maximum rent is fixed, it must be presumed, in the absence of anything else that the rent is fixed for all time: *Baboo Dhunput Singh* v. *Gooman Singh* (2), *Soorasoonderee Dabea* v. *Golam Ali* (3), and *Huro Prasad Roy Chowdhury* v. *Chundee Churn* (1).

Mr. *DeGruyther*, *K. C.*, in reply.—If the lease were reconstructed, the terms of it would be

1. We will take no premium.
2. In consideration of that, you will bear the cost of clearing over a certain small sum.
3. The holding will be hereditary.

It cannot be argued from this that the rent was to be fixed.

[VISCOUNT CAVE.—The Company has lost the counterpart of the lease, and only have an entry in their books. There may have been terms not expressly stated in the memo. When the Company proceeded on the lease, in 1898, they gave *mokurrari* to other tenants: also, there is the fact that for years you did not claim to enhance the rent.]

[SIR JOHN EDGE.—How do you explain

(1) 9 C. 505; 12 C. L. R. 251; 4 Ind. Dec. (N. S.) 984.

(2) 11 M. I. A. 433 at p. 465; 9 W. R. 3 (P. C.); 2 Sar. P. C. J. 309; 2 Suth. P. C. J. 92; 20 E. R. 164.
(3) 15 B. L. R. 125 *note*; 19 W. R. 141.

the Company's giving *mokurrari* to the others?

They may have paid a premium. My submission is that it has not been proved by legal evidence that the lease was to be *mokurrari*.

JUDGMENT.

MR. AMEER ALI —This appeal arises out of a suit brought by the plaintiff Company in the Court of the First Subordinate Judge of the 24 Pergunnahs in Bengal for the enhancement of the rent of a tenure held under them by the respondent. The Subordinate Judge dismissed the suit, holding that the rent of the tenure was not enhancible; his judgment was reversed on appeal by the District Judge. On second appeal the High Court of Calcutta came to the conclusion, as an inference of law on the documentary evidence and the conduct of the parties, that the view taken by the Subordinate Judge was well founded, and it accordingly set aside the District Judge's order and restored that of the first Court dismissing the suit.

The plaintiff Company, a Syndicate, was formed in Bombay with the object of acquiring from Government grants of land in the Sunderbun jungle tract and reclaiming the same. The procedure that was adopted for the purpose was to carve out the land granted to them by Government into a number of subordinate tenures, to the holders of which was entrusted the actual work of reclamation and the settlement of ryots on land so reclaimed. It would appear from the record that the Syndicate ordinarily gave some pecuniary assistance towards the reclamation, but in the instance in dispute they waived the payment by the tenure holders of the usual premium or *salami* on account of the heavy cost of the work.

The plaintiff Company, it is admitted, carried on their work in the Sunderbun tract through an agent named Eduljee Cowasjee, who was in their service for a number of years prior to 1885, and continued in that capacity until 1893. The power-of-attorney given to him, which bears date the 20th October 1876, is of the usual character. It gives him, naturally under the circumstances, very wide powers. In exercise of this authority he granted to a number of people collectively, called Teacher & Co., a tenure consisting of 1,000 *bighas* of land, roughly 333 acres, which subsequently was split up into three lots, one of which, consisting of 193 *bighas*, is now held by the defendant respondent in the present appeal. The plaintiffs admit that the tenure was *mourousi*, but they allege that though permanent and heritable, it did not carry with it the incident of fixity of rent as alleged by the respondent The plaintiff Company further alleged that the counterpart of the lease granted to the tenure-holder was lost.

In support of her contention that the tenure then created was non-enhancible, the defendant produced a memorandum executed by Eduljee Cowasjee, which she alleged set out the terms of the contract. To the reception in evidence of this memorandum the plaintiff Company objected, contending that, as it was unregistered, it was inadmissible under sections 17 and 47 of the Indian Registration Act.

The Subordinate Judge overruled the objection, holding that it was neither a lease nor an agreement for a lease, but only a memorandum relating to a previous and completed transaction by which the tenure-holders had obtained possession of the lands. The learned Judges of the High Court take the same view. Their Lordships are unable to concur with the judgment of the High Court on this point in face of the admission by Ramtrahi Chakravarti, one of the tenure-holders, that he got into possession under the memorandum, which he regards as his lease. Being unregistered, it is inadmissible in evidence, and no effect can be given to it; but the respondent relied also in support of her case on an entry in the settlement books of the plaintiff Company which is in these terms :—

"Rent free from 1291 to 94 B. S.
"4 annas in 1295.
"8 annas in 1296.
"12 annas in 1297.
"17 annas in 1298."

The District Judge does not appear to have given much attention to this document, but the Subordinate Judge and the High Court both attach to it, and rightly, in their Lordships' opinion, great importance in judging of the character of the tenancy which Eduljee Cowasjee acting as the Company's

agent created in 1835. The document is found in the books of the plaintiff Company, and if it is open to the construction for which the respondent contends, taken in conjunction with other circumstances, their Lordships can arrive only at one conclusion, that the claim of the plaintiff Company must fail.

Before proceeding further their Lordships desire to observe that the plaintiff Company in 1895 put up the tenure in question to sale for arrears of rent. They admit that it is heritable (*mouroosi*), and by their conduct in trying to bring it to sale, they admitted it to be transferable; in other words, that it is a permanent, heritable, and transferable tenure. The only question is whether the rent is fixed as the defendant alleges, or is liable to enhancement from time to time under the provisions of the Tenancy Act. Ordinarily the two admitted characteristics would create a presumption in favour of the tenant, and throw on the plaintiff the onus of showing that the tenure is wanting in the characteristic of fixity of rent. But assuming that the onus lay on the defendant, their Lordships are of opinion that she has fully discharged it. In the books of the plaintiff Company it is expressly stated that the tenure should not be liable to rent for the first four years. After that it is to carry rent on a progressive scale until in 1298 it reached one rupee one anna. The contract as to progressive rise thus came to an end in 1298, and there is no reference to further enhancement by operation of law. In their Lordships' opinion the clear inference from these facts is that the maximum rent reached in 1298 was the fixed rent of the tenure so long as it lasted. This form of agreement, in the case of reclamation leases, has formed the subject of decision in three cases. In the case of *Golam Ali* v. *Gopal Lal Thakoor* (4) Mr. Justice Phear observed as follows :—

"I am led to this (conclusion) in great degree by consideration of the fact that the parties to the contract have carefully provided for a variation of the rent up to a maximum of Rs. 5 per *kanee*, and have yet been entirely silent as to any possibility of variation beyond that amount, and also that they have minutely prescribed the mode in which the excess lands within the given boundaries are to be assessed at rates rising up to the same amount, Rs. 5, but at the same time have made no allusion to any other ground for the enhancement of the *jumma* to be paid for the land lease."

This case came up on appeal before the Judicial Committee, and their Lordships agreed with the High Court that the terms of the agreement carried fixity of rent. The words used by the Board in giving their decision on the point are important [*Soorasoonderee Dabea* v. *Golam Ali* (3).] Their Lordships observed :—

"The *kabuliyat* did not contain the term *mokurrari* or the words 'from generation to generation,' and the *kabuliyat* was one of modern date, and there was not as in *Dhunput Singh's case* (2) any long uninterrupted enjoyment at a fixed, unvarying rent. It was, however, admitted by both parties in argument that the tenure was a permanent one. It is unnecessary for their Lordships to express any opinion on that point, and they, therefore, abstain from doing so. Looking at the words of the *kabuliyat*, their Lordships are of opinion that it was the intention of the parties that in and after the year 1264 the defendant should hold at the fixed rate of Rs. 5 per *kanee*, and that consequently the rent was not liable to enhancement beyond that rate."

In *Huro Prasad Roy Chowdhury* v. *Chundee Churn* (1) Mr. Justice Wilson, afterwards Sir Arthur Wilson (sitting with Mr. Justice Maclean), dealing with the construction of an agreement of a similar character, expressed himself as follows :—

"Now the question is shortly this. When land is let for the purpose of clearing jungle or other reclamation and on this ground or any other ground mentioned in the lease a reduced rent is provided for the first few years and it is said that the rent is to be at such and such rate, a sum as the full rent, does that mean, as the words seem to import, that the full rent is to be the full rent as long as the tenure subsists, or is such a rent liable to enhancement under the provisions of the rent law. We agree with the lower Appellate Court in thinking that the decision of the Privy Council in *Soorasoonderee Dabea* v. *Golam Ali* (3) is an authority for holding that the former view is the true one, and that

(4) 9 W. R. 65.

in the present case the rent cannot be enhanced."

Counsel for the plaintiffs were asked if they knew of any case in which a contrary view had been taken, and they frankly admitted that they had found none. Nor are their Lordships aware of any.

The conduct of the plaintiff Company supports the respondent's case. There can be little doubt that the plaintiff Company must have been fully aware of their agent's transactions; not only is there a presumption that he must have faithfully carried out his duties and kept them informed of his dealings with the tenures, but there are the outstanding facts that they received an unvarying rent for nearly seventeen years; that when the original tenure was split up they confirmed to two of the grantees two of the plots at the fixed rent reached in 1298, and that they allowed the defendant to raise permanent structures on the tenure and to materially alter its agricultural character, although they must have known of her acts, as they had admittedly a branch office at Mutla not far from where the lands lay.

On the whole their Lordships are of opinion that the judgment of the High Court is correct, and that this appeal should be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellants:—Messrs. *Sanderson, Adkinha & Eddis.*

Solicitors for the Respondent:—Messrs. *T. L. Wilson & Co.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 19-B OF 1918.

October 19, 1918.

Present:—Mr. Mittra, A. J. C.

RATANLAL—APPELLANT

versus

ANWAR KHAN—RESPONDENT.

Evidence Act (I of 1872), s. 92—Decree, adjustment of—Certification of adjustment—Compromise, whether new contract—Oral evidence, admissibility of, to prove compromise—Contract Act (IX of 1872), s. 25.

Where in execution of a decree the parties effect a compromise and in consequence certify the adjustment of the decree to the Court, whereupon the execution case is struck off on the ground that the decree is fully satisfied, the order of the Court is binding on the parties and there is no longer an operative decree in existence. The fact that the liabilities under the decree form the consideration for the compromise, does not prevent that compromise from being a new and independent contract which may form the basis of a suit and which may be proved by oral evidence, and such evidence would not amount to "contradicting, varying adding to or subtracting from" the terms of the decree. [p 528, col. 2.]

First appeal against the decree of the Sub. Judge, Akola, dated the 31st January 1918.

Mr. *R. N. Mudholkar*, R. B., for the Appellant.

Mr. *M. V. Joshi*, for the Respondent.

JUDGMENT.—The plaintiff obtained a decree on the 29th July 1910 for Rs. 6,485 (six thousand four hundred and eighty-five) and costs, the decree carrying interest at six per cent. per annum. On the 22nd September 1911 two of the judgment-debtors entered into a compromise with the decree-holder. The amount due under the decree was found by the parties to be Rs. 7,628 (seven thousand six hundred and twenty-eight). The plaintiff agreed to accept Rs. 7,200 (seven thousand two hundred) in full satisfaction of the decree. Bashiruddin, one of the judgment-debtors, paid Rs. 3,600 (three thousand six hundred) and the defendant, another judgment-debtor, executed an acknowledgment in the plaintiff's books for the same amount. On the following day the decree-holder's Pleader certified the adjustment and the execution case was struck off, as the decree was fully satisfied. The defendant had dealings with the plaintiff and the suit has been brought for the balance due which includes this item of Rs. 3,600 (three thousand six hundred). The lower Court has disallowed this item on the ground that the suit, so far as this item is concerned, is based on a mere acknowledgment. It is, however, conceded before me by the learned Advocate for the respondent that the further pleadings of the parties have elicited all the material facts bearing on this claim and that the suit is not liable to be dismissed on this technical ground.

The argument on behalf of the respondent is that the acknowledgment is not a promise to pay and that evidence of sub-

sequent oral agreement to modify or rescind the decree is inadmissible under section 92 of the Evidence Act. It may, however, be fairly urged on the other side on the authority of the Privy Council judgment in *Maniram* v. *Seth Rupchand* (1) that such an acknowledgment implies a promise to pay, though it cannot be an express promise to pay, a barred debt, within the meaning of section 25 of the Contract Act. Some such distinction between an express promise and acknowledgment is necessitated by the terms of section 19 of the Limitation Act when compared with section 25 of the Contract Act, as was held in *Gobind Das* v. *Sarju Das* (2). But even apart from the acknowledgment I am of opinion that the plaintiff is entitled to prove the compromise of the decree by oral evidence in this suit.

The respondent relies upon *Karan Singh* v. *Kanhai Lal* (3), where it was held that section 92 of the Indian Evidence Act of 1872 forbids proof of a distinct subsequent oral agreement to rescind or modify a decree, whether or not such decree be an embodiment of a 'disposition of property' within the meaning of that phrase in the said section. I agree with my learned predecessor that a decree is neither a contract nor a grant or other 'disposition of property.' I do not see how it can be regarded as a document embodying the terms of a 'disposition of property.' It merely embodies the result of an adjudication. I also agree that proviso 4 cannot be called in aid to allow oral evidence regarding an adjustment of a decree, if such evidence is excluded by section 92 itself. Proviso 4 seems to lay down merely a rule of restriction by disallowing evidence of subsequent oral agreement where the contract, grant or disposition of property is required by law to be in writing or has in fact been registered.

With due respect it appears to me that the question, which has not received sufficient consideration in the judgment, is whether an adjustment of a decree is an agreement by way of 'contradicting, varying, adding to or subtracting from' the decree, though it is an agreement to 'rescind or modify it.' A contemporaneous oral agreement does not 'rescind or modify' a written agreement but it 'may contradict, vary, add to or subtract from' its terms. A subsequent agreement 'rescinds or modifies' them but does it contradict, nay add to or subtract from the prior agreement, within the meaning of section 92? It is, however, unnecessary to pursue this subject any further so far as this case is concerned.

The adjustment of the decree was certified to the Court on the 23rd September 1911, and thereupon the execution case was struck off on the ground that the decree was fully satisfied. This is proved by the record of the execution case, and not by oral evidence. The order of the executing Court is now binding on the parties. There is, therefore, no longer an operative decree in existence. The fact that the liabilities under the decree form the consideration for the compromise sued upon, does not prevent that compromise being a new and independent contract which may form the basis of a suit and which may be proved by oral evidence. The plaintiff in the present suit cannot be said to be giving oral evidence contradicting, varying, adding to or subtracting from' the terms of the decree.

Under section 257A of the Civil Procedure Code, 1882, such a compromise without the sanction of the Court, when sought to be enforced by a separate suit, was valid according to all the High Courts except that of Bombay. That section is repealed in the present Code and, therefore, there is no objection to the plaintiff's claiming interest at a higher rate than that allowed by the decree.

Some evidence has been given on behalf of the defendant to prove that he was not to be held liable for any amount above Rs. 2,500 (two thousand five hundred) and that in any case he was not to pay interest on the amount of Rs. 3,600 (three thousand six hundred). I agree with the Court below that the evidence regarding this alleged agreement is unreliable. The fact that there was a subsequent acknowledgment signed by the defendant for Rs. 5,400 (five thousand four hundred) in which interest was calculated on Rs. 3,600 (three thousand six hundred) at the rate of ten annas per cent. per mensem, shows the understanding of the

(1) 2 N. L. R. 130; 4 C. L. J. 94 (P. C.); 8 Bom. L. R. 504; 10 C. W. N. 874; 1 M. L. T. 199; 4 A. L. J. 525; 16 M. L. J. 360; 33 C. 1047; 33 I. A. 165.
(2) 30 A. 268; 5 A. L. J. 274; A. W. N. (1908) 129.
(3) 8 Ind. Cas. 279; 6 N. L. R. 123.

parties as regards the rate of interest and the extent of the defendant's liability.

The result is that the plaintiff is entitled to Rs. 3,600 (three thousand six hundred) with simple interest at ten annas per cent. per mensem from the 22nd September 1911. The decree of the lower Court is accordingly modified by allowing an additional sum of Rs. 4,891-8-0 (four thousand eight hundred and ninety-one rupees and eight annas). This sum will carry interest at six per cent. per annum from the date of suit till realisation. The respondent will pay the appellant's costs on Rs. 4,891-8-0 in both Courts and bear his own costs.

Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 283 OF 1918.

May 28, 1919.

Present:—Mr. Justice Newbould.

RAM KUMAR BHOWAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

CHANDRA KANTA CHAKRABARTY—DEFENDANT RESPONDENT.

Assam Land Revenue Regulation (I of 1886), ss. 23, 154—Deputy Commissioner, whether has power to settle boundary dispute coming to his knowledge otherwise than in course of settlement proceedings—Civil Court, whether can entertain suit regarding boundary dispute in respect of which Deputy Commissioner has passed order—Jurisdiction of Civil Court, when ousted.

In order to give a Settlement Officer jurisdiction under section 23 of the Assam Land Revenue Regulation there must be a report by a Survey Officer concerning a boundary dispute that has come to his knowledge in the course of his survey. The Regulation gives a Deputy Commissioner no power to settle a dispute which arises long after the settlement proceedings and which comes to his knowledge on an application from one of the parties concerned. [p. 530, col. 2; p. 531, col. 1.]

Where the order of a Deputy Commissioner deciding a boundary dispute on the application of one of the parties concerned does not appear to be one which is final by reason of its having been passed under section 23 of the Assam Land Revenue Regulation, nor does the order show under what section the Deputy Commissioner purported to act, the Civil Court has jurisdiction to entertain a suit regarding the dispute. [p. 530, col. 2.]

The question whether the Civil Court has jurisdiction or not depends on whether the order of the Deputy Commissioner was or was not passed under section 23 of the Regulation. [p. 530, col. 2.]

Appeal against the decree of the Subordinate Judge, Lakhmipur, dated the 13th October 1917, affirming that of the Munsif, Dibrugarh, dated the 12th May 1917.

FACTS appear from the judgment.

Dr. *S. C. Basak*, (with him Babu *Asita Ranjan Chatterjee*) for the Appellants.—The lower Appellate Court without going into the merits of the case dismissed the suit, holding that by virtue of a certain order of the Deputy Commissioner relating to the matter in suit the Civil Court had no jurisdiction to interfere. The order of the Sub-Deputy Collector is dated 21st May 1916. The order of the Deputy Commissioner is dated 8th June 1916. Then there was an application by the plaintiff for review, which was decided on 8th July 1916.

Babu *Gunada Chara Sen*, for the Respondent.—The last order is not an exhibit in the case, and so the appellant cannot, in second appeal, rely on that order.]

The order though not marked as an exhibit is on the record. Upon a proper construction of the orders of the 8th June and 8th July it would appear that the order was subject to any decision of the Civil Court in the matter. The Civil Court has got jurisdiction to entertain a suit relating to the boundary dispute in question, because the order of the Deputy Commissioner is not final. The dispute was not brought to the knowledge of the Deputy Commissioner in the course of survey and settlement proceedings and so the order cannot be treated as final. Refers to sections 23, 154 of the Assam Land Revenue Regulation 1886.

Babu *Hun da Charan Sen*, (with him Babu *Surendra Nath Das Gupta*), for the Respondent.—The Deputy Commissioner is a Settlement Officer under section 138 of the Assam Land Revenue Regulation, 1886, and the only section under which he could have acted is section 23, which provides that the order of the Deputy Commissioner exercising the powers of a Settlement Officer is final and is not open to revision by the Civil Court The view taken by the lower Appellate Court is correct. Under the

corresponding Bangal Act V of 1875, it has been held that in such a case the order of the Deputy Commissioner is final.

Dr. *Sarat Chandra Basak*, in reply, contended that there was nothing on the record to show that the order was one under section 23. Under the circumstances the Civil Court had jurisdiction to entertain the suit.

JUDGMENT.—This is an appeal against a decision dismissing a suit for recovery of possession of a small piece of land in the town of Dibrugarh. The land in suit is a piece of land between the homesteads of the plaintiffs and the defendant and the dispute between the parties is a boundary dispute. There was a survey and settlement in 1911, in which the boundary between the lands of the two parties was laid down by the settlement authority. In 1915 the Sub-Deputy Collector held an enquiry and found that the defendant had encroached on the plaintiffs' land to the extent of 33 links and that the plaintiffs had encroached on the defendant's land to the extent of 3 links, and the Sub-Deputy Collector referred the plaintiffs to a Civil Court for redress, on the 21st May 1916. Then I find that the parties appeared before the Deputy Commissioner, but whether they made an appeal from the Sub-Deputy Collector's order or put in a fresh application regarding the boundary dispute does not appear from the papers that have been filed in these proceedings. The Deputy Commissioner passed an order that the parties must abide by the existing boundary. On the record of the first Court there was also a copy of the later order of the Deputy Commissioner dated the 8th July 1916 in which he says:—"He must adhere to the boundaries fixed at the last re settlement unless he can get a decree of a Civil Court altering them". Though this document was on the record, it was not marked as an exhibit and no reference was made to it in either of the lower Courts. In the suit brought by the plaintiffs with reference to this boundary dispute, the Munsif went into the merits and decided in favour of the defendant and also held that the Civil Court had no jurisdiction having regard to the provisions of the Assam Land Revenue Regulation, 1886. On appeal, the lower Appellate Court only decided the question of jurisdiction and confirmed the order of dismissal of the suit. Obviously if, as is contended, the order of the Deputy Commissioner, dated the 8th July 1916 was in review of his order dated the 8th June of the same year, it cannot be treated as a final order ousting the jurisdiction of the Civil Court. But this order has not been properly proved, nor did I allow it to be put in in evidence in accordance with rule 27 of Order XLI, Civil Procedure Code, though I might have done so, if I had not held that the appeal would succeed on other grounds.

Whether the Civil Court had jurisdiction or not depends on whether the order of the Deputy Commisioner was passed under section 23 of the Regulation. That section provides: "Whenever, in the course of survey, it comes to the knowledge of the Survey Officer that any boundary dispute exists, he shall notify the same to the Settlement Officer who shall proceed as follows". Then the section lays down how the Settlement Officer shall proceed to determine the boundaries in the case of different classes of boundary disputes. Sub-section (2) of that section provides that the order of the Settlement Officer determining any boundaries or any dispute under two of the clauses of that section shall be final. Section 154 of the Regulation provides that any matter respecting an order expressly declared by this Regulation to be final shall be excluded from the jurisdiction of a Civil Court. It appears to me that this appeal must succeed, on the ground that the defendant has failed to show that the order of the Deputy Commissioner deciding this boundary dispute was one which was final by reason of its having been passed under section 23. Copies of the orders passed do not show under what section the Deputy Commissioner purported to act. Further, it will appear that at the time when the order was passed no settlement operation was going on. Section 23 is a part of Chapter III of the Regulation, which deals with settlement and resumption. In order to give the Settlement Officer jurisdiction under that section, there must be a report to be made by a Survey Officer of the dispute that has come to his knowledge in the course of his survey. The Deputy

Commissioner's powers as a Survey Officer are given him by section 138 of the Regulation. That section empowers the Chief Commissioner to invest any officer with all or any of the powers of a Settlement Officer during the currency of a settlement and further provides that if no Settlement Officer is appointed, the Deputy Commissioner shall have all the powers conferred by this Regulation on a Settlement Officer or Survey Officer. The learned Vakil for the respondent has not been able to show me that there is any section in the Regulation which empowers a Settlement Officer to settle disputes other than those which come to the knowledge of the Survey Officer in the course of a settlement proceeding. It will appear that the Regulation gives the Deputy Commissioner no power to settle a dispute, such as is the dispute in the present case, which arose long after the settlement proceedings and which came to the knowledge of the Deputy Commissioner on an application from one of the parties concerned. Taking this view, I must hold that the learned Subordinate Judge was wrong in dismissing the appeal before him on the ground that the Civil Court had no jurisdiction.

The appeal is allowed, the judgment and decree of the lower Appellate Court is set aside and the case is remanded to that Court for a decision on the merits. If the order of the Deputy Commissioner of the 8th July 1916 had been properly put in in evidence and the learned Subordinate Judge's attention had been drawn to it, it seems to me unlikely that the learned Judge would have held that the Civil Court's jurisdiction had been ousted.

As the appellants failed to do this they must pay the costs of this appeal.

Appeal allowed; Case remanded.

COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

REVENUE REVISION No. 24 OF 1918-19.

May 29, 1919.

Present:—Mr. Maynard, F. C.

RAM CHAND AND OTHERS—DEFENDANTS—APPLICANTS

versus

KISHAN CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 56, 59, 60, 111, 112—*Occupancy tenancy, alienation of—Agreement recorded in settlement record, whether can override provisions of Act—Intention of parties—Precedents, value of—Subordinate Courts, duty of.*

The provisions of the Punjab Tenancy Act in regard to the alienation of, and succession to, an occupancy tenancy may be overridden by an agreement valid according to the provisions of sections 111 and 112 of the Act. [p. 533, col. 1.]

An agreement entered in a settlement record must be interpreted in a reasonable manner, and as a whole with due reference to all the provisions which it contains: it cannot be construed so as to give in perpetuity to an occupancy tenant, his heirs and assigns an unrestricted power of alienating his tenancy, unless such an intention is expressed in clear and unambiguous language, uncontradicted by other provisions such as those regarding the treatment of the tenancy on failure of heirs. [p. 533, col. 2.]

It is always open to the subordinate Revenue Courts to consider previous decisions of the highest Revenue Court which appear to be relevant to the decision of a case pending before them and it is desirable that they should follow such decisions, even when unpublished, where it is perfectly certain that the facts are in all respects similar and the issue is the same. But unpublished rulings must be treated with more caution than published rulings. [p. 534, col. 1.]

Revision from the order of the Commissioner, Jullundur, dated the 9th September 1918.

The Hon'ble Mr. *Muhammad Shafi*, for the Petitioners.

Messrs. *Beechey* and *Nanak Chand*, for the Respondents.

JUDGMENT.—I have heard the Counsel for the parties. The principal question is whether certain entries in successive administration papers of the village of Malout constitute an agreement whereby the applicants (who are occupancy tenants but not under section 5) are at liberty to alienate their occupancy rights without the previous consent in writing of the landlord, which section 56 of the Punjab Tenancy Act makes a normal condition of such alienations.

The entries in question are these. In

clause No. IV of the administration paper of 1857 the following passage occurs:—

"The tenants cultivating the land for more than 10 years have been classed as *qadim* and those of less than 10 years' standing have been classed as *jadid*. The *qadim* tenants can either cultivate their tenancies themselves or can derive a profit by having them cultivated by others. They can sell or alienate their right of cultivation (*haqq kasht*). The *jadid* tenants cannot have their lands cultivated by others." This is the document upon which the names of some of the landlords appear and the natural construction to be put upon the passage cited is that it defines the conditions upon which tenants may, or may not, pass on the right of cultivation to others. The Settlement Officer's final *robkar* dated September 12th, 1858, uses similar language regarding the power of transfer of the right of cultivation (*hoqq kasht*). And in a later passage of the *robkar* the Settlement Officer goes on to say that the tenancy shall go to the landlords, in the absence of descendants or co-tenants, on the death of a tenant, whether *qadim* or *jadid*.

An entry similar to that of the *robkar* above cited is repeated in the administration paper of 1882, with a preamble setting forth that the entry is made in accordance with section 2 of the Tenancy Act of 1868 (which provided that entries in the record of a regular settlement sanctioned by the Local Government before 1871, regarding alienation of occupancy tenancies among other matters, were to be deemed to be agreements, remaining operative in spite of anything contained in the Act of 1868). In clause No. 19 of the administration paper of 1900-01 the following is the language employed: –

"The tenants of more than ten years' standing are classed as *qadim* and those of less than ten years' standing are classed as *jadid* in accordance with (the entries in past Records of Rights). The *qadim* tenant..... ...is entitled to sell or transfer his cultivator's right (*haqq kashtkari*)."

These successive entries have the superficial appearance of being virtually verbatim repetitions of one and the same set of statements. But it was a very different thing to be a tenant of ten years' standing in 1882, from being a tenant of ten years' standing in 1857. And it was a still more widely different thing to be a tenant of ten years' standing in 1900-01. Plainly, the drafters of the paper of 1882, and, still less, those of the paper of 1900-01, did not mean what they said when they assigned large powers and a special security and a special devolution of tenure to persons who had been occupying land for ten years at each of these two dates respectively. The laxity of the language employed shows that former entries were repeated without any serious consideration of the significance to be attached to them The later entries must be left entirely out of account in determining whether the occupancy tenants of the land now in dispute had or had not a right of alienating the tenancy, without the landlord's consent. If such a right exists, it can only exist in virtue of the entries of 1857 and 1858, authorizing the tenant, as successor-in-interest of persons who were "*qadim*" tenants at the date, to exercise it.

Throughout the proceedings in this case *Hira* v. *Muhamadi* (1) has been cited as an authority for the view that an entry in the administration paper of a village constituting an agreement under section 111 or 112 Punjab Tenancy Act is in force only for the term of the settlement. What the Chief Court in that case actually said was that, in the absence of an express intention to the contrary, agreements recorded in a settlement record are not intended to take effect after the expiry of the period of the settlement. The learned Judges cited in support of this view *Fateh Bakhsh* v. *Lehna* (2) (a case in which the agreement was expressly limited to the term of one settlement) and *Musammat Narain Devi* v. *Hira* (3) (where the record did not fulfil the conditions of section 112, Punjab Tenancy Act, because it was prepared after 1871).

I have examined a number of rulings, *Ranjha* v. *Dhukar* (4), *Jowahir Singh* v. *Asa* (5), *Lehna* v. *Chetu* (6), *Phina Singh* v.

(1) 26 Ind Cas. 404; 16 P. R. 1915; 64 P. L. R. 1915; 21 P. W. R. 1915.
(2) 4 Ind. Cas. 851; 97 P. R. 1909; 136 P. W. R. 1909; 10 P. L. R. 1910.
(3) 21 Ind. Cas 843; 22 P. R. 1914; 12 P. L. R. 1914; 212 P W. R. 1913; 339 P. L. R. 1913.
(4) 47 P. R. 1877.
(5) 64 P. R. 1877.
(6) 22 P. R. 1882.

Mahtab Khan (7), *Jiwan* v. *Ibrahim* (8), *Puran* v. *Mamun* (9), which show that, in the matter of alienation of or succession to occupancy tenancies, the Chief Court of the Punjab had not, prior to the ruling in *Hira* v. *Muhamadi* (1), dealt with the question of the validity of entries in a village administration paper, regarded as agreements under the Punjab Tenancy Act, after the expiry of the term of the settlement for which the administration paper was prepared. Nor has the unpublished ruling of the Financial Commissioner in Revision No. 150 of 1895-1899 any bearing upon this particular point; because in that case it was held that the agreement of 1857 had been repeated in the Settlement of 1882. All that emerges from all these rulings is this: that the provisions of the Tenancy Act in regard to the alienation of, and succession to, an occupancy tenancy may be overridden by an agreement valid according to the provisions of sections 111 and 112 of the Punjab Tenancy Act. They do not decide for how long a period such an agreement is to be regarded as remaining valid, or whether there is any term to its validity: and *Hira* v. *Muhamadi* (1) stands alone as an authority on this subject.

In *Allah Ditta* v. *Achhru Mal* (10) it was pointed out that an entry in an administration paper regarding a rule of succession to an occupancy tenancy may be viewed either as a record of custom or as an agreement under section 111 or 112, Punjab Tenancy Act. As a record of custom, no doubt such an entry would at all events purport to be of permanent significance and there would be nothing surprising or suspicious about it if it appeared to be peculiarly favourable to one of two parties concerned. But custom cannot override the provisions of the statutory law in regard to the alienation of, or succession to, an occupancy tenancy. As an agreement, the learned Chief Judge went on to point out, an entry of this kind must be interpreted in a reasonable way: and when it employs vague language (as, *e.g.*, in saying that the succession should go to "*bhaiya karabati*"), a reasonable interpretation is to be put upon that language. Now, in order to enable this Court to accept the contention that the occupancy tenants were entitled to alienate in the present case without the landlord's consent, it would be necessary to hold that the language of the records of 1857-1858 was intended to make for an unlimited period the concession of complete liberty of alienation of their tenancies to all persons who had at that time held them for ten years: and that it was intended for an unlimited period to provide the holder for the time being of such a tenancy, whether a holder by succession or by purchase, with the power to defeat, by alienation, that right of the landlords, which is clearly set forth in the same record and almost in the next sentence, to succeed to the tenancy when descendants or co-tenants fail. Though an agreement of this one-sided character would have been less surprising in 1857, when tenants were possibly not easily obtained, than at a later date, it does not appear to this Court that this is a reasonable interpretation to attach to the records of 1857 and 1858: and there does appear, on the contrary, to be an irreconcilable contradiction between the interpretation for which the applicants contend and that clause in the Record of Rights which affirms the rights of the landlord in event of the failure of heirs.

Without, therefore, affirming that in the absence of an expressed intention no agreements recorded in a settlement record are intended to take effect after the expiry of the period of the settlement, I hold that such entries must be interpreted in a reasonable manner, and as a whole with due reference to all the provisions which they contain: and that they cannot be construed so as to give in perpetuity to an occupancy tenant, his heirs and assigns an unrestricted power of alienating his tenancy, unless such an intention be expressed in clear and unambiguous language, uncontradicted by other provisions, such as those regarding the treatment of a tenancy on failure of heirs. In the present case the view taken by the Commissioner, that the provisions of 1857 were an attempt to define in a rough manner some form of fixity of tenure, at a time when there

(7) 20 P. R. 1896.
(8) 196 P. R. 1889.
(9) 130 P. R. 1907; 76 P. L. R. 1903.
(10) 6 Ind Cas. 774; 38 P. R. 1910; 182 P. L. R. 1910; 60 P. W. R. 1910.

was no statute law regulating the incidents of occupancy tenancy, appears to be the correct and reasonable view. They constitute what is technically an agreement under section 112, Punjab Tenancy Act. But the agreement does not bear the construction which it is sought to put upon it.

In the first ground of revision it is urged that it was the duty of the learned Commissioner to decide this case in accordance with the ruling of the Financial Commissioner in Revision Case No. 150 of 1898-1899. In that case it had been definitely held that the entries of 1857 were repeated in the record of 1832. In other respects the facts appear to have been similar to those of the present case: but, as is very natural in an unpublished ruling, they are not set forth with that fulness which can alone enable a Court to satisfy itself that it has before it a ruling applicable to the facts of the case which it is considering. It may be taken for granted that a Court whose decisions are binding upon subordinate Courts, will, when declaring a ruling upon a question of law upon which previous authoritative decisions are lacking, take steps to publish its decision. In such a case the facts will be set forth in full detail, so that subordinate Courts may find the guidance which they require. As I have pointed out above, the Financial Commissioner's decision in revision No. 150 of 1898-1899 did not purport to decide anything more than that an agreement regarding the right of alienation recorded in the Settlement Record of 1852 was valid as between the landlord and the occupancy tenant in 1898. From that view I do not dissent: but that is not the point upon which the decision of the present case turns. It is always open to the subordinate Revenue Courts to consider previous decisions of the highest Revenue Court which appear to be relevant to the decision of a case pending before them: and it is desirable that they should follow such decisions, even when unpublished, where it is perfectly certain that the facts are in all respects similar and the issue is the same. But there are obvious reasons for treating unpublished rulings with more caution than published rulings.

There appears to be no ground for the contention in head 6 of the petition of revision that the plaintiffs respondents were by their own acts and conduct estopped from questioning the alienation in dispute.

The application for revision is rejected.

Revision rejected.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

July 1, 1919.

Present:—Viscount Haldane, Lord Buckmaster, Lord Dunedin.

Rani HEMANTA KUMARI DEBI—APPELLANT

versus

THE MIDNAPORE ZEMINDARI COMPANY, LIMITED—RESPONDENTS.

Registration Act (XVI of 1908), ss. 2 (7), 17, 49—Agreement to grant lease on happening of contingency, whether agreement to lease—Registration, whether necessary—"Decree" in s. 17 (2) (vi), meaning of—Agreement adjusting suit relating to matters beyond subject-matter of suit, whether compulsorily registrable—Procedure—Civil Procedure Code (Act XIV of 1882), s. 375—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3.

An agreement that upon the happening of a contingent event a lease will be granted is not an agreement to lease within the terms of section 2 (7) of the Registration Act, and does not, therefore, require registration under section 17 (1) *(d)* of the Act. To fall within these sections a lease or an agreement to lease must be a document which effects an actual demise and operates as a lease *in præsenti* [p 538, col 2.]

Panchanan Basu v. *Chandi Charan Misra*, 6 Ind. Cas. 443; 37 C 803; 14 C. W N. 874, approved.

The word "decree" in section 17 (2) *(vi)* of the Registration Act must be construed in connection with the purpose of the statute, which was to provide for the public registration of documents. It is not confined to so much of a decree as may be operative [p. 538, col. 2; p 539, cols 1 & 2.]

Where, therefore, an agreement adjusting a suit went beyond the subject-matter of the suit by providing that in a certain contingency lands not included in the suit should be leased, and such agreement was recorded in a decree framed under section 375 of the Code of Civil Procedure, 1882:

Held, (1) that the agreement did not fall within section 17 (1) *(b* of the Registration Act and that though it would otherwise fall under section 17 (1) *(b* of the Act it was excepted by the words "any decree of a Court" in sub-section (2) of the section; [p. 538, col. 2; p. 539, cols 1 & 2.]

(2) that even though the decree might be incapable of execution as a decree outside the lands of the suit, it might still be received in evidence of the agreement which it embodied. [p. 540, col. 1.]

Appeal from a decree of the Calcutta High Court, (Justice Sir Asutosh Mookerjee and Mr. Justice Beachcroft), dated the 6th July 1914, reported as 28 Ind. Cas. 879, affirming a decree of the Subordinate Judge, Nadia.

FACTS.—In 1895 the present appellant, Rani Hemanta Kumari Debi, instituted two suits to recover possession of certain lands as reformations *in situ* of her *zemindari*. Of these suits No. 72 was against the Government, and No. 73 against Robert Watson and Co. Both suits were contested, but on the 20th September 1897 the latter suit was settled by a compromise, the terms of which were embodied in a decree of the same date. Its eighth paragraph was in the following words :—

"If in future by the final adjudication of the Court the plaintiff obtains a decree against Government in Suit No. 72 of 1895, which the plaintiff has instituted in this Court against the Government and which is now pending, for getting possession of plaintiff's 2 annas 15 *gundas* share of the contiguous accretions, to the south of the lands claimed mentioned above of the said *joteshai* appertaining to my *zemindari* right and mentioned in the compromise petition, then the plaintiff and the heirs and representatives of the plaintiff and her husband shall grant *jote* settlement to the defendants Sahibs upon the conditions mentioned above of the lands falling in the plaintiff's 2 annas 15 *gundas* share out of (the whole of) the said decretal lands for the purpose of making cultivations, etc., and shall continue to realize from the said Sahibs and their heirs and representatives the *jamma* that would remain as balance after deducting collection charges at the rate at which Government would allow collection expenses from the *jamma* that would be fixed by Government from time to time according to *jamabandi* on the occasion of assessment of rent of the said land during the term of each successive settlement granted by Government."

The lands which were the subject-matter of the suit (No. 72 of 1895) against the Government were entirely outside the scope of the suit against the Company, and the former suit was finally decided in favour of the appellant by a decree of the Judicial Committee of the Privy Council, dated the 4th April 1906.

In 1909 the plaintiff Company (respondents), who were the successors-in-interest of Robert Watson and Co., instituted the present suit against the appellant for specific performance of the agreement contained in paragraph 8 of the compromise above recited. The defendant pleaded, *inter alia*, that the alleged agreement was inadmissible in evidence for want of registration, and that anyhow it was of such a nature that a Court of Equity would not enforce it.

The Subordinate Judge of Nadia, who tried the suit, held that in making a decree in accordance with the terms of the compromise, the Court acted without jurisdiction so far as such decree affected the agreement relating to property outside the scope of the suit: and that such decree was "a nullity" in so far as the agreement was concerned. But he also held that the agreement itself did not require registration, as in his opinion it did not of itself create any interest in the property: he, therefore, gave effect to it and decreed the suit.

Defendant appealed to the High Court, but the learned Judges of that Court dismissed his appeal, though on different grounds, Mookerjee, J., holding that though the compromise was not exempt from registration under section 17 of the Registration Act, it had rightly been received in evidence in proof of the agreement to lease, not being a present demise: while Beachcroft, J., held that the petition of compromise on which the decree was based was not itself an agreement to lease, but merely a statement to the Court that the parties had made such an agreement, and that the proceeding of the Court did not require registration. The material portion of his judgment was as follows :—

"I agree that this appeal should be dismissed with costs, though my reasons for considering the compromise petition and the decree in Suit No. 73 of 1895 admissible in evidence differ somewhat from those given by my learned brother. The view, which I take, is that the petition was not an agreement to lease and, therefore, section 49 of the Registration Act can have no application. It was a petition presented on behalf of the then plaintiff, defendant in

the present suit. It is headed 'the petition of the plaintiff Rani Hemanta Kumari, and runs as follows:—'Being apprehensive as to the future result of the said Suit No. 73 of 1895 which I have instituted in this Court against Messrs. Robert Watson & Co., Ld., for the lands mentioned in the schedule and which is still pending, now with the consent of both of us this suit is compromised according to the manner mentioned below * * *.' Then follow the terms set out in 8 paragraphs. The effect of these terms is that the plaintiff's title as proprietor to the lands in suit is recognised, the Company will be given a lease of those lands on certain terms, and also be given a lease of the lands, the subject-matter of Suit No. 72, in case of a successful termination of that suit against Government. Then follows the prayer, 'Hence by filing this *solehnama* with the consent of the defendant Sahibs it is prayed that after going through the above statements the present suit may be decided in terms of the aforesaid terms'. Then follow the schedule of the boundaries and the signatures of the managing agents and the Pleader of Messrs. Watson & Co. as consenting to the petition.

"To my mind this simply amounts to a statement to the Court by the plaintiff that the parties have come to certain terms, the accuracy of which statement is accepted by the managing agents and Pleader of the Company, accompanied by a prayer that the suit may be disposed of accordingly. The document itself is not an agreement to lease but a statement of fact, accompanied by a prayer, in a petition to the Court.

"If the terms had been stated orally to the Court, the Court would have been bound to make a record of the whole of them, under section 375 of Act XIV of 1882, though the decree of the Court would have been final only so far as it related to the subject-matter of the particular suit. For the convenience of the Court or for the purpose of ensuring accuracy, the terms were put on paper, but that fact does not alter the real nature of the petition, or convert what is really a prayer to the Court into an agreement to lease.

"The decree was equally admissible in evidence. As already remarked, the Court was bound to record the whole of the terms of the compromise. The promise to give a lease of the land, which was the subject-matter of Suit No. 72, was part of the consideration to the Company for consenting to a decree in Suit No. 73. If any authority is required for the proposition that the decree would be evidence, it may be found in the case of *Pranal Anni* v. *Lakshmi Anni* (1). The Privy Council remarked: 'If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise and had invited him by reason of such compromise to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of the land now in dispute.' That language applies to the circumstances of the present case.

"Section 17 of the Indian Registration Act does not to my mind create any real difficulty. It is true that the documents, referred to in clauses (*e*) to (*n*) of that section are excepted only from the provisions of clauses (*b*) and (*c*) and not from the provisions of clauses (*a*) and (*d*); but that is because the documents enumerated in clauses (*e*) to (*n*) come within the description of documents in clauses (*b*) and (*c*) only and not within the description of documents in clauses (*a*) and (*d*)."

Hence this appeal.

Messrs. *Dunne*, *K. C.*, and *Dube*, for the Appellant.—The petition of compromise was an agreement to lease, and not having been registered, was inadmissible in evidence—section 49 of the Registration Act. "Lease" includes "agreement to lease"—section 2 (7). Registration of leases is compulsory under section 17 (1) (*d*).

Section 375 of the Code of Civil Procedure provides that when a suit is compromised, the Court shall pass a decree in

(1) 23 M. 508; 1 Bom. L. R. 394; 3 C. W. N. 485; 26 I. A. 101; 9 M. L. J. 147; 7 Sar. P. C. J. 516; 8 Ind. Dec. (N. S.) 363.

accordance therewith so far as it relates to the suit, and such decree shall be final. The property in question was outside the scope of Suit No. 72 and the Subordinate Judge was right in holding that the decree in regard of it was a nullity: *Fajaleh Ali Miah* v. *Kamaruddin* (2).

Reference was also made to *Sarat Chandra Ghose* v. *Sham Chand Singh Roy* (3).

The agreement to lease contemplated in section 17 of the Act need not operate as a present demise. The decision in *Satyendra Nath Bose* v. *Anil Chandra Ghosh* (4) is erroneous. The contrary view has been taken in several other cases: —

Hurjivan Virji v. *Jamsetji Nowroji* (5), *Purmanandas* v. *Dharsey Virji* (6), *Syed Sufdar Raza* v. *Amzad Ali* (7).

Reliance cannot be placed on sub-section (2) of section 17, which excepts from registration "any decree of a Court". To fall within that exception the decree must be one which the Court had power to make under the Civil Procedure Code. That part of the decree which related to the agreement was not within the competence of the Court under section 375. The test is whether the decree-holder can execute it: if he could, there is no need for this suit for specific performance. The exact point did not arise in *Pranal Anni* v. *Lakshmi Anni* (1) and it was not necessary to decide it: section 17 (2) was not referred to. The exception created by that sub-section applies only to "proper" judicial proceedings. *Bindesri Naik* v. *Ganga Saran Sahu* (8).

Even if the Court has discretion to decree specific performance, it would be inequitable to do so under the circumstances of this case: the agreement of compromise was made on the understanding that Robert Watson & Co. would not assist Government against appellant in the other suit, but as a matter of fact they did assist Government.

Mr. *E. B. Raikes* (with him Mr. *De Gruyther*, *K. C.*), for the Respondents.—The decree in the 1895 suit was a declaratory decree, and was within the jurisdiction of the Court making it. That decree can be used as evidence of the agreement, even though it cannot be put in execution. The matter is concluded by *Pranal Anni* v. *Lakshmi Anni* (1), where the Board fully considered the effect of section 375 of the Code of Civil Procedure.

The agreement for a lease which requires registration must be an actual demise *in praesenti* which operates as a lease: it does not include an agreement to demise upon the happening of a contingent event.

He relied on *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (9), *Panchanan Basu* v. *Chandi Charan Misra* (10), *Raghubans Mani Singh* v. *Mahabir Singh* (11), *Rajah of Venkatagiri* v. *Narayana Reddi* (12).

Mr. *Dunne*, *K. C.*, replied.

JUDGMENT.

LORD BUCKMASTER.—The real question on this appeal is whether an agreement made in writing between Robert Watson & Company, Limited, and the appellant, incorporated in a decree of the Subordinate Judge of Nadia but not registered, is admissible in evidence. The appellant contends that it is not, and the respondents assert that it is.

The determination of the question depends mainly upon the construction of the Registration Act of 1908, but before considering the terms of this statute it is desirable to state shortly the facts which have led up to the dispute. In 1895 the appellant instituted two suits in the Court of the Subordinate Judge of Nadia, the one against the Government (No. 72 of 1895) and the other against Robert Watson & Company, Limited, being No. 73 of 1895. The object of each of these suits was to obtain possession of land claimed by the appellant. The land had been diluviated owing to encroachments of the river Padma and had then subsequently re-appeared and formed the areas which were the subject of controversy. The Suit No. 73 of 1895 was com-

(2) 13 C. 170; 6 Ind. Dec. (N. S.) 612.
(3) 14 Ind. Cas. 701; 39 C. 663; 16 C. L. J. 71.
(4) 5 Ind. Cas. 38; 14 C. W. N. 65.
(5) 9 B. 63; 5 Ind. Dec. (N. S.) 42.
(6) 10 B. 101; 5 Ind. Dec. (N. S.) 453.
(7) 7 C. 703; 4 Shome L. R. 240; 10 C. L. R. 121; 3 Ind. Dec. (N. S.) 1001.
(8) 25 I. A. 9 at p. 15; 20 A. 171; 2 C. W. N. 123; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S. 471.

(9) 35 C. 837; 12 C. W. N. 849; 7 C. L. J. 492.
(10) 6 Ind. Cas. 443; 37 C. 808; 14 C. W. N. 874.
(11) 23 A. 75; 2 A. L. J. 564; A. W. N. (1905) 195.
(12) 17 M. 453 (F. B.); 4 M. L. J. 198; 6 Ind. Dec. (N. S.) 316.

promised, the terms of the compromise being that Robert Watson & Company, Limited, were to retain possession of the land they occupied, but that the ownership of the appellant was to be recognised and Messrs. Watson & Company's possession was to be upon certain agreed terms as to payment of rent and otherwise. It was also provided that if in Suit No. 72 the appellant succeeded in obtaining a decree against the Government, she should grant a *jote* settlement of the lands in such suit to Robert Watson & Company upon the same conditions as those agreed with regard to the land that was in their possession. This agreement was reduced into writing, a petition of compromise based upon it was filed by the appellant in Suit No. 7.{, and on the 20th September 1897 judgment was given in terms of the compromise and a decree was drawn up in pursuance of the judgment on the same date. This decree recites the claims in the suit and the petition for compromise and grants a decree in the terms of the compromise, which are then set out in full.

The appellant pursued her claim against the Government and the litigation proceeded through all the Courts until by His Majesty's Order in Council of the 4th April 1906 the appellant was declared entitled to the land. Meanwhile, the rights of Messrs. Watson & Company had been sold to Messrs. Crawford and Gregson, and they, on the 3rd December 1906, conveyed all their rights to the present respondents. The appellant refused, for various reasons which are not now material, to recognise the obligations into which she had entered by the compromise to grant a *jote* settlement of the lands the subject of Suit No. 72, and the proceedings out of which this appeal has arisen were instituted by the respondents claiming specific performance of the agreement in this respect.

Apart from matters which need not now be considered, the appellant's defence rested upon the ground that the compromise could not be given in evidence, *firstly*, because, treated as an ordinary contract, it had not been registered, and *secondly*, if it were regarded as a decree, the decree was inoperative in relation to the lands in dispute, as they did not relate to the suit in which the decree sanctioning the compromise had been made.

With regard to the first, the Registration Act of 1908 provides that "lease" includes an agreement to lease, and by section 17 enacts that leases must be registered, the penalty for non-registration being imposed by section 49, which provides that, if not registered, no document shall affect immoveable property which it comprises or be received as evidence of any transaction affecting such property. If the document in question can be regarded as a lease within the meaning of this definition it could not be received in evidence. Their Lordships are of opinion that it cannot be so regarded. An "agreement for a lease," which a lease is by the statute declared to include, must, in their Lordships' opinion, be a document which effects an actual demise and operates as a lease. They think that Jenkins, C. J., in the case of *Panchanan Basu* v. *Chandi Charan Misra* (10) correctly stated the interpretation of section 17 in this respect. The present agreement is an agreement that, upon the happening of a contingent event at a date which was indeterminate and, having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted. Until the happening of that event it was impossible to determine whether there would be any lease or not. Such an agreement does not, in their Lordships' opinion, satisfy the meaning of the phrase "agreement for a lease," which, in the context where it occurs and in the statute in which it is found, must in their opinion relate to some document that creates a present and immediate interest in the land. So far, therefore, as this decision depends upon the need for registration of the document as a lease, the Registration Act places no obstacle in the respondents' way. By section 17 (1) (*b*), however, it is also provided that other non-testamentary instruments which purport or operate to create, whether in present or in future, any right, title or interest, vested or contingent, of the value of Rs. 100, and upwards, to or in immoveable property, need registration. But this is subject to the exception provided in sub-section (2) of section 17, which states that "Nothing in clauses (*b*) and (*c*) of sub-section (1) applies to," among other things,

"any decree or order of a Court." If, therefore, the decree in the present case can be regarded as a decree within the meaning of that exception, there is nothing in the Registration Act to affect the matter. It is urged that it cannot be so regarded for this reason, that by section 375 of the Code of Civil Procedure (Act XIV of 1882) it is provided:—

"If a suit be adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the suit, such agreement, compromise or satisfaction shall be recorded, and the Court shall pass a decree in accordance therewith so far as it relates to the suit, and such decree shall be final, so far as relates to so much of the subject-matter of the suit as is dealt with by the agreement, compromise or satisfaction."

The terms of this section need careful scrutiny. In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject-matter of the suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India, but a perfectly proper and effectual method of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. This in fact is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents.

Turning now to the Registration Act of 1908, and considering the meaning of the word "decree" in section 17 (2) (*vi*), this must be read in connection with the purpose of the statute, which is to provide a method of public registration of documents, and there is, therefore, no reason why a limit should be imposed upon the meaning of the word so as to confine it to the operative portion only of the decree.

This conclusion is in agreement with the view expressed by Lord Watson in *Pranal Anni* v. *Lakshmi Anni* (1) on a point in close resemblance to that raised in the present appeal. In that case a suit was originally raised for possession of certain land, and certain other lands were expressly excluded from the ambit of the claim. That suit was compromised by two documents, the one being styled a *razinamah*, or agreement of compromise, and the other an agreement of union. The agreement of union, which related to the lands outside the suit as well as those within, was not registered and was not submitted to the Subordinate Judge before whom the litigation depended. The *razinamah* was produced in the suit on a petition asking:—"That a decree may be passed in accordance with the *razinamah* which they have presented under section 375 of the Civil Procedure Act, after settling." It contained, in the first place, a detailed description of the lands which were in controversy in the suit of 885, and stated that the parties had agreed to share these lands in certain proportions. It also independently set out the effect of the agreement as to the lands outside the suit, and described them in a schedule named Schedule D, but the order made did not include and had no reference to these lands. The parties acted upon the entire agreement, and in a subsequent dispute as to the land outside the suit of 1885 the question arose as to whether the *razinamah* could be given in evidence. This Board decided that, so far as it was acted upon by the learned Judge, it was properly admissible, but that as the order made had not in fact referred to or narrated the terms of the compromise, the *razinamah* being unregistered could not be received in evidence. But in expressing the judgment of the Board upon this point Lord Watson made the following statement:—

"If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half-share of the lands involved in that suit, and also a half-share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the

conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute. But their Lordships are unable to find that any such course was taken, either in the *razinamah* or in the judicial order which gave effect to it. The *razinamah* merely referred, by way of remark, to the lands now in dispute; and the Judge was only asked to give effect to a compromise which related to the lands then in dispute before him. This order, accordingly, merely concerns the latter, and has no reference whatever to the lands described in Schedule D of the *razinamah*. So far as regarded these lands the compromise was not submitted to the learned Judge, but was deliberately left by the parties to stand upon their unregistered agreement of union."

Section 375 and its effect were clearly under the consideration of the Board, and the judgment thus expressed showed that, merely regarding the question as a question of evidence and not as to the effect of the decree on lands outside the subject of the suit, such a document as that in the present case when incorporated in a decree was clearly admissible as judicial evidence. Though this judgment does not in terms refer to section 17 (2) (*vi*) of the Registration Act, it gives full effect to the opinion that their Lordships have formed as to its interpretation. The decree in the present case is a decree which makes no difference whatever in its language between one part and another part of the compromise; it incorporates the whole; and it is, in other words, a decree which, though affecting the lands in the suit as a decree, incorporates the whole of the agreement which led to the suit being compromised. For this reason their Lordships think that the registration of the agreement was unnecessary and that the decree is sufficient evidence of its terms.

The learned Subordinate Judge, before whom this matter was first heard, treated the decree as a nullity and based his judgment in favour of the respondents upon the view that, when once the agreement was held not to be a lease, there was nothing to compel its registration. He regarded the document as outside the provisions of section 17 (1) (*b*). Their Lordships are unable to take this view. They think the document did purport to create a contingent right or interest in immoveable property, and they do not think that in treating the decree *pro tanto* as a nullity the learned Subordinate Judge has given effect to the difference between receiving the decree in evidence as a decree and executing its terms as against property outside the suit. Mr. Justice Beachcroft in the High Court took the view on this point which their Lordships think accurate, and they are of opinion for the reasons they have given that the appellant's contention cannot succeed.

The appellant further raised a question relating to the circumstances under which the document was executed. She said the agreement was come to upon the basis that Watson & Company should not assist the Government in their defence of the appellant's suit and that they did in fact render active assistance, and thereby rendered it inequitable on their part to ask specific performance of an arrangement which was only come to on the terms that such assistance should not be afforded. Upon this point it is important to observe, in the first place, that if this really were a term of the arrangement, it is not to be found in the agreement; and secondly, that, if it affects the contract, it must affect it *in toto*, and that it is impossible for the appellant, having accepted and received the advantage of the compromise so far as it related to the lands in the suit, now to resist its effect upon the other portion of the lands to which it related.

For these reasons their Lordships think that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondent:—Messrs. *Orr, Dignam & Co.*,

SHEIKH MANSUR *v.* BRAHMAMAYEE.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 359 OF 1918.

May 27, 1919.

Present:—Mr. Justice Newbould.

SHEIKH MANSUR—DEFENDANT No. 1—APPELLANT

versus

BRAHMAMAYEE BRAHMANI—PLAINTIFF—RESPONDENT.

Burgadar, *whether tenant*—Kabuliyat, *construction of.*

Where a *burgadar* executes a *kabuliyat* as a mere contract for service, he is not a tenant, but where the document creates a tenancy, *i e.*, where the contract is one of letting out the land for cultivation and is not a mere contract for service, the *burgadar* becomes a tenant. [p 542, col 2.]

Shaikh Pokan v. *Rajani Kamal Chakravarty*, 50 Ind. Cas. 285; 23 C. W. N. 614, distinguished.

Appeal against the decree of the Subordinate Judge, 3rd Court, Dacca, dated the 2nd October 1917, reversing that of the Munsif, 4th Court at Narainganj, dated the 28th February 1917.

FACTS appear from the judgment.

Babu *Rajendra Chandra Guha*, for the Appellant.—The question for decision is whether the defendant No. 1 is a *raiyat* or a mere labourer or servant. The Court of first instance, upon the construction of the Burga lease, came to the conclusion that the defendant had been let into the land as a *raiyat* and not as a mere labourer and held that the plaintiff was not entitled to *khas* possession. On appeal the learned Subordinate Judge, putting a different construction on the lease, allowed the plaintiff recovery of *khas* possession. The lease is before your Lordship, and your Lordship will find that the terms of the lease make it clear that the rights of the defendant under the lease are not merely those of a hired labourer or servant, that the contract between the parties was one of letting out the land for the purpose of cultivation. The lower Appellate Court has, therefore, erroneously held that the defendant did not acquire the rights of a *raiyat* in the land but that he was a mere servant or labourer under the plaintiff.

Babu *D. N. Chakrabarty* (with him Babu *Gopal Chandra Chakravarty*), for the Respondent.—Upon the construction of the lease the learned Subordinate Judge has rightly held that the contract between the parties was one of service, and that the defendant, not having acquired the right of a *raiyat* in the land in question, is liable to ejectment. Burgadars ordinarily do not acquire any interest in the land. Their position is that of mere labourers or servants. The terms of the lease show that plaintiff did not intend to give him any interest in the land. By virtue of the lease the defendant cannot claim to have acquired the rights of a *raiyat*. Refers to *Shaikh Pokan* v. *Rajani Kumal Chakravarty* (1) and *Kade Mandal* v. *Ahadali Molla* (2).

JUDGMENT.—This appeal arises out of a suit for recovery of *khas* possession. The first Court dismissed the suit, holding that the defendant was an occupancy *raiyat* of the land and could not be ejected. The lower Appellate Court held that the defendant's position was that of a labourer or servant under the plaintiff and decreed the suit. The learned Subordinate Judge in deciding the appeal also held that if it could be found that the defendant came into possession of the land as a tenant, he was holding the land as a *raiyat* and was, therefore, not liable to be evicted from the land. The defendant in this case is admittedly a settled *raiyat* in the village and consequently, as held by the lower Courts, if he came into possession of the land as a tenant he at once acquired the right of occupancy and was not liable to ejectment. The document under which the plaintiff came into possession is a registered *kabuliyat* in the following terms:—

"To

The worthy of remembrances Srijukta Brahmamayi Barmani, wife of Ram Bux Roy, inhabitant of Balla, Thana and Sub-Registry Monohardi, District Dacca, by caste Kshetria, occupation Talukdari and Mahajani.

I, Sheikh Mansur, son of late Sheikh Sudan, by race Musulman, occupation cultivation, inhabitant of Majidia, Thana and Sub Registry Monohardi, District Dacca, execute this Burga *kabuliyat* for a term of eleven months to the following effect:—

That you are the superior *malik* of the land described in the schedule below,

(1) 50 Ind. Cas. 285; 23 C. W. N. 614.
(2) 6 Ind. Cas. 594; 14 C. W. N. 629.

situate in Mouza Bir Majdia, generally known as Mouza Majidia, being the Taluk Sahebram Rai Ranjit, appertaining to the Zamindari Hissya 9 annas of Purgana Bhowal, under Police Station and Sub-Registry Monohardi, District Dacca, and you, having purchased this land together with other lands at a public auction sale and held in Execution Case No. 116 of 1914 of the fourth Court of Munsif at Narayangunge and having taken possession thereof by taking sale certificate, have been the *malik* thereof. As I applied to take Burga settlement of the said land in half *bhag*, you have granted my application and have agreed to grant me Burga settlement of the said land for a term of eleven months commencing from the month of Baisakh and ending in the month of Falgun this year. I, therfore, execute this Burga *kabuliyat* for a term of eleven months and promise hereby that, keeping the metes and boundaries of the under-described land intact, I will with due care plant, sow crops and reap them and whatever crops I will grow, I will take to your house or in the house of any other person as you may order, and after threshing the same I will take the half share thereof to your house and give it to you to your satisfaction and I shall take the remaining half share of the crops as my remuneration. I will give the seeds that may be required for sowing the land and I will give you a half share of the Kuts to your satisfaction. I shall take advice from you as to which crop should be sown in which season, and sow crops accordingly. I will give up the land without notice, on the expiry of the term. I shall not be at liberty to raise any objection on the ground of cultivation or possession, and if I raise any, it will be disallowed by Court. Further if I do not sow or reap crops in proper time and if you suffer any loss for any act done by me, then I shall pay to you Rs. 48 on account of compensation, and if I do not do so, then you shall be competent to institute suit and realize the said amount by taking out execution of the decree (passed in that suit). To this effect I execute this Burga *kabuliyat* for a term of eleven months, out of my own will and in sound state of my senses."

The learned Subordinate Judge has held on this agreement that the defendant acquired no tenancy right in the land. I am unable to agree with him. He cites in support of his decision the case of *Kale Mandal* v. *Ahadali Molla* (2). But in that case, though it was held that a suit against a Burgadar for recovery of the price of the produce was maintainable in a Small Cause Court, it threw very little light on the circumstances which distinguish a Burgadar who is a tenant and a Burgadar who is a servant. In that case the terms of the contract were not proved and the finding that the Burgadar was a servant was based to some extent on the custom of the Pabna District. My attention has been drawn to the decision of this Court in the case of *Shaikh Pokan* v. *Rajani Kamal Chakravarty* (1), where it was held that the *kabuliyat* which was set out at length in the judgment was a contract for service and was not a document creating a tenancy. But there is a marked difference between the contract in that case and in the present case. Here there is no reference to agricultural labour and by the document, the settlement of the land for a term was created. In the case cited, the grantor of the *kabuliyat* had a right to decide where crops were to be grown and the grantee was declared unable to grow any crops according to his own will. Here the *kabuliyat* only provides that the executant thereof shall take advice, which is a very different matter from taking an order. Finally, there is a provision to give up the land without notice on the expiry of the term. On the document itself, I would hold that the contract was one of letting out the land for cultivation and was not a mere contract for service. On this construction of the document and the findings of the lower Courts the plaintiff could have no right to eject the defendant.

The result, therefore, is that this appeal is decreed, the judgment and the decree of the lower Appellate Court are set aside and those of the Munsif dismissing the suit restored.

The appellant is entitled to his costs in this Court and in the lower Appellate Court.

Appeal decreed.

HAJI BEGUM *v.* SHANKAR RAO PARBAT RAO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 30B OF 1916.

February 16, 1917.

Present:—Mr. Stanyon, A. J. C.

HAJI BEGUM—PLAINTIFF—APPELLANT

versus

SHANKAR RAO PARBAT RAO DESHMUKH—DEFENDANT—RESPONDENT.

Landlord and tenant—Agricultural holding, whether transferable—Tenant right, transfer of—Transferee, position of—Transfer by limited owner, effect of.

An agricultural holding is a personal right, not transferable unless expressly declared to be so by contract or by statute. In Berar there is no law which permits an annual tenant of an agricultural holding to transfer his right. [p. 543, col. 2.]

Under the Berar Land Revenue Code a tenant right is heritable and transferable as "property", but a transferee of a tenant right by contract who does not make any fresh contract with the landlord obtains only the right, title and interest of the transferor, and if the transfer is from a woman with a limited interest, his right to occupy the land would come to an end on her death or re-marriage. [p. 544, col. 2.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 121 of 1915, dated the 20th September 1915, arising out of Civil Suit No. 24 of 1914, decided by the Subordinate Judge, Malkapur, on the 22nd April 1915.

The Hon'ble Sir *Bipin Krishna Bose* and Mr. *Lal Mohan Vivian Bose*, for the Appellant.

JUDGMENT.—The plaintiff is the owner of a Jagir in Berar. The defendant is in possession of land which was formerly occupied by a tenant named Ananda. This tenant died a few years ago, and on the 29th May 1912 his widow, *Musammat* Lakshmi, executed a document whereby she purported to sell the tenant right to the defendant. The plaintiff brought the suit out of which this appeal has arisen to evict the defendant as a trespasser. The defendant pleaded that Ananda was the holder of a hereditary and permanent tenant right, which his widow had inherited from him and transferred to the defendant, who, therefore, claimed to be a permanent tenant and, as such, not liable to be evicted. This original pleading was further evolved into the plea that Ananda was an ante-Ijara tenant.

The Courts below found that an ante-Ijara tenancy was not proved, but that by reason of the antiquity of the tenancy no satisfactory evidence of its commencement and term is forthcoming. They ruled, therefore, that the tenancy was permanent, by which I understand them to have applied section 78 (2) of the Berar Land Revenue Code, and to have held that the term of the tenancy is co-extensive with the duration of the plaintiff's Jagir as such. The Courts below have further found that the tenant right is alienable and declaring the defendant to be a permanent tenant have dismissed the suit. The plaintiff has, therefore, made this second appeal. Two main grounds are put forward on her behalf, namely—

(1) that the tenant right was not alienable; and

(2) that in any case the defendant has only purchased the limited interest of *Musammat* Lakshmi.

The learned Advocate for the appellant felt himself unable to press the first of these grounds in the face of the decision of Mittra, Additional Judicial Commissioner, in *Bhiwaji* v. *Tukaram* (1), in which the same learned Advocate had successfully sustained an opposite contention. For that reason I abstain from deciding the point in this case. I must confess to feeling considerable doubt, with all due respect, to the correctness of the assumption that because there is no law in Berar which expressly forbids an annual tenant from transferring his rights, therefore, such rights are transferable. There is abundant authority for the view that an agricultural holding is a personal right, not transferable, unless expressly declared to be so by contract or by statute. Therefore it seems to me that it would be more correct to say that there is no law in Berar which permits an annual tenant of an agricultural holding to transfer his rights. Under the Bengal Tenancy Act, 1859, which was the predecessor of the Central Provinces Tenancy Act of 1883, *inter alia*, it was generally held that an agricultural tenancy was not

(1) 39 Ind. Cas. 15; 13 N. L. R. 11.

transferable. No doubt section 6 of the Transfer of Property Act, 1882, which was applied to Berar in 1907, enacts that property of any kind may be transferred. But the Act avoids any definition of the important word property, and, as pointed out by Dr. Gour at page 121 of the 4th Edition of his work on the Transfer of Property, it is necessary to construe the word with circumspection. A wife is the property of her husband in the eye of the law, but she is not ordinarily transferable. However there is a good deal to be said on the other side, and as the contention is not pressed before me I see no reason to come to any finding which might possibly be in conflict with the published ruling.

For the purposes of this appeal, therefore, I will assume, without any decision of my own on the point, that the tenant right of the late Ananda was heritable and transferable in the ordinary way. The provisions of the Berar Code are not very clear in their applicability to tenancies in alienated land as compared with tenancies and other forms of holdings in unalienated land. No doubt some attempt is made in section 222 to set out a general rule; but section 224 provides exceptions thereto which are rendered somewhat vague by use of the words "as far as may be." Moreover, is a tenant in an alienated village included in the category of "holders of alienated land", or is he a tenant from a holder of such land? For if sections 72 and 73, while applying to the alienee from Government, do not apply to his tenants, then the heritability and alienability of an Ijara tenancy becomes extremely doubtful. Section 223 contains express provisions for the protection of an ante-alienation tenant; and that suggests that post-alienation tenants are left to make their own terms with their landlords and receive no statutory protection independently of their contracts. But I am inclined to hold that Chapter VII of the above Code is one of general applicability, and that section 78, with which that Chapter opens, applies as much to tenants in alienated villages as to tenants in unalienated lands. Therefore, I accept the finding of the Courts below that the tenant right of Ananda was of the kind provided for by section 75 (2) of the Berar Code.

We have it, then, that Ananda held a tenant right which was heritable and transferable, for a term co-existent with the duration of the plaintiff's Jagir as such. But section 72, which deals with the devolution and transfer of occupancy of unalienated land, can only apply, as far as may be, to a tenant from a holder of alienated land like the plaintiff. The Deputy Commissioner can "recognize" heirs and transferees of occupancies held directly from Government. But, obviously, he cannot take that course in regard to the tenants of a private proprietor. Therefore, we can only apply section 72 to such cases as the present by holding that the tenant right is heritable and transferable as "property." The difference is very substantial. Each transferee of an occupancy who is recognized by the Deputy Commissioner becomes a fresh occupant, and holds with all the rights of an original occupant. It does not matter in his case that the occupant for whom he has been substituted was a woman with a limited interest, or the last of a line of holders, on whose death the occupancy would have lapsed. The new occupant becomes the first of a fresh line of devolution until another transfer again starts yet another line of proprietor and successors. But a transferee of a tenant right by contract who does not make any fresh contract with the landlord, obtains only the right, title and interest of his transferor. In the present case, following the assumption already made as to the tenant right of Ananda being heritable, it was inherited by his widow Lakshmi Bai. The defendant bought the right, title and interest of Lakshmi Bai, and nothing more. He stands in the shoes of his vendor, and his right to occupy the land comes to an end on her death or re-marriage, I, therefore, modify the decrees of the Courts dismissing the suit by adding the words "became the defendant as the transferee of the right, title and interest of the tenant Laxmi Bai, widow of Ananda, is entitled to occupy the land as a tenant of the plaintiff until the death or re-marriage of his vendor, the said Lakshmi Bai."

I make no order as to the costs of this appeal. In the Courts below costs will be paid as ordered by the lower Appellate Court.

Decree modified.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE NO. 484 OF 1918.
May 29, 1919.
Present:—Mr. Justice Newbould.
BROJABASHI RUDRA PAL AND OTHERS —PLAINTIFFS—APPELLANTS
versus
SARAT CHANDRA RUDRA PAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—"Ijara," *meaning of*—*Lessor and lessee, rights of*, inter se—*English Law, principles of, whether applicable Sub-lease granted in contravention of provisions of lease, validity of Re-entry, right of, when can be exercised.*

The word "*ijara*" has no settled meaning which would make its use inconsistent with the interest of a tenure-holder. The usual meaning of "*ijara*" is a lease for a term. [p. 546, col. 1.]

The general rights between the lessor and the lessee as laid down in the English Law would govern cases under the Bengal Tenancy Act, unless that Act contains anything to the contrary. [p. 546, col. 1.]

Where the terms of a lease give the lessor a right of re-entry in case of a breach of covenant in the lease, unless and until that right is exercised, a sub-lease granted in breach of the terms of the lease would operate as valid [p 545, col. 2.]

Plaintiffs brought a suit for recovery of *khas* possession of land, basing their title on a *raiyati* lease granted by persons who had obtained a lease from the superior landlord for six years and by which they covenanted with their lessor not to assign, underlet or part with any part of the *parganah* in which the land in suit was situate:

Held, that the plaintiffs' *raiyati* lease, even if granted in breach of a covenant in the head lease, was not void but voidable at the option of the head lessor and that a third party could not challenge the rights of the plaintiffs, who were entitled to succeed on the basis of their *raiyati* lease. [p. 545, col. 2.]

Appeal against the decree of the Subordinate Judge, First Court, Tipperah, dated the 5th of December 1917, affirming that of the Munsif, First Court at Kasba, dated the 25th of September 1916.

Babu *Rupendra Kumar Mitra*, for the Appellants.

Babu *Upendra Kumar Rai*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants sued the defendants-respondents for recovery of *khas* possession of certain land upon establishment of their *raiyati* title thereto. The plaintiffs base their title on a *raiyati* lease of the disputed land granted to them by certain persons who obtained a lease for a term of six years of the Pergannah Gangamandal to which the land in suit appertains. This lease was granted to them by the Official Receiver of the estate. By this lease the lessees covenanted with the lessor, among other things, that they "will not, save and except for the purpose of granting *dur ijara* settlements to *dur ijaradars* or other tenants or persons by means of which the rents of the said Pergannah or the greater portion thereof may be collected as heretofore, assign, underlet or otherwise part with the possession of the said Pergannah or any part thereof and will not enter into any partnership with any other person or persons in respect of the said Pergannah or any part thereof or charge or assign the lessees' interest under those presents or any part thereof without the previous consent of the lessor." The lower Courts have held that the lease to the plaintiffs in breach of that covenant is void and consequently the plaintiffs have no title on which they can support an action in ejectment.

On behalf of the appellants-plaintiffs it is contended that this lease, even if granted in breach of covenant in the head lease, is not void but voidable at the option of the head lessor, and that a third party cannot challenge the rights of the plaintiffs. This contention seems to be sound. The terms of the head lease give the lessor a right of re-entry, and until this right is exercised, the sub-lease granted to the lessees would appear to be valid. In Foa's Landlord and Tenant, 5th Edition, it is stated that "a very common covenant in leases is one by which the lessee undertakes not to assign or underlet or part with the possession of the premises demised to him, at least without the license or consent of the lessor." "When this covenant exists, the landlord's

consent must be obtained before an assignment or underlease may be made; nor will the mere fact that the landlord has not objected at the time to the assignee taking possession, be held to amount to such consent. But the assignment itself will not, unless the lease be expressly made to be determinable upon its taking place and the lessor determine it accordingly, be invalid without such consent." Here though the lease is made determinable upon the taking place of the breach, the lessor has not determined it and the lease granted to the plaintiffs has not become invalid.

It is contended on behalf of the respondents that this is authority under the English Law and the present case is governed by the Bengal Tenancy Act. There is nothing in that Act which goes against the principle there laid down, and the general rights between the lessor and the lessee would govern cases under Bengal Tenancy Act, unless that Act contains anything to the contrary.

It is further contended that the lessors of the plaintiffs, being *ijaradars*, were not tenure holders and had no interest in the property, that they were farmers of rent and that they were, as represented by the learned Vakil for the respondents, only dignified *tahsildars*.

For the appellants, it is pointed out that there is no mention in the lease that the interest created is that of an *ijaradar*. This point appears to me to be of no importance. By implication the lessees are described as *ijaradars*, as under the covenant, they have authority enabling them to grant *dur ijara* leases to *dur ijaradars* and none but *ijaradars* can create a *dur ijara* interest. But there is no settled meaning of the word "*ijara*" which would make it inconsistent with the interest of a tenure holder. The usual meaning of "*ijara*" is a lease for a term. Though the interest of an *ijaradar* may be limited to collection of rents, it cannot be held to be so in the present case. It is stated in the lease that "he, the lessor, doth hereby demise and lease unto the lessees all that Pergannah Gangamondal, etc." This surely grants to the lessees a greater interest than that of a mere rent collector. Though the subsequent covenant to some extent restricts his rights, the original nature of the interest has not altered from that of a lease holder to that of rent collector. Both the lower Courts have dismissed the suit solely on this issue, the first Court stating that "as the plaintiffs' suit fails on the decision of these two issues, no further evidence has been recorded".

It is, therefore, necessary that the case should be re-heard on the other points that arise. I accordingly decree this appeal, set aside the decrees of both the lower Courts and remand the case to the Court of the Munsif at Kasba for a re-hearing and decision of the other points in this case. Costs will abide the result.

Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 6 OF 1918.

December 5, 1918.

Present:—Mr. Fawcett, J. C.

GOVERDHANDAS CHELLARAM—APPELLANT

versus

LALCOMAL AND ANOTHER—RESPONDENTS.

Hindu Law—Adoption by widow—Agreement postponing vesting of estate till after adopter's death, validity of—Alienation by widow, effect of.

An agreement made at the time of effecting an adoption by a widow under which the adoptee assents to his adoption, but the vesting of the estate in him is postponed till after the death of the adopter, is binding upon the adoptee, and it is not open to him to contest an alienation made by the adopter. [p. 548, col. 1.]

Appeal from the decision of the Sub-Judge, Tatta.

Mr. *Tahilram Maniram*, for the Appellant.

Mr. *Hirdaram Mewaram*, for the Respondents.

JUDGMENT.—The plaintiff appellant claimed to have been taken in adoption by his uncle's widow, Tharibai (respondent No. 2), and sued to set aside a sale of a house made by her in favour of the respondent No. 1 and to recover its possession.

The defence raised was that the adoption was invalid, that in any case it was made subject to an agreement between the appellant and respondent No. 2, by which the vesting of the estate in the former was postponed till after the death of the latter and that, therefore, he was not competent to dispute the validity of the alienation.

The Subordinate Judge held that the adoption was proved and valid, but he decided that the agreement made at the time of effecting adoption precluded appellant from disputing the alienation. That being so, he did not decide whether the sale was one justified by legal necessity, as further pleaded in the written statement. He, accordingly, dismissed the suit with costs. The appeal raises the issue whether the lower Court erred in holding that the agreement relied upon was binding on the appellant and barred him from disputing the alienation.

The appellant's adoption is shown by the evidence to have taken place on the 25th of August 1901, with ceremonies which continued for two days. On the 27th of August a registered adoption deed was executed by Tharibai in the admitted presence of the appellant. The Subordinate Judge says it is clear to him that the terms of the deed were settled before the adoption took place and that it was under the knowledge of the agreement and in pursuance of it that the adoption took place. I concur in this finding of fact. Tharibai in her deposition says that the terms reduced to writing in this deed had been settled at the outset, and this is probable and not contradicted by any reliable evidence. The adoption, under the circumstances, was one made subject to the conditions stated in the deed of adoption to which the appellant assented. I agree, therefore, with the conclusion of the Subordinate Judge that there is no force in the contention that under the adoption the appellant got a vested right to the estate of Tharibai's deceased husband, and that this estate could not be affected by the subsequent deed of adoption. Nor do I think that there is any force in the contention that the agreement is void for want of consideration. On the finding of fact mentioned above, there was clearly consideration for appellant agreeing to Tharibai's control of the property during her lifetime, in view of the benefits otherwise conferred on him by the adoption. Nor was any such objection mentioned specifically in the plaint.

But two arguments were addressed to the Court by Mr. Tahilram for the appellant, which deserve fuller notice. The *first* is that the agreement confers nothing more on Tharibai than an ordinary widow's estate and gives her no right of alienation except the ordinary one of a Hindu widow, namely, for legal necessity, and my attention was drawn to two rulings that in construing deeds of gift or Wills, the presumption is that the widow takes only an ordinary widow's estate. But, in the present case, although the deed makes no express mention of an absolute power of alienation, yet I think that clause 4 distinctly implies such a power. It says that after her death the *kharkhana*, cash and all moveable and immoveable property, which she may save and which remains after her spending and eating, will belong to the appellant. This can only be construed as implying that the immoveable property also might be alienated by Tharibai in the course of her spending and eating. Nor does it appear to have occurred to the plaintiff's Pleaders in the lower Court to construe the document in any other way.

The *second* argument is that the agreement, so far as it gives the respondent No. 2 a power of alienation in excess of that allowed to a widow under the ordinary Hindu Law, is invalid, as being repugnant to Hindu Law. This point has been fully considered by the Subordinate Judge in his judgment, and he has distinguished the present case from those in which a bargain is made between the adopting widow and the guardian of a minor adopted son, diminishing the estate which the adopted son is to take. In these latter cases it has been held that whether the agreement is valid depends on its being a reasonable one in the interest of the minor; and it has been held that stipulations giving the widow an absolute power of disposition over the property are unreasonable. But in the present case appellant was of full age when he was adopted, and the Subordinate Judge's view that the agreement is binding upon him is sup-

ported by *Kashibai Ramchandra Ghatge* v. *Tatya Genu Pawar* (1). As inthat case, so here, the appellant deliberately accept-ed the arrangement under which he was adopted and has derived a considerable advantage therefrom and he must, therefore, be held bound by his agreement. This also is the view taken in Mayne's Hindu Law, 8th Edition, page 261, where some old Bengal decisions to the same effect are cited. There is only one argument to the contrary which seems to me to be substantial. This is whether the adopted mother is entitled to enlarge her estate by an arrangement with the adopted son. Such an argument was raised in the case of *Vyasacharya* v. *Venkubai* (2) but no opinion on this point was expressed by the Full Bench. Nor, do I think, is it necessary to decide it in this case. The appellant is suing in the capacity of an adopted son, and is bound by the terms of an agreement under which he himself assented to his adoption being made, on the principle of "*volenti non fit injuria*", as pointed out by the Subordinate Judge. It may be that the next reversioner could object to the alienation on the ground that this agreement does not bind him and was invalid, so far as it purported to give Tharibai a larger power of alienation than a Hindu widow ordinarily possesses. But the plaintiff-appellant is not suing in this capacity. And even supposing he is the next reversioner, it is possible that the consent given by him to the terms of the adoption deed might be held to cover this particular alienation and raise a suffi-cient presumption of its propriety under the rulings of this Court in *Jiwanmal* v. *Nihalchand* (3) and *Jiwatmal* v. *Gianibai* (4)

I, therefore, agree with the lower Court's conclusion and see no reason to interfere. The appeal is dismissed with costs.

Appeal dismissed.

(1) 36 Ind. Cas. 546; 40 B. 668; 18 Bom. L. R. 740.
(2) 17 Ind. Cas. 741 37 B. 251, at p. 259; 14 Bom. L. R. 1109.
(2) 1 S. L. R 196
(4) 35 Ind. Cas. 681; 10 S. L. R. 49.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 871 OF 1917.

May 15, 1919.

Present:—Mr. Justice Newbould and Mr. Justice Duval.

BALARAM PAL—DEFENDANT—APPELLANT

versus

KANYSHA (KANGSHA) MAJHI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XXII, r. 3, O. XLI, r. 4—Appeal—Death of joint plaintiff before hearing of appeal, effect of—Abatement of appeal—Decree passed in ignorance of fact of death, validity of—Appeal by one of several plaintiffs—Other plaintiffs, whether necessary parties.

Where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, rule 4 of Order XLI of the Civil Procedure Code does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto. [p. 549, col 2.]

The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity. [p. 549, col. 2.]

Appeal against the decree of the District Judge, Jessore, dated the 2nd of February 1917, reversing that of the Munsif, 2nd Court at Jhinidah, dated the 29th of November 1915.

FACTS appear from the judgment.

Babu *Upendra Narain Bagchi* (with him Babu *Jatindra Narain Bagchi*), for the Appellant.—The first Court dismissed the suit on the ground that the plaintiffs had failed to prove their title and that the suit was time barred. On appeal the suit was decreed, but the ques-tion of limitation was not gone into by the lower Appellate Court. During the pendency of the appeal one of the appellants, Kailash Majhi, died but the appeal was heard and decided about a month after the death of Kailash without his heirs being brought on the record. So I submit that the decree for joint possession in favour of Kailash is bad, because he died before the hearing of the appeal and his heirs were not brought on the record. The decree of the lower Appel-late Court is invalid—it is a nullity—because one of the plaintiffs-appellants was dead before the hearing of the appeal.

Babu *Bhudar Haldar* (with him Babu *Nirode Bandhu Roy*), for the Respondents.—The appeal was heard within a month of Kailash's death, and so the substitution could not be

made by the heirs of Kailash who were entitled to six months' time for substitution. Our remedy was to apply for an amendment of the decree—the objection taken now is a mere technical one. Even if there was any irregularity, that would not affect the merits of the case. Even assuming that the appeal abated so far as the heirs of Kailash are concerned, still under Order XLI, rule 4, Civil Procedure Code, the lower Appellate Court was competent to hear and decide the appeal because the appeal proceeded on a ground common to all the plaintiffs. Further, your Lordships are competent under section 151, Civil Procedure Code, to bring the heirs of Kailash on the record. The right in this case was a joint right and under the provisions of Order XXII, rule 3, Civil Procedure Code, after the death of Kailash the other appellants are competent to maintain the appeal.

Babu *Upendra Narain Bagchi*, in reply, referred to *Sriram Chandra Naik* v. *Hridoy Nath Gupta* (1).

JUDGMENT.—This appeal arises out of a suit brought by six plaintiffs for recovery of possession of a homestead on declaration of their title thereto. The suit was dismissed by the Munsif on the 29th November 1915. Against that dismissal all the plaintiffs jointly preferred an appeal in the Court of the District Judge of Jessore. That appeal was argued before that Court on the 31st January 1917, and the judgment was delivered on the 2nd February 1917. But it is admitted that the first plaintiff-appellant, Kailash Manjhi, died on the 1st January 1917. The information of his death was not given to the lower Appellate Court. As the plaintiffs pleaded a joint title, the right to sue was one which did not survive to the surviving plaintiffs. The result consequently was that rule 3, Order XXII, Civil Procedure Code, came into operation, and the suit, that is to say, the appeal before the lower Appellate Court abated under the second clause of that section. No application was made by the other plaintiffs-appellants to have the legal representatives of Kailash Manjhi made parties to that appeal at any time within six months of his death. The learned District Judge decreed that appeal and passed a decree in favour of all the plaintiffs in ignorance of Kailash Manjhi's death. Against that decree the sole defendant appealed making all the plaintiffs, as they appeared on the record, respondents. Notice was served on the living respondents on the 20th November 1917, and the notice on Kailash was returned unserved with the report of his death, and that, according to the defendant-appellant, was the first time he learnt of his death. He then made the heirs of Kailash parties to the appeal before this Court, and they appear and we have heard the learned Vakils for the appellant, for the survivors of the original plaintiffs and for the heirs of Kailash.

It is contended that Order XLI, rule 4, Civil Procedure Code, operates in favour of the surviving plaintiffs. But we think that when a plaintiff prefers an appeal in which other plaintiffs are interested, that section does not authorize him to proceed with the appeal without making other plaintiffs parties to the appeal. In the present case, they, all the plaintiffs, are necessary parties.

It is futher contended that as the heirs of Kailash are now before this Court, the appellant defendant cannot say the appeal has abated. But the effect of allowing the appeal to be heard and the decree passed by the lower Appellate Court in ignorance of the death of one of the joint plaintiffs was that that judgment and decree became a nullity. The heirs of Kailash might have applied, within six months from the date of their father's death, to have the decree set aside and the appeal re-heard, but they having taken no action, the whole appeal must be held to have abated.

The result is that the decree of the lower Appellate Court being a nullity, the original judgment of the first Court must stand and the suit must be dismissed in accordance with that decree.

The appellant will get his costs in this Court as well as in the lower Appellate Court.

Appeal decreed.

(1) 51 Ind. Cas. 409; 29 C. L. J. 461.

AJODHYA PRASAD *v.* KARAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 23 OF 1919.

August 12, 1919.

Present :—Mr. Findlay, A. J. C.

AJODHYA PRASAD—PLAINTIFF—APPLICANT

versus

KARAN—DEFENDANT—NON-APPLICANT.

Custom—Wajib-ul-arz, *entry in, effect of—Burden of proof—General law, modification of.*

In order to get rid of the binding effect of a custom recorded in a *wajib-ul-arz*, the person seeking to avoid it must show that the custom has been modified by contract or otherwise. [p. 551, col. 2.]

The general law as regards the ownership of trees standing on tenancy land is inapplicable where there is an express provision in a *wajib-ul-arz* that such ownership is with the tenant. [p. 552, col. 1.]

Revision of the judgment and decree of the Judge, Small Cause Court, Bilaspur, in Civil Suit No. 689 of 1918, dated the 4th January 1919.

Mr. *V. Bose*, for the Applicant.

Messrs. *M. V. Joshi* and *G. R. Deo*, for the Non-Applicant.

ORDER.—The plaintiff-applicant, who is the *malguzar* of Mouza Deori, Bilaspur, sued the defendant-non-applicant in the Court of Small Causes, Bilaspur, for damages, being the value of certain trees of spontaneous growth alleged to have been felled by the non applicant, who is an ordinary tenant in the village. The suit was dismissed by the lower Court, on the ground that under the current *wajib-ul-arz* the general law as regards the ownership of trees resting in the landlord had been modified and that the custom represented in the terms of the *wajib ul-arz* had not been rebutted by sufficient evidence. The clause of the *wajib-ul-arz*, referred to, read as follows :—

"Cultivators have a right to cut all trees of spontaneous growth or which have been planted by them on land included in their holdings but in the absence of agreement to the contrary, they cannot cut fruit trees which were not planted by them, except with permission of the *lambardar*."

The first contention urged on revision is that the entry in question in the current *wajib-ul-arz* is based on an erroneous view of the law and does not represent the correct custom, and that, in the circumstances, the plaintiff-applicant is not bound thereby. It may be of interest to glance at the corresponding entries in the earlier *wajib-ul arzes* of the Bilaspur District. In Fuller's Compilation of Wajib-ul-arzes, dated 1885, the corresponding clause was,—

"Trees of spontaneous growth are the property of ourselves and co-sharers, but they shall not be cut without the consent of all the co-sharers. Cultivators, however, may, with our permission, continue to cut Babul trees required for agricultural purposes, without being required to pay anything for doing so. All existing rights over trees or their produce shall be maintained and shall not be interfered with. All persons who have hitherto enjoyed the right of cutting trees planted by themselves shall continue to do so. In future, however, any person planting trees within the village limits shall have no right to the trees so planted as soon as he is dispossessed of the land on which he may have planted the same. Such trees shall in this case become our property."

Coming to the Settlement of 1886-90, paragraph 97 (3) of the apposite report shows that the cultivators' right to cut the trees planted or sown by them was recognised, as also their right to cut trees of spontaneous growth with the permission of the *lambardar* and, in case of the *malguzar's* refusal, they could apply to the Deputy Commissioner for permission. It is obvious that a considerable difference emerges between these earlier *wajib ul-arzes* and the terms of the current one in this connection. The learned Counsel for the applicant has referred me to paragraph 8 of Letter No. 253/XI-13 2, dated the 24th August 1908, from the Chief Secretary to the Chief Commissioner, Central Provinces, to the Commissioner of Settlement, in which the current *wajib ul arz* for the Bilaspur District was approved. The following remarks occur in that letter with regard to the clause in question of the *wajib-ul-arz* :—

"As regards the right to trees, the Chief Commissioner is not sure whether the clause represents the actual custom in Mungali, or whether it represents the ideas of the Settlement Officer at the last Settlement as to what these rights should be, and has been accepted by the present Settlement Officer on the same consideration. The Chief Commissioner understands the universal custom to be that a cultivator may cut trees of spon-

taneous growth within his holding and trees which he has planted himself, but he shall not without the permission of the *lambardar* cut fruit trees which he has not planted himself, and if this is so, that is all that need be said in the *wajib-ul-arz*. It is undesirable in such a matter to enter anything in the *wajib-ul-arz* in regard to which a definite custom is not established but it is better to leave it to the ordinary presumption of the ordinary law. Subject to anything the Settlement Officer may wish to urge, the clause has been amended accordingly."

The present village, I may note, is situated in the Bilaspur Tahsil, but the term of the *wajib-ul-arz* with which we are concerned would appear to be identical with that mentioned in the letter just quoted. Now, it has been urged on behalf of the applicant that the letter from the Chief Secretary to the Chief Commissioner proceeds on a view of the law which was erroneous, and that the terms of the *wajib-ul-arz* do not in effect enunciate the custom. I have, in this connection, been referred to various decisions, like those in *Kasim Mian* v. *Banda Husain* (1), *Kausalia* v. *Gulab Kuar* (2) and *Ganga Dei* v. *Badam* (3), laying down the proposition that, ordinarily, the property in timber on a tenant's holding rests in the landlord. In our own Provinces we have the decision of Stanyon, A. J. C., in *Hiria* v. *Mahomed Sirajuddin Khan* (4). The learned A. J. C. there remarked as follows :—

"It is now well established that the ownership in trees standing on tenancy lands is always with the landlord, and whenever such trees, or any parts thereof, are severed from the soil, under the general law, such trees and parts can be taken away by the landlord. This general law may of course be controlled and varied by contract or custom, but in the absence of these it is the law to be applied."

The case for the applicant, therefore, is that he is not, in the circumstances, bound by the entry in the *wajib-ul-arz* referred to, and that under the ordinary law the right to cut the trees which are in question in this case rested in himself. On the other hand, it has been urged on behalf of the defendant-non-applicant that the plaintiff is bound by his acceptance of the assessment of the village and that as no suit was filed under section 83 of the Land Revenue Act of 1881, he cannot now question the apposite entry in the *wajib-ul-arz*. In the present case I am unable to see that the ordinary legal presumption does not still arise from the entry in question. It is impossible to treat the document as a nullity merely because of the alleged erroneous view of the law taken by the Local Administration but even as I read the passage from the letter, dated the 24th August 1908, it seems to me that whether or not the view of the law taken was correct, the Chief Commissioner desired to see that the entry in the *wajib ul arz* should be nothing more than a mirror of what was the actual custom. In this connection I would also point out that a gradual change in the custom may have crept in since the old settlement. In any event, I am of opinion that the present plaintiff-applicant cannot question the entry in the *wajib ul arz* in the incidental way in which he desired to do so in the present case. There has been no express suit for a declaration that the entry in question was erroneous and I think, so far as the present suit is concerned, he is so far bound by it unless he can show that in the particular case the custom has been modified by contract or otherwise. Still further, it would be impossible for me to disturb the finding of the lower Court to the effect that there has not been sufficient evidence to disprove the terms of the *wajib ul arz* and, as I have already stated, the ordinary presumption seems to me to arise from these terms.

The next point urged on revision is that even if the terms of the *wajib-ul-arz* are correct, it does not deal with the further question of whose the property in the felled timber should be; I, however, feel no doubt on this question. The *wajib-ul-arz* is not a document embodied in strictly technical or legal terms and it seems to me perfectly plain that the presumption must be that the property in the timber belongs to the person entitled to fell it.

(1) 5 A. 616; A. W. N. (1883) 169; 3 Ind. Dec (N. S.) 557.

(2) 21 A. 297; A. W. N. (1899) 72; 9 Ind. Dec. (N. S.) 898.

(3) 30 A. 134; 5 A. L. J. 99; 3 M. L. T. 194; A. W. N. (1908) 51.

(4) 4 N. L. R. 104 at p. 110.

GHULAM MAHOMED v. LAL CHAND.

Had the intention of the *wajib-ul-arz* been rightly or wrongly that the tenant could fell the trees but the property in the trees so felled should pass to the landlord, this would most certainly have been stated. It would, of course, have been open to the plaintiff-applicant to prove that in the particular case the custom had been modified or otherwise altered to the extent now alleged, *viz.*, that the tenant could fell but the trees so felled would belong to the landlord. No such plea, however, was taken in the lower Court and cannot be considered now. So long, therefore, as the *wajib-ul-arz* stands and is not disproved in the particular case by evidence to the contrary, the general law as regards the ownership of trees standing on tenancy lands is inapplicable in the present case. These finding dispose of the application, which is dismissed. The applicant must bear the non-applicant's costs. Pleader's fees Rs. 60.

Application dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 4 OF 1918.

June 7, 1918.

Present :—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

GHULAM MAHOMED—APPELLANT

versus

LAL CHAND AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, 144, O II, r. 2—Restitution, application for, when can be made—Declaration that decree is null and void—Omission to ask for restitution—Application, subsequent, for restitution, maintainability of—Estoppel.

No restriction is contained in section 144 of the Civil Procedure Code as to the manner in which a decree should be varied or reversed, and none can be read into it, except it be "in accordance with law." [p. 553, col. 1.]

The omission to ask for restitution in a suit for a declaration that a decree is null and void, does not amount to a representation that the right to restitution is relinquished. Even if it does amount to such a representation, it would not operate as an estoppel, being a mere statement of intention or promise *de futuro*. [p. 553, col. 1.]

Appeal against the order of the First Class Sub-Judge, Sukkur.

Mr. *Isardas Oodharam*, for the Appellant.

JUDGMENT.

FAWCETT, A. J. C.—Appellants obtained a decree declaring that another decree, in execution of which respondents recovered Rs. 4,393 from them and their mother, was null and void against them. They then applied under section 144, Civil Procedure Code, for restitution of their share of Rs. 4,393. The Sub Judge held that the decree under which respondents obtained the Rs. 4,393 was superseded by the later decree, so far as appellants were concerned, and that section 144, Civil Procedure Code, applied, but that as they had omitted to seek such restitution in the suit in which the superseding decree was obtained, they must be held to have relinquished their claim to this relief. Appellants appeal from this decision.

I agree with the lower Court as to the applicability of section 144 in this case, which is supported by *Tangutur Subrayuduv. Yecrramsetti Seshasani* (1). The Legislature has evidently intended to widen the scope of section 144 as compared with section 583 of the former Code, and the presumption is that it has put the power to order restitution on the general basis, which enabled a Court to exercise an inherent power in this respect in accordance with Privy Council rulings of 1865 and 1871. No restriction is contained in the section as to the manner in which the decree should be varied or reversed, and, in my opinion, none can legitimately be read into it, except of course that it be "in accordance with law."

On the second point, the Sub-Judge, in my opinion, is clearly wrong. Order II, rule 2, Civil Procedure Code, does not apply to the case, because this and section 12 only forbid a subsequent suit, and the appellants are not precluded from adopting any other remedy the law gives them to enable them to obtain restitution, *cf. Rajah Eswara Doss* v. *Venkataroyer* (2). Moreover, if they had asked for restitution in their suit to declare the decree against them void, they would probably have been successfully met by the objection that such relief was barred by section 144 (2). If

(1) 33 Ind. Cas. 739; 40 M. 299; 3 L. W. 236; (1916) 1 M. W. N. 155; 30 M. L. J. 366; 19 M. L. T. 235.
(2) 21 M. 236; 7 Ind. Dec. (N. S.) 522.

so, it was not part of the claim which the plaintiff is entitled to make within the meaning of Order II, rule 1, Civil Procedure Code. Apart from Order II, rule 2, the Sub-Judge's view can only be justified by principles of *res judic ta* or estoppel. But neither of these bars can apply to the present case. Explanation IV to section 11, Civil Procedure Code, does not apply, (1) because for the above reasons this particular claim could not have been made in that suit, and (2) because it contemplates only every ground, which could and ought to have been urged in support of the claim actually made in the suit: *cf Ramasuami Ayyar* v. *Vythinatha Ayyar* (3). And no question of estoppel arises as the omission to ask for restitution in the suit does not amount to a representation that appellants relinquished their right to restitution, and even if it did, there is nothing to show that respondents altered their position to their prejudice in consequence. Even treating it as a representation that they would not apply for restitution under section 144, this could not operate as an estoppel being a mere statement of intention, or a promise *de futuro, cf. Jethabhai* v. *Nathabhai* (4) and Woodroffe and Ameer Ali's Law of Evidence, 6th Edition, page 758.

I would, therefore, reverse the lower Court's order rejecting the application, and under Order XLI, rule 23, Civil Procedure Code, remand this case for readmission and disposal according to law. Respondent to bear appellant's costs of this appeal.

PRATT, J. C.—I concur as to the application of section 144. The case is similar to that of *Shiam Sundar Lal* v. *Kaisar Zamani Begam* (5) where restitution was ordered on reversal of a declaratory decree. This was done under the inherent power of the Court to right a wrong done by order of the Court and the section has been widened to give recognition to this power.

Case remanded.

(3) 26 M. 760; 13 M. L. J. 448.
(4 28 B. 399 at p 407; 6 Bom. L R. 428.
(5) 29 A. 148; 4 A. L. J. 19. A. W. N. (1906) 315.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2428 OF 1917.

April 9, 1919.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Cuming.

KAMAL KRISHNA BARNIKYA AND OTHERS—APPELLANTS

versus

PEARY MOHON SAHA AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 171, 174—Contract Act (IX of 1872), s. 72, applicability of—Taluk, sale of—Rent-decree, execution of—Payment made by purchaser of portion of taluk to save taluk from sale—Suit for refund of payment, maintainability of.

One *B.* purchased a *taluk* at an auction. Plaintiffs purchased a share of it from *B* and *D.* purchased the rest from the heirs of *B.* The superior landlord obtained a decree for rent against the heirs of *B.* and threatened to bring the whole *taluk* to sale. To stop the sale the plaintiffs deposited the decretal amount in Court. In a suit by the plaintiffs for a refund by the landlord of the sum deposited by them as well as for a declaration of their title to the land:

Held, (1) that the plaintiffs were entitled to a declaration of their title but were not entitled to get back from the landlord the decretal amount deposited by them, as they were jointly liable for the rent payable for the whole *taluk*; [p. 554, cols. 1 & 2.]

(2) that the deposit was obviously made under section 174 of the Bengal Tenancy Act; [p. 554, col. 2.]

(3) that as the deposit was not made by mistake or under coercion or under stress of legal process, section 72 of the Contract Act did not apply. [p. 554, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 10th of May 1917, modifying that of the Munsif, 3rd Court at that place, dated the 22nd of December 1915.

Babus *Jyotish Chandra Hazara* and *Probodh Kumar Das*, for the Appellants.

Babu *Bhagirath Chandra Das*, for the Respondents.

JUDGMENT.—The facts of this case are a little complicated, but when they are clearly understood there should be no difficulty in deciding the case. As stated in the plaint, 3 Kanis 2 Karas of land, including 1 Kani 14¼ Gandas, formed a Taluq standing in the names of Mati Bibi and Banu Bibi at an annual Jama of Rs. 17-8. The predecessor of the plaintiffs took a settlement of the 1 Kara 14¼ Gandas in Topa interest (which is an under-tenure) at an

annual Jama of Rs. 9. That was in July 1854. Subsequently the Taluq was sold by auction and Becha Gazi purchased it. The predecessor of the plaintiffs purchased a share of that Taluq, *i.e.*, 1 Kani $14\frac{1}{4}$ Gandas, from Becha Gazi in November 1862. Defendants Nos. 2 to 4 are the heirs of Becha Gazi and defendant No. 5 is the transferee from defendants Nos. 2 to 4. The proprietary rights having been sold, and bought by Kamal Krishna Banik defendant No. 1, he brought a suit for rent against the heirs of Becha Gazi and obtained a decree. He threatened to bring the whole Taluq to sale in execution of that decree and the plaintiffs in order to stop that sale, acting presumably under section 171 of the Bengal Tenancy Act, paid the amount into Court. They then filed this suit in order to set aside the decree in Kamal Krishna Banik's suit on the ground of fraud and also to obtain refund of the amount which they had deposited in Court with costs, amounting in all to Rs. 146-10-3. They asked for a declaration of their title to the land, and they contended that they were in exclusive possession and denied the title of defendants Nos. 2 to 5. The Munsif found against the plaintiffs on the ground of fraud. He found in their favour on the ground of title, that is to say, that they were really co tenants along with defendant No. 5 who had acquired the interest of defendants Nos. 2 to 4. He accordingly decreed the suit declaring the plaintiffs' Taluka and Topa interest and giving the plaintiffs also a declaration that the decrees in question were not binding upon them. He disallowed their claim for refund and also refused (very properly) to go into the question of contribution by defendant No. 5. On appeal by the plaintiffs to the learned Subordinate Judge, the decree of the Munsif was varied and the plaintiffs were given a decree for the refund of the money which they had deposited in Court or for repayment of that sum by defendant No. 1 in case he had withdrawn it. Against that decree the present appeal is preferred. Both the Courts have found against the plaintiffs on the question of fraud. That finding is conclusive and neither side attempted to go behind it. There cannot be any doubt as to the title of the plaintiffs as I have stated it. The only question really before this Court is whether the plaintiffs are entitled to a refund by the defendant No. 1 of the money deposited by them. It is argued for the plaintiffs that the matter comes under section 72 of the Contract Act or is so similar as to be governed by that section. But that argument overlooks the fact that the plaintiffs were undoubtedly tenants of the defendant No. 1 and were bound equally with defendants Nos. 2 to 5 to pay rent in respect of this Taluk. They cannot, therefore, be said to have made this deposit by mistake or under coercion or under stress of legal process. They obviously made the deposit under the provisions of section 174 of the Bengal Tenancy Act. Whatever their rights may be as to contribution from their co-debtors, there can be no question that this money being due to the defendant No. 1 as landlord under the decree, though that decree was not binding against the plaintiffs, they were liable nevertheless for a share of that sum as rent, and liable moreover to the defendant No. 1. It would, therefore, be quite unjust that they should be allowed to deposit the amount in Court simply to stop the sale for the time being and then get their money back again. The outstanding fact in the case, that they were tenants as well as defendants Nos. 2 to 5 and thus liable for the rent, was overlooked by the learned Pleader for the plaintiff in his argument, but once that fact is made clear, there is no doubt as to what the decision should be. The appeal must, therefore, be allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs in this Court and in the lower Appellate Court.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 84 OF 1918.

February 19, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

GANGAMIRTHAM PILLAI, MINOR, BY HIS GUARDIAN, CHIDAMBARAM PILLAI—DEFENDANT No. 1—APPELLANT

versus

RAJAMANIKKATHAMMAL AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2, 3, 5 AND 6—RESPONDENTS.

Hindu Law—Widow—Compromise of suit effected by widow—Reversioner, whether bound by compromise.

Where there is a litigation pending in the subject-matter of which a Hindu widow is interested, she has a discretion as to how to conduct that litigation and to come to an arrangement with her opponent, if she believes that it would be in the interests of the estate. But a reversioner is entitled to show that the compromise was not arrived at with due care and caution and was such as really showed negligence on the part of the widow, and if he succeeds in showing that, the compromise will not be binding upon him. [p. 556, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, in Original Suit No. 41 of 1916.

Mr. *T. V. Muthukrishna Aiyar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar*, *K. S. Ganesa Aiyar* and *Sundara Rou*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—The first question raised in the appeal relates to the effect of a compromise in a previous proceeding between the 2nd defendant, the widow of Krishnaswami Konar, his father, Karuppanna Pillai, his brother, Perumal, and the 1st defendant. Krishnaswami Konar who died in 1907 had, by his first wife, two daughters, the plaintiff, and another daughter now deceased. After the death of his first wife he married the 2nd defendant, Muthukannammal. Karuppanna, his father, died in 1912 and Perumal, his brotner, died in 1910. The first defendant is the son of Perumal. It is not necessary to refer to the other defendants, for these are the principal parties concerned.

It would appear that, on the death of Krishnaswami Konar, his father and brother laid claim to the properties standing in his name as belonging to the joint family They applied for succession certificate and the 2nd defendant, the widow, apparently acquiesced at that time in their claim and made no objection to the grant of a certificate to Perumal. Then apparently she changed her mind not long afterwards, for we have got a number of notices, MM series, which she gave to the debtors of her husband; they were asked not to pay over outstandings to Perumal because he was making a fraudulent attempt to secure the moneys which did not belong to him. Thereafter the parties seem to have come to an amicable understanding, for a deed of maintenance was executed in 1909. Under that document the widow accepts Rs. 20 a month for her life as maintenance and also a right of residence in the family house. But again apparently she fell out with her husband's relations, for we find that Karuppanna, Perumal and the 1st defendant instituted a suit, Orignial Suit No. 44 of 1910, for recovery of debts due under certain bonds in the name of Krishnaswami Konar, and in that suit the 2nd defendant filed a written statement alleging that the properties were the separate property of her deceased husband, being his self-acquisitions. Then apparently there was an attempt at mediation by common friends, with the result that a document, Exhibit XVIII, called settlement Sridhanam deed, was executed under which Perumal assigned to the plaintiff and her deceased sister hypothecation bonds to the value of Rs. 2,300. This was on 28th May 1910. The suit was compromised by a Razinamah petition Exhibit XX. In that petition the 2nd defendant expressed herself as satisfied with receiving Rs. 3,200 cash in quit of all her claims to the property of her deceased husband. A decree based on that petition, Exhibit XXI, was passed, the Court sanctioning the compromise on behalf of the minor 3rd defendant (1st defendant in this suit). The present plaintiff or her sister was not a party to that suit; and the Court's sanction was naturally not obtained on behalf of them, who were also minors at the time, for the compromise. It is the effect of Exhibits XX and XXI that we are mainly concerned with in this appeal. I might also mention another suit which was filed (Original Suit No. 3 of 1915) by the 1st defendant seeking to set aside the settlement in favour of the

plaintiff and her sister under Exhibit XVIII. The plaintiff in this suit filed a written statement, Exhibit GG1, contesting that suit.

The contention on behalf of the appellant is that the compromise evidenced by Exhibits XX and XXI was in the nature of a family settlement arrived at by the widow and, therefore, binding on the plaintiff, the presumptive reversioner. No doubt the father and brother of Krishnaswami did make allegations that the properties standing in the name of Krishnaswami were joint family properties and that the 2nd defendant was a member of the joint family, and it may be taken that the 2nd defendant, the widow of Krishnaswami, acquiesced in that allegation on several occasions and even accepted the allegation as true. But any such statement of hers cannot amount to an estoppel by which the plaintiff would be bound and it is not so contended. These various statements of the 2nd defendant have been referred to only as showing that there was a *bona fide* dispute and that the Razinamah was executed in settlement of that dispute. The most significant fact, however, is that in the very Razinamah petition all the properties are alleged by the parties as belonging to Krishnaswami himself and not as belonging to the joint family. There is no allusion whatever either in Exhibit XX or XXI to any claim by Perumal or by Karuppannah that Krishnaswami was a member of the joint family, that the properties belonged to the joint family and that the parties were adjusting their disputes in the manner stated in Exhibit XX. In Exhibit XXI also, the decree, they, in more than one place, speak of the properties as belonging to the deceased husband of the 2nd defendant. How came these documents to be drafted in that way it is impossible to tell, because no evidence has been brought to our notice which furnishes any explanation. In the face of those documents it is impossible to say that the 2nd defendant was adjusting a *bona fide* dispute in regard to the estate, and the facts which have already been mentioned show clearly that the 2nd defendant was not making any attempt to protect the interests of the reversioner. All that she was content with was a sum of Rs. 3,200, and for that amount she parted with all the properties of her husband amounting to about Rs. 20,000. These documents really are in the nature of an alienation purporting to be made by the widow of her husband's properties and not a settlement of a *bona fide* dispute as to the title of these properties. We have been referred to a ruling of the Privy Council on the subject of compromise by widows in *Khunni Pal* v. *Gobind Krishna Narain* (1). All that their Lordships lay down is to this effect, "that a compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is." Such an agreement is altogether wanting in this case, for it proceeds on the assumption not that Karuppanna and Perumal had any title to those properties but that they belonged solely to the 2nd defendant's deceased husband. Further, as pointed out by a Bench of this Court in a case reported as *Muthukumarasami Odayar* v. *Subramania Iyer* (2), a compromise effected by a widow, in order to be binding, must be shown to have been made with due care and caution. "When there is a litigation pending, the widow is also interested in the subject-matter of the litigation and she must have a discretion as to how to conduct that litigation and to come to an arrangement with her opponent, if as a matter of fact she believed that it would be in the best interests of the estate. On the other hand, the reversioner is entitled to show that the compromise was not arrived at with due care and caution and was such as really showed negligence on the part of the widow." In this case, as already stated, the 2nd defendant cannot be said to have taken any caution whatever to protect the interests of the reversioner. All the evidence points to the conclusion that she was from time to time acting either at the whim of the moment or at the advice of persons who happened to surround her at the time. I, therefore, agree in the conclusion arrived at by the Subordinate Judge on this point.

Then Mr. T. V. Muthukrishna Ayyar appearing on behalf of the appellant argued

(1) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. 575; 11 Bur L. R. 427; 10 M. L. T. 28; (1911) M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).

(2) 33 Ind. Cas. 687; 31 M. L. J. 87.

that the finding that the family was divided and that these properties were the self-acquisitions of Krishnaswami is wrong. He did not in fact attempt to take us through the entire evidence in the case which has been fully dealt with by the Subordinate Judge, but he brought to our notice what apparently he thought was the most important evidence in favour of his client in this connection and as we did not think that that evidence in the light of the admitted facts of the case showed that the family was joint and the properties in dispute were properties of the family, he did not think it would serve any useful purpose to go further into the matter. I shall assume that he has succeeded in showing that Exhibit CC, which is a mortgage of the two houses for Rs. 3,000, alluded to two previous mortgages, Exhibits BB and Z. The mortgage under Exhibit Z for Rs. 1,000 purports to be in favour of Karuppanna, the father of Krishnaswami. But Exhibit CC does not, as pointed out by the Subordinate Judge, say that part of the consideration was a previous mortgage in favour of Karuppanna.

Whether Exhibit Z was a Benami transaction or whether there is some other explanation forthcoming as to how that is included in Exhibit CC, if that be a fact, we are not in a position to determine because no evidence has been given as to the circumstances under which Exhibit CC was executed, and as to how it referred to Exhibit Z even though it purported to be in favour of Karuppanna. It would be going much too far to say that these transactions showed that Krishnaswami was joint at their date with Karuppanna and Perumal. Krishnaswami admittedly left the family house in 1889, and he carried on separate business in contracts in his own name. A long list of documents which have been filed stand in his name alone. Similarly Karuppanna had a business in his own name and Perumal also was earning money and acquired properties separately. There cannot be any doubt whatever that the finding of the Subordinate Judge that Krishnaswami had separated from the family and all these properties were his self-acquisitions is correct.

The next question relates to the appointment of a Receiver. The learned Subordinate Judge thought that in the circumstances disclosed the best thing for the parties was that there should be a Receiver to collect the outstandings due to the estate of the deceased Krishnaswami. The 2nd defendant parted with her interest in the properties as a widow in favour of Perumal and Karuppanna now represented by the 1st defendant. It is so held by the Subordinate Judge and although she is represented by a Pleader in this appeal, she takes no objection to the finding of the Subordinate Judge to that effect. She, therefore, has no interest in safeguarding the estate of Krishnaswami. As the bulk of the property of the estate consists of outstandings, the Subordinate Judge was right in the circumstances to appoint a Receiver. At the same time the 1st defendant, who, it may be pointed out, is still a minor though he will attain majority soon, is entitled to make the best use of the money which he is entitled to hold during the lifetime of the 2nd defendant, and the learned Pleader for the 1st defendant has asked us, therefore, to modify the decree by directing that as soon as the Receiver has collected a sum of Rs. 1,000 or thereabouts he should hand over the amount to the 1st defendant on his (1st defendant's) furnishing security to the satisfaction of the Court after due notice to the plaintiff. This, I think, is reasonable.

With that modification the decree of the Subordinate Judge must be confirmed and the appeal dismissed with costs of the plaintiff.

As regards the memorandum of objections, the first point urged by the learned Pleader for the plaintiff was that, as a matter of fact, the 2nd defendant did not alienate her interest in the properties to Perumal and Karuppanna. But the 2nd defendant herself, though there is, as already pointed out, the decree against her so far as her interest is concerned, does not contest it and even in this Court her Pleader is content with the decree. It is not open to the plaintiff to dispute this part of the judgment of the lower Court.

The same answer applies to the second point urged in the memorandum of objections, namely, that the suit comprised properties other than those set

out in the schedule to Exhibit XXI, the decree on the compromise and, therefore, at least with respect to those properties, the 1st defendant has no right even during the lifetime of the 2nd defendant. The 2nd defendant in Exhibit XX, the Razinamah, says that she has relinquished all her rights to the estate of her husband. As she does not raise any question before us as regards any item of the properties, the memorandum of objections must be dismissed with costs of the 1st defendant.

SPENCER, J.—The plaintiff is the daughter and nearest heir of the deceased Krishnaswami Konar, who died in 1907. The 2nd defendant is plaintiff's step-mother and Krishnaswami Konar's 2nd wife. Plaintiff sued to obtain a declaration that the decree in Appeal Suit No. 44 of 1910 on the file of the District Munsif of Trichinopoly was not binding on the reversioner. The first point argued in appeal was that when the 2nd defendant entered into the compromise in Original Suit No. 44 of 1910, she represented the estate of her deceased husband and that the compromise should be upheld as a *bona fide* settlement of family disputes and as binding on the plaintiff. I feel quite clear that the widow, 2nd defendant, did not represent any interests but her own when she entered into the compromise embodied in Exhibits XX and XXI in Original Suit No. 44 of 1910. What Muthukannammal got out of that arrangement was a lump sum of Rs. 3,200 in quit of all her claims on the estate of her deceased husband and a right of residence for her lifetime in a certain house. This she took "absolutely and for her sole and exclusive benefit," as stated in Exhibit XX. If any one represented the reversionary interest in that suit, it was rather the plaintiff in that suit, as may be seen from the words "that the plaintiffs or other reversionary heirs of the said Krishnaswami Konar be entitled to the house after her." Beyond the words "other reversionary heirs of the said Krishnaswami Konar," there is no indication that the future claim of the reversioners to Krishnaswami Konar's estate was even considered at the time; much less that steps were taken to protect the interest of those minors.

Although the leave of the Court was obtained under Order XXXII, rule 7, of the Code of Civil Procedure for the present appellant Gangamirdham, who was then as now a minor, entering into that compromise, Rajamanikkathammal (plaintiff in this suit) and her sister Meenammal (now deceased) were not personally made parties to that suit and no similar permission was obtained on their behalf for compromising it, although they were then minors. It would be manifestly unjust to hold the plaintiff and her sister bound by the acts of their step-mother in that suit.

On the other questions argued before us I have noting to add to what my learned brother has said and I agree in the order proposed by him.

M. C. P.

Appeal dismissed;
Decree varied.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 216 OF 1918.

June 24, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

HAZARI LAL *alias* AMRITA LAL GHOSH—JUDGMENT-DEBTOR—APPELLANT

versus

Srimati ALAP SUNDARI DASI—DECREE-HOLDER—RESPONDENT.

Execution of decree—Order dismissing application for execution—Appeal—Judgment-debtor, whether has right of appeal against finding —Res judicata.

A judgment-debtor has no right of appeal against an order dismissing an application for the execution of a decree on the ground that the decree would only be capable of execution on the decree-holder complying with its terms by executing and registering a lease in favour of the judgment-debtor. In order to give the judgment-debtor a right of appeal not only must he be aggrieved by the reasons given by the Judge, but the finding must be one that would operate as *res judicata*. [p. 559, col. 2.]

Appeal against the order of the Subordinate Judge, 3rd Court, 24-Perganas, dated the 22nd of April 1918.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Chowdhury* (with him Babu *Surendra Mohan Ghose*), for the

Respondent, raised a preliminary objection that the appellant, being a successful party in the lower Court, was not competent to prefer the appeal.

Babu *Monmohan Bose*, for the Appellant.—The first point raised in the lower Court, *viz.*, whether the decree, which contains matter extraneous to the subject-matter of the suit, is enforceable should be decided finally, and the lower Court having decided that point against me I can prefer an appeal to this Court. If the lower Court had decided the first point in my favour, then it would not have been necessary for the lower Court to decide the second point, *viz*, whether without performing his part of the agreement the plaintiff was competent to execute the decree. The first point having been decided against me, I can prefer an appeal to this Court taking legal objections to the decision of the lower Appellate Court.

[FLETCHER, J.—The executing Court must take the decree as it is.]

Yes. But it can decide whether the decree is enforceable, and any party who is dissatisfied with any decree or order against which an appeal lies, may appeal from the decree or order. If a party is aggrieved by the decision of any point he may prefer an appeal. Refers to *Krishna Chandra Goldar* v. *Mohesh Chandra* (1), *Lachman Singh* v. *Mohan* (2), *Ran Golam* v. *Sheo Tahal* (3).

Babu *Sarat Chander Roy Chowdhury* briefly replied.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the defendant. The plaintiff, who is a Hindu widow and the owner of 8-annas of a certain property with a limited interest, brought a suit against the brother of her husband to whose property she succeeded. The matter was referred to arbitration and agreement was arrived at between every body and was approved of by the arbitrators, and a decree was made with the consent of the parties. It was provided by the decree that the plaintiff had to execute in favour of the defendant a lease of the property in suit and on her doing so she would get certain *nazars* and certain rents. She then applied for execution of this decree. The application failed. The defendant, being successful, has appealed against the order of the learned Judge dismissing the application for execution, and the reason for the appeal is this, that although the learned Judge in dismissing the application remarked that it was premature for the plaintiff to apply to execute the decree unless and until she had performed the duty cast upon her by the terms of the decree by executing and registering the lease in favour of the defendant, yet the learned Judge stated that if and when that happened, the decree was one that was capable of being put into execution. That is what the Judge means, because the Judge could not adjudicate on what would happen to the decree when the plaintiff had performed the duty cast upon her by the decree. The foundation of the appeal is this: The defendant says that he is aggrieved by the Judge having found that the decree was one which could at some subsequent date, if and when the plaintiff complied with the terms cast on her by the consent decree, be capable of execution. But in order to give the defendant right of appeal not only must he be aggrieved by the reasons given by the Judge but the finding must be one that would operate as *res judicata*. It seems to me quite clear that the finding could by no possibility operate as *res judicata*. The Judge held that this application was premature and could not be determined by the Court until the plaintiff had complied with the conditions mentioned in the decree. Directly the Judge held that the plaintiff had not performed the duty cast upon her by the decree, the other remark that he made as to what would happen when the plaintiff had complied with the terms of the decree—whether the decree would be capable or incapable of being executed—is clearly not binding on the defendant and is *obiter*. I think there is no appeal in this case. The present appeal, therefore, fails and must be dismissed with costs; hearing fee three gold *mohurs*.

CUMING, J.—I agree.

Appeal dismissed.

(1) 9 C. W. N. 584.
(2) 2 A. 497 (F. B.); 4 Ind. Jur. 644; 1 Ind. Dec. (N. S.) 888.
(3) 1 A. 266 1 Ind. Dec. (N. S.) 179.

GHULAM HYDER KHAN *v.* TEKCHAND.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 57 OF 1917.

June 7, 1918.

Present:—Mr. Pratt, J. C, and Mr. Fawcett, A. J. C.

Serai GHULAM HYDER KHAN SON OF JAIN MAHOMED KHAN—APPLICANT

versus

Diwan TEKCHAND SON OF *Diwan* TOLARAM AND OTHERS—OPPONENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 3, 8, O. XVII, rr. 2 to 4—One of several defendants not served—Adjourment for ascertaining whereabouts—Default of appearance—Dismissal of suit for default, legality of—"Hearing," meaning of—Procedure.

Several adjournments were granted in a case to enable the plaintiff to discover the whereabouts of one of the defendants who had not been served with notice. On the last date of hearing neither the plaintiff nor his Pleader appeared, while the Pleader for the defendants, except the one who had not been served, was present. The Court dismissed the suit for default, and subsequently refused an application to set aside the dismissal. The plaintiff applied in revision:

Held, (1) that Order XVII, rule 2, Civil Procedure Code, applied to the case, and that the original order of dismissal was a legal order. [p. 560, col. 2; p. 561, col. 2.]

(2) that the negligence of the plaintiff's Pleader resulting in the non-appearance of the plaintiff was not "sufficient cause" under Order XVII, rule 4, of the Code for setting aside an order of dismissal for default. [p. 561, col. 1.]

Per *Pratt, J. C.*—Where the conditions laid down in rules 2 and 3 of Order XVII of the Civil Procedure Code coincide, the procedure laid down in rule 2 of the Order must be followed inasmuch as the consequences of non-appearance have a natural precedence over the merits. [p. 560, col. 2.]

Per *Fawcett, A. J. C.*—The word "hearing" in rules 3, 6 and 8, Order IX, of the Civil Procedure Code is not necessarily equivalent to a "hearing of evidence," and the words "the defendant" in rule 8 of that Order must be construed as "the defendants who have been served." [p 561, cols. 1 & 2.]

Application for revision against the order of the First Class Sub-Judge, Sukkur.

Mr. *C. M. Lobo*, for the Applicant.

Mr. *Bup Chand Bilaram*, for the Opponents.

JUDGMENT.—This suit was filed on the 28th October 1915 against five defendants and summonses were issued for the 29th November 1915. On that date 4 defendants were served and appeared by Pleader. This Pleader promised to file a power for the absentee, defendant No. 4, and the case was adjourned to the 14th December 1915. As no *vakalatnama* was filed, order was made on the latter date for summons to issue for defendant No. 4 for the 28th January. There were nine subsequent adjournments at the request of plaintiff's Pleader for the whereabouts of defendant No. 4. The last was for the 4th August and the suit was dismissed for default.

Application was made to restore the suit to the file, on the ground that plaintiff's Pleader had made a mistake as to the date. The lower Court refused the application and the plaintiff applies to this Court for revision of that order, which was made on the 17th February 1917.

It is said that the order dismissing the suit for default is an order that the Sub-Judge was not competent to make and the 4th of August was not a date of hearing. The case of *Debi Sahai* v. *Saraswati* (1) is referred to, but the facts of that case are different. There the suit had been fixed for hearing on a specified date and an intermediate date had been fixed for an interlocutory application. It was held that the suit could not be dismissed for default on the intermediate date. But here there was no intermediate date and as Order XVII, rule 1 (2), requires the date of hearing to be fixed whenever it is adjourned or time granted to a party, the 4th August must have been the date of hearing and it is so shown in the diary—and so also on the nine other dates for whereabouts.

It is also contended that the Sub Judge should have proceeded under Order XVII, rule 3, and not Order XVII, rule 2, as plaintiff had been granted time to perform an act necessary to the further progress of the suit. It is true that Order XVII, rule 3, is in this view applicable but plaintiff made default of appearance, and when both these conditions coincide, we agree with the decision in *Chandramathi Ammal* v. *Narayanasami Iyer* (2) that Order XVII, rule 2, should have preference for the consequences of non appearance have a natural precedent over the merits. This view is also in accord with the decision of the Bombay High Court in *Shrimant Sagajirao* v. *Smith* (3).

The Sub Judge was, therefore, right in applying Order IX and the order of dismissal operated in case of defendant No. 4

(1) 10 Ind. Cas. 313; 33 A. 560; 8 A. L. J. 612.
(2) 5 Ind. Cas. 23; 33 M. 241; 19 M. L. J. 760; 7 M. L. T. 369.
(3) 20 B. 736; 10 Ind. Dec. (N. s.) 1061.

as an order under rule 3 and in the case of the other defendants as an order under rule 8.

In the case of the other defendants the remedy was by way of appeal under Order XLIII, rule 1 (*c*), and in the case of defendant No. 4 we need only observe that the Pleader's negligence is not sufficient cause under rule 4.

I would, therefore, reject this application with costs.

FAWCETT, A. J. C.—In the suit out of which this application for revision arises defendant No. 4 had not been served with a summons, and several adjournments had been given to the plaintiff "for whereabouts" of this defendant. The other defendants had appeared and put in their written statement, and an application for a prohibitory order had been made and decided, but otherwise no progress had been made with the suit, when on the 16th June 1916, to which date the hearing of the suit had been adjourned, the case was again adjourned, at the request of the plaintiff's Pleader "for whereabouts of defendant No. 4" to 4th August 1916. On that date, however, plaintiff and his Pleader were absent, while the Pleader of the defendants (except defendant No. 4) was present. The Court, thereupon, dismissed the suit with costs for plaintiff's default of appearance. The Sub-Judge has refused an application to set aside the dismissal, and plaintiff appeals.

The first contention of applicant is that the lower Court erred in dismissing the suit for default, as it was not set down for hearing on the 4th August. It is to be noted that rules 3, 6 and 8 of Order IX, Civil Procedure Code, all refer to appearance or non-appearance, "when the suit is called on for hearing;" and as noted in Woodroffe and Ameer Ali's Civil Procedure in British India, 2nd Edition, page 753, these words appear to have been inserted so as to limit the rule to the first day of hearing and mark the distinction between these provisions and those of Order XVII, rule 2. "Hearing", however, is not necessarily equivalent to "hearing of evidence", as is clear from the proviso to Order XVII, rule 1 (2), and as stated in the latter rule, the Court in every case where it grants an adjournment has to fix a day for the further hearing of the suit. Therefore, though time was granted to the plaintiff for finding the whereabouts of defendant No. 4, a date had to be fixed for the further hearing of the suit, and the 4th August 1916 was accordingly entered in the diary as the "date to which hearing is adjourned." It is not a case where the hearing has already been fixed for a particular date, and an intermediate date is fixed for disposing of an interlocutory matter, as in the instance of the rule *nisi* to plaintiff for 21st January 1910 though the hearing of the suit had been fixed for 1st February 1910, given in the Form of Diary at page 154 of the Sind Courts' Civil Circulars. For the same reason it is not a case like that of *Debi Sahai* v. *Sarasvati* (1) where the hearing for settlement of issues had been fixed for 25th July 1907, and the disposal of the guardianship application for 16th July 1907 on which date the suit was dismissed for default of plaintiff's appearance. In such a case, the suit could not be said to be "called on for hearing," and, therefore, Order IX, rule 8, could not be appealed under Order XVII, rule 2, Civil Procedure Code.

I think, therefore, that the 4th August was a day to which the hearing of the suit was adjourned and that the case falls, therefore, under Order XVII, rule 2. It clearly does not fall under Order XVII, rule 3, because that rule applies only where there has been a default of the kind referred to, which leads to the Court's order, and not a non-appearance, *cf. Shrimant Sagarirao* v. *Smith* (3) and *Chandramathi Ammal* v. *Narayanasami Iyer* (2).

The next question is what rule, if any, of Order IX was applicable to the case. I think it is clearly rule 8. In a case where there are several defendants, one or some of whom have not been served with the summons, the words "the defendant" in that rule must be construed as "the defendants who have been served," for otherwise there is no obligation on a defendant to appear under Order V, rule 1, and Order IX, rule 1. The principle underlying rule 8 is one of punishment in respect of a default by a party to a cause [*cf. Debi Bakhsh Singh* v. *Habib Shah* (4)],

(4) 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. R. 640; 25 M. L. J. 148; 14 M. L. T. 33; (1913) M. W. N. 563; 16 O. C. 194; 40 I. A. 150 (P. C.).

and the rule is inapplicable to the case of the non-appearance of a suitor, who has not been served with a summons, just as it is to one who is dead. The non-appearance of defendant No. 4 was, therefore, immaterial: the case otherwise fell under Order I, rule 8, and the Court not only had the power, but was bound, under that rule, to dismiss the suit. The Sub-Judge appears to have treated the case as falling under Order IX, rule 3, but this is obviously wrong. It would only fall under that rule, if defendant No. 4 were the sole defendant.

The contention that the original order of dismissal was illegal, therefore, fails. On the merits, also, the Sub-Judge is clearly right in holding that "sufficient cause" for plaintiff's non-appearance on the 4th August had not been shown. Nor is it, in my opinion, a case to which the provisions of section 151, Civil Procedure Code, can be properly applied.

I agree that the application should be rejected with costs.

Application rejected.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 498 OF 1918.

May 30, 1919.

Present:— Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Cuming.

RAM CHANDRA BAHARDAR—PLAINTIFF —APPELLANT

versus

Srimati ABEDA KHATUN SAHEBANI AND OTHERS—DEFENDANTS— RESPONDENTS.

Appeal—Mortgage suit—Mortgage executed by husband under power-of-attorney from wife—Power-of-attorney not proved—Remand, whether can be ordered.

Where in a suit upon a mortgage purporting to have been executed by the husband of a lady on her behalf under a power-of-attorney from her, the plaintiff does not take any step for the production of the power or to prove it, or to give secondary evidence of its contents, the case ought not to be remanded to give him the opportunity of producing and proving the power. [p. 563, col 1.]

Appeal against the decree of the District Judge, Noakhali, dated the 26th of November 1917, affirming that of the Additional Subordinate Judge of that district, dated the 23rd of January 1917.

FACTS appear from the judgment.

Babu *Dhirendra Lal Kastagir* (with him Babu *Tarakeswar Nath Mitter*), for the Appellant.—The property belongs to defendant No. 3. Though defendant No. 3 did not herself execute the mortgage-deed, the said deed was executed by defendant No. 4, the husband of the lady, under a power-of-attorney from her. The lower Appellate Court ought to have granted a remand to give the plaintiff an opportunity to produce and prove it. In justice to the plaintiff your Lordships should give the plaintiff an opportunity to prove the deed.

On the point of limitation decided by the lower Appellate Court, I submit that the plaintiff is entitled to get the benefit of section 18 of the Limitation Act. And so the suit cannot be held to be barred. The fraud was perpetrated upon the plaintiff, inasmuch as defendants Nos. 1 and 2 conspired with defendant No. 4 in persuading the plaintiff to believe that defendant No. 3 had really authorised the mortgage of the property in question. Plaintiff's knowledge of his right to proceed against defendants Nos. 1 and 2 in a law Court was kept away from him with a view to defraud him of his legitimate right. The whole business makes out a clear case of remand and re-adjudication.

Babu *Upendra Lal Roy* (with him Babu *Jitendra Kumar Sen Gupta*), for the Defendants-Respondents.—It is now too late in the day to ask for a remand. At the very first stage the plaintiff should have taken good care to get the mortgage-deed produced and properly proved. There was no examination of the Sub Registrar even.

The claim against defendants Nos. 1 and 2 is of a purely personal nature. Plaintiff perfectly knew that his rights were against these two persons who admittedly took the money. The plaintiff has shown no fraud which concealed from him his knowledge to sue defendants Nos. 1 and 2. The written statement says the lady, *i.e*, defendant No. 3 whose property was mortgaged, did not give any authority.

Babu *D. L. Kastagir* replied.

JUDGMENT.—This is a suit on a mortgage executed by defendants Nos. 1, 2 and

4. The property mortgaged belongs to defendant No. 3. Defendant No. 1 is the son of defendant No. 3. Defendant No. 2 is her husband's brother. Both the Courts have held that defendant No. 3 never executed the document. It is not alleged by the plaintiff that she personally executed the mortgage deed, but he said that the document was executed by defendant No. 4, the husband of the lady, under a power of-attorney from her. The power-of-attorney was not produced. It was pressed upon the Appellate Court that a remand ought to be granted to give the plaintiff an opportunity to produce and prove it. But having regard to the delay that had taken place in connection with that matter, the Appellate Court did not think fit to grant a remand. That point has again been urged before us. We do not think that we can accede to that prayer. The plaintiff did not take any steps to have the Sub Registrar examined in respect of that power of attorney, nor has he attempted to give secondary evidence as to what that power contained. We do not think that at this stage we can accede to a prayer of this nature.

The next question argued is this, that it has been held by the Appellate Court that the suit is barred by limitation so far as defendants Nos. 1 and 2 are concerned. The money was admittedly taken by them and it is said that fraud having been committed on the plaintiff, he is entitled to the benefit of section 18 of the Limitation Act. That overlooks this fact, that the claim against these two persons was of a personal nature. The property which was mortgaged belonged to defendant No. 3 and the plaintiff knew that his rights were as against these two persons, he knew at the time the mortgage was executed. He now says that fraud was committed upon him inasmuch as they conspired with defendant No. 4 in persuading him to believe that defendant No. 3 had really authorized the mortgage of this property. It appears that defendant No. 1 in his written statement said that defendant No. 3's property was included in the bond without her knowledge and consent simply at the request of the plaintiff, and through fear of the plaintiff it was done and to please him and that it was at the wrongful request of the plaintiff, defendant No. 2 included defendant No. 3's property in the deed. It was open to the plaintiff to go into that question at the trial as to whether any fraud had been practised upon him and to amend his plaint. There is no fraud shown by which the knowledge of his right to proceed against defendants Nos. 1 and 2 was kept back from him. We, therefore, think that there is nothing in that contention.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 3179 OF 1917.

February 1, 19.9.

Present:—Mr. Justice Abdul Raoof.

Musammat MURAD BIBI—PLAINTIFF—APPELLANT

versus

UMAR DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 9 (1), 47 b, 48—Application for appointment of guardian—Order directing return of application for presentation to proper Court—Appeal, whether lies—Revision—Other remedy open—High Court, power of interference of.

An order made under the first clause of section 9 of the Guardians and Wards Act, returning an application for appointment as guardian of a minor for presentation to a Court having territorial jurisdiction, is not appealable. [p. 564, col. 2.]

The High Court will not exercise its extraordinary powers of revision where other remedies are open to a petitioner, nor in all cases where a question of jurisdiction is raised. [p. 564, col. 2.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Lahore, dated the 2nd November 1917.

Mr. *Imam Din*, for the Appellant.

Mr. *Amar Nath Monga*, for the Respondents.

JUDGMENT.—This is a first appeal from an order under the Guardians and Wards Act. The facts out of which it has arisen are:—One Khuda Bakhsh, a resident of the District of Amritsar, died leaving a widow and two little minor girls, Ta

PRAVAKAR MAJUMDAR *v.* UPENDRA NATH.

Bibi and Lachhmi. The age of the latter is only seven years and that of the former about 11 years. Shortly after the death of Khuda Baksh his widow *Musammat* Ajhunda also died and the children were left alone in the house. *Musammat* Murad Bibi, the maternal grandmother of the minors, who lives in the District of Lahore, then went to Amritsar and brought the girls to her own house. They arrived at Lahore on the 23rd June 1917 and ever since then have been living with their maternal grandmother and under her care and protection.

On the 11th July 1917 after the girls had been with her for less than a month *Musammat* Murad Bibi made an application to the Court of the District Judge of Lahore under the Guardians and Wards Act, asking the Court to appoint her the guardian of the person and property of the minors. She mentioned in the application the names of other persons who are related to the minors. They were (1) Umar Din, and (2) Ghulam Muhammad, nephews of Khuda Bakhsh, being the sons of his brother Nur Muhammad, deceased, and (3) Pir Muhammad, (4) Ata Muhammad, and (5) Maula Bakhsh, the brothers of *Musammat* Ajhunda, the deceased mother of the minors. The application was transferred to the Court of the Senior Subordinate Judge of Lahore by an order dated the 17th of July 1917. Notice of the application was sent to the relations mentioned in the application. The maternal uncles did not raise any objection but the nephews of Khuda Bakhsh orally raised an objection on the 2nd of November 1917 to the effect that the application should have been made to the District Court of Amritsar where the minors "ordinarily resided" and where the property of the minors was situated; section 9, clause (1), of the Act was relied upon. The Senior Subordinate Judge, Ganga Ram, held that the ordinary residence of the minors being at Amritsar he had no jurisdiction to entertain the application. He ordered that the application be returned for presentation to the Court at Amritsar. Against this order the present appeal has been filed. A preliminary objection is taken to the hearing of the appeal, on the ground that an order made under the 1st clause of section 9 of the Act is not appealable. Clause (*b*) of section 47 allows an appeal from an order made under section 9, sub-section (3), returning an application. Apparently it was not intended by the Legislature to allow an appeal under sub section (1) of section 9. I am, therefore, constrained to hold that the present appeal does not lie.

I am asked by the learned Counsel of *Musammat* Murad Bibi, the appellant, to treat the memorandum of appeal in this case as a petition for revision and to set aside the order of the learned Senior Subordinate Judge returning the application. He relies on the provisions of section 43 of the Act and argues that this Court is competent to take up the matter on its revisional side and pass a proper order. Powers of revision, however, are not to be exercised in all cases where a question of jurisdiction is raised. It has been repeatedly held that where other remedies are open to a petitioner the extraordinary powers of revision are not to be exercised. In this case the appellant can present her application for the appointment of a guardian in the Court at Amritsar. No doubt she will be put to some inconvenience as is argued by the learned Counsel, but that is no reason for the exercise of this exceptional power. I, therefore, refuse to accede to the prayer of the learned Counsel and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 772 OF 1918.

April 29, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Cuming.

PRAVAKAR MAJUMDAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

UPENDRA NATH (CHANDRA IN VAKLAUTNAMAH) BHOWMIK—DEFENDANT—RESPONDENT.

Landlord and tenant—Holding, purchaser of—

PRAVAKAR MAJUMDAR *v.* UPENDRA NATH.

Failure to get possession of one plot—Suspension of rent—Abatement.

Lands appertaining to three *jotes* were sold in execution of rent decrees and were purchased by the defendant, who was subsequently recognized by the plaintiff as tenant of the *jotes*. Before the defendant's purchase the plaintiff was in possession of a plot of land included in one of the *jotes* and he settled it with another party after the defendant's purchase and after his recoguition as a tenant. In a suit for rent in respect of the said *jotes*, the defence was that the defendant had not obtained possession of a plot of land included in the *jotes* and so there ought to be a suspension of rent:

Held, (1) that this was not a case of a demise by the plaintiff and the latter could not, therefore, be held responsible for giving possession to the defendant and the question of suspension of rent did not arise, although if the subsequent settlement was bad, the defendant could set that aside; [p. 566, col. 1.]

(2) that the plaintiff was not entitled to rent of the plot of land of which the defendant had not got possession. [p. 566, col. 1.]

Appeal against the decree of the District Judge, Birbhum, dated the 18th January 1918, affirming that of the Munsif, Suri, dated the 25th May 1917.

FACTS appear from the judgment.

Babu *Broio Lal Chakarabarty* (with him Babu *Santimoy Majumdar*), for the Appellants.—The landlords instituted three suits for arrears of rent in 1907. All the suits were decreed. There is no question of suspension of rent. They never got possession and made no settlement with defendant. There can be suspension when the landlord has turned out or interfered with possession. It is not a case of demise by the plaintiff to the defendant. The purchaser of the holdings derived his title from his purchase.

Babu *Baranashibashi Mukherjee* (with him Babu *Surat Chandra De*), for the Respondent.—The plot from which my client has been dispossessed is a rent paying land. The landlord, although he remains in *khas* possession, has granted a demise to a third party. Refers to *Piggott* v. *Birtles* (1) (referred to in Foa on 'Landlord and Tenant') and *Holgate* v. *Kay* (2). There must be full possession of the thing demised, see Foa, pages 168, 169, 5th Edition.

The finding is that the landlord was in *khas* possession and he did not give me full possession. At the time when the lands were settled with me, I was not given full possession by the landlord; he made settlement with another. This is practically eviction.

Babu *Brojo Lal Chakarabarty*, in reply.—The plots are not identical. He claims under the purchase of 1910. I got possession in 1908. I allowed his name to be registered in my *sherista*. The first question to be decided is—did I grant a lease? Is there any suspension under the circumstances? It was not a lease granted by me to him. I only registered his name. See Foa on Landlord and Tenant, page 163. In this case the lease has not come into operation. The question of suspension arises only in case of eviction and not of dispossession. Upon the pleadings here there is no question of eviction. His title is under the sale certificate which he can execute and take possession. Nobody can be heard against the sale certificate. There is no delinquency on my part. There is no *mala fides* in my conduct. Dispossession plus *mala fides* have always been the ground for suspension of rent. The principle of *mala fide* conduct has been discussed in *Rai Charan Das Mazumdar* v. *Administrator General of Bengal* (3), *Annada Prosad* v. *Mathura Lal* (4) is similar to the present case. The tenant cannot complain if he can enforce his legal right. He can assert his title on the strength of the sale certificate. Even the landlord's getting *kabuliyats* from sub-tenants won't matter—*Srimati Moni* v. *Kalachand Gharami* (5).

JUDGMENT.—The plaintiff appears to have brought three rent suits in respect of certain holdings, being Suits Nos. 523 of 1907, 525 of 1907 and 529 of 1907, and obtained decrees in all. So far as the holding in Suit No. 523 is concerned, the plaintiff purchased it as decree-holder in 1908 and settled it with a tenant in 1913. Then in respect of the holdings in the two other suits, being three *jotes*, they were sold in 1910 and bought by the defendant. It appears that in 1911 the plaintiff recognised the purchaser as tenant and recorded his name in his *sherista*. These three holdings, which are covered by Suits Nos. 525 and 529, were consolidated into one *jote*

(1) (1836) 1 M. & W. 441 at p. 447; 1 Tyr. & Gr. 729; 2 Gale 18; 5 L. J. (N. S.) Ex. 193; 150 E. R. 507; 46 R. R. 349.

(2) (1844) 70 R. R. 800; 1 Car. & Kir. 341.

(3) 2 Ind. Cas. 169; 13 C. W. N. 853; 36 C. 856; 9 C. L. J. 578.

(4) 2 Ind. Cas. 123; 13 C. W. N. 702; 9 C. L. J. 585.

(5) 9 C. W. N. 871.

and the plaintiff sued for rent in respect thereof. The defence was that the defendant had not obtained possession of a plot of land in that *jote* amongst others, a plot measuring 4 *bighas* and 7 *cottahs*.

It was found by the learned Munsif that the plaintiff was in possession of this disputed plot before the defendant's purchase and that after the defendant's purchase he settled it with another party. He also holds that this plot really belongs to the holding covered by Suits Nos. 525 and 529, whereas the plaintiff apparently dealt with it as a plot covered by Suit No. 523. Therefore, the facts as found by the learned Munsif and the Appellate Court are these: that the three holdings which are covered by Suits Nos. 525 and 529 include the plot of land 4 *bighas* 7 *cottahs*, that the plaintiff recognised the defendant as his tenant, that he was in possession of it before the defendant's purchase and after the defendant's purchase and recognition of him as tenant, settlement was made with another party. It was thereupon held by both Courts that there ought to be a suspension of rent as the defendant is said to have been dispossessed by the plaintiff.

It has been contended before us that it is not a case of demise by the plaintiff to the defendant, that these holdings were put up to sale under rent-decrees, that the holdings were sold by the Court and the purchaser derived his title from his purchase and that nothing further was necessary to perfect his title and the recognition of him as tenant by the plaintiff did not add to the title which he had acquired in consequence of the purchase. It is contended that this not being a case of demise by the plaintiff and not being a case in which he can be held in any way responsible for giving possession to the defendant, who could assert his right in the execution proceedings or obtain it through Court, the question of suspension of rent does not arise.

We agree this is not a case for suspension. Nothing has been found to indicate that there was any *mala fide* dealing by the plaintiff There is nothing to show that he caused any eviction or ejectment of the defendant in respect of this plot of land. There is no tortuous act alleged against him. The utmost that can be said is that he made a mistake in settling the plot he purchased in 1903. If the subsequent settlement is bad, the defendant can set it aside. The plaintiff did not bring him on the land, or induced him to come. In view of these circumstances we are unable to hold that *Dwijendra Nath Roy* v. *Aftabuddi* (6) is of any avail as against the plaintiff's claim. It is also to be noticed that so far as these plots are concerned, although these have been consolidated, they are mentioned as three definite holdings with three different rentals, and there is no difficulty in separating the plot in dispute. Since the defendant has not obtained possession of that plot, it ought to be held that the plaintiff is not entitled to rent of that plot of land from the defendant.

It is also urged before us that the defendant is not in possession of other plots of land, that the utmost that can be said is that he was in possession of 21 *bighas* only. The Munsif deals with it and says that he is not prepared to accept the statement of the defendant in that respect. He comes to a definite finding with regard to the plot, which we have dealt with. This does not seem to call for a remand having regard to the finding arrived at by the Munsif.

Having regard to those findings we think that the plaintiff is entitled to a decree for rent with the exception of the plot of land above mentioned, that is to say, he will have a decree for Rs. 31-2 annas per year with cess and damages and costs in proportion.

Order accordingly.

(6) 39 Ind. Cas. 209; 25 C. L. J. 53; 21 C. W. N. 492.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1170 OF 1918.

November 21, 1918.

Present:—Mr. Justice Shadi Lal.

BISHEN SINGH—PLAINTIFF—APPELLANT

versus

MUSAMMAT SHAHNDO AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption, right of, nature of—Sale—Vendor entitled to only a portion of property sold—Pre-emptor, whether entitled to proportionate abatement in price.

A right of pre-emption is a right of substitution, and the pre-emptor steps into the shoes of the vendee in respect of all the rights and obligations in respect of the sale transaction. [p. 567, col. 1.]

APARNA CHARAN CHABRI *v.* GOPI NATH SAMANTA.

In the case of a sale of landed property where the vendor is found later to have owned only part, the purchaser, if he has acted *bona fide*, is not compelled to surrender the remnant portion of his purchase to a pre-emptor at a less sum than that which he paid for the entirety of his purchase, if the purchaser elects to abide by his bargain and retain the residue at the amount he paid for the whole.

Second appeal from the decree of the District Judge, Ambala, dated the 18th October 1917.

Pandit *Nanak Chand*, for the Appellant.

Mr. *Fakir Chand*, for the Respondents.

JUDGMENT.—This was a suit for the pre emption of one-third share of a joint *khata* sold by *Musammat* Bishni to defendants Nos. 2 and 3 for Rs. 300. During the pendency of the pre emption suit, the other co sharers in the *khata* brought a suit that the vendor was entitled to only one ninth share and not to one-third share, and obtained a decree in their favour.

The contention on behalf of the pre-emptor is that, considering that he cannot get more than one-ninth of the joint holding, he is liable to pay not the price mentioned in the deed but only one-third thereof. To this contention I am unable to accede. It has been repeatedly held that the right of pre-emption is a right of substitution, and that the pre-emptor steps into the shoes of the vendee in respect of all the rights and obligations arising out of the sale transaction. Indeed, a judgment in N. W. P. Sudder Dewanni, Adawlat, 1863, at page 394, lays down that "in case of landed property, where the vendor is found later to have owned only part, the purchaser, if he has acted *bona fide*, is not compelled to surrender the remnant portion of his purchase to a pre-emptor at a less sum than that which he paid for the entirety of his purchase, if the purchaser elects to abide by his bargain and retain the residue at the amount he paid for the whole."

Mr. Nanak Chand for the appellant places his reliance upon an unreported judgment in Civil Appeal No. 1C 2 of 19 6 which is to the effect that a condition in the deed of sale, by which the vendor guarantees his title in the land solely to the vendee and agrees to compensate the latter, if disturbed, is one which does not enure for the benefit of the pre-emptor. The learned Counsel consequently argues that as his client is not entitled to bring a suit against the vendor for damages caused by the breach of the covenant of title, he should not be compelled to pay the whole price. In view of the nature of the right of pre-emption, I am doubtful whether that ruling should be regarded as sound law. At any rate, I do not think that there is any valid reason why I should not follow the decision of the Agra Court, which is directly to the point and lays down a principle which has my entire concurrence.

The learned Counsel's prayer for the extension of time for the payment of money cannot be accepted. The appeal, therefore, fails, but, in view of the novelty of the point involved, the parties are directed to bear their own costs in this Court.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 483 OF 1918.

May 28, 1919.

Present:—Mr. Justice Newbould.

APARNA CHARAN CHABRI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

GOPI NATH SAMANTA—DEFENDANT No. 1 AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XLI, r. 27—Rent suit—Res judicata *as against* pro forma *defendants—Matter not in dispute—Appeal—Appellate Court, power of, to admit fresh evidence, when to be exercised.*

In a suit for rent by the plaintiffs, who were co-sharer landlords, the defendants sought to use a judgment in a previous rent suit between other co-sharer landlords and themselves in which the plaintiffs in this suit were *pro forma* defendants:

Held, that the decision in the previous suit for rent could neither be binding on the present plaintiffs nor operate as *res judicata* against them on matters which were not or could not be in issue in that suit between them as *pro forma* defendants and the principal defendants [p. 568, col. 1.]

Evidence not tendered before the primary Court ought not to be admitted by the Appellate Court, unless on examining the evidence as it stands some *lacuna* or inherent defect becomes apparent, and not merely because a discovery is made, outside the Court, of fresh evidence and the application is made to import it, [p. 569, col. 1.]

APARNA CHARAN CHAKRI v. GOPI NATH SAMANTA.

Kessowji Issur v. *Great Indian Peninsula Railway Company*, 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 31 B. 381; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435, relied on.

Appeal against the decree of the Additional District Judge, Midnapore, dated the 29th of November 1917, reversing that of the Munsif, 2nd Court at that place, dated the 11th of September 1916.

FACTS appear from the judgment.

Babu *Sarada Charan Maity*, for the Appellants, submitted that in reversing the decision of the Munsif the lower Appellate Court relied on a judgment in a previous rent suit between the present defendants and the co-sharers of the plaintiffs. It held that the question relating to the *jama* purchased by the defendants was *res judicata* because of the decision in the previous rent suit to which the present plaintiffs were added as *pro forma* defendants. The lower Appellate Court erred in allowing the document to be used in evidence at the appellate stage without recording sufficient reason for so doing as required by Order XLI, rule 27, Civil Procedure Code. The lower Appellate Court could not admit such document in evidence without fulfilling the conditions laid down in Order XLI, rule 27, *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1), *Garden Reach Spinning & Manufacturing Co.* v. *Secretary of State for India* (2) The decision of the Court of Appeal below was vitiated by the admission in evidence of the judgment in question.

On the question of *res judicata* the view taken by the learned Judge was also incorrect. The present plaintiffs could not be held bound by any decision in the suit for the conduct of which they were not in any way responsible. The doctrine of *res judicata* could not be applied to the facts of the case. The present plaintiffs had been merely *pro forma* defendants and there was no contest between them and the principal defendants. Section 11, Civil Procedure Code, was referred to.

Babu *Satcouri Pati Roy*, for the Respondents, contended that the lower Appellate Court had discretion to admit the additional evidence in question, and it did so under Order XLI, rule 27, sub-rule (1), clause (*b*). The admission of the judgment in the previous rent suit did not vitiate the decision of the lower Appellate Court. *Ambuja Amma* v. *Appadurai Mudali* (3) was referred to. On the question of *res judicata* the lower Appellate Court rightly held that the finding in the previous rent suit that the defendants did not hold the land of the disputed *jama* as a part of their ancestral holding was *res judicata* as between the plaintiffs and the defendants in this suit. This question was directly and substantially in issue in the previous suit, and there was adjudication upon the question in the presence of the plaintiffs who were present before the Court as *pro forma* defendants. The plaintiffs, therefore, were bound by the decision in the previous suit on the question relating to the purchased *jama*.

Babu *Sarada Charan Maity* briefly replied.

JUDGMENT.—This appeal arises out of a suit for arrears of rent brought by the co sharer landlords. The plaintiffs' case was that the defendants held 4 *bighas* of land at a rental of 2 *aras* and $3\frac{1}{2}$ *mans*. The defendants alleged that they held the 2 *bighas* of land only at a *jama* of 14 *kuris*. The defendants admittedly held their ancestral *jote* of 2 *bighas* at the rent admitted by them. The dispute between the parties was whether they also held another *jote* which had formerly belonged to one Sharif Patar and which is said to have been purchased by the defendants in 1296. The Munsif held that the defendants held the lands in both the *jamas* and were liable for the full amount of the rent claimed. The lower Appellate Court held that the question relating to the purchased *jama* was *res judicata* and modified the Munsif's decree and granted the plaintiffs a decree in accordance with the defendants' admission. In deciding this issue of *res judicata* the lower Appellate Court relied on the judgment in a previous rent suit which had not been put in in evidence before the Munsif. In admitting this judgment in evidence the learned District Judge failed to record reasons for its admission in accordance with the provisions of clause 2 of rule 27 of Order XLI of the Code of Civil Procedure. There is nothing on the record to show that the admission of this evidence was justified. It was not certainly justified

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435.

(2) 28 Ind. Cas. 865; 42 C. 675; 19 C. W. N. 401.

(3) 30 Ind. Cas. 402; 38 M. 414.

under clause (*a*), sub-section (1) of that rule, since the document had not been tendered and there was no refusal to admit it in the first Court. As regards clause (*b*) the Judicial Committee of the Privy Council in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1) laid down the conditions under which evidence should be admitted for the first time in the Court of Appeal. The legitimate occasion for this rule is when on examining the evidence as it stands, some inherent *lacuna* or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence and the application is made to import it. It will be necessary for the case to be sent back to the lower Appellate Court for re hearing, and at the re-hearing the learned District Judge will consider whether this document will be required to be produced and the learned Judge will in the exercise of his discretion decide either to admit or to refuse this document.

Then as regards the question of *res judicata* the learned District Judge seems to have overlooked a very important point. The plaintiff in the previous suit was not the plaintiff in the present suit but one of his co-sharers. The plaintiffs in the present suit were the *pro forma* defendants in that suit. But as *pro forma* defendants, though the decision might be binding upon them as to their claim to any share of the rent for the years for which the rent was claimed in that suit, the decision cannot be binding upon them on matters which were not or could not be in issue between them as *pro forma* defendants and the principal defendants. They were not responsible for the conduct of the suit and should not be held responsible for their co sharers' act in that suit. The only point in which they were interested was whether their share of the rent for these years had been paid and if they did not think it necessary to enter appearance in that suit in order to insist on their claim, there was no duty cast upon them to take any action in connection with that suit. It is pointed out that the last year for which the rent was claimed in that suit is the first year in which the rent is claimed in the present suit and so far as the claim for that year is concerned, it would appear that the plaintiffs' suit is barred. But as regards the subsequent years the finding in the previous suit that the defendants did not hold the land of the disputed *jama* as a part of their ancestral holding is not *res judicata* as between the plaintiffs and the defendants in the present suit.

As other points were raised on behalf of the respondents in the lower Appellate Court and it left them undecided, the suit will be remanded for the determination of those issues as well as the issue of *res judicata* as regards the rent of the year 1919. The appeal is accordingly allowed and the suit remanded to the lower Appellate Court for re hearing in accordance with the above directions.

Costs will abide the result.

Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1474 OF 1918.

January 7, 1919.

Present:—Mr. Justice Scott Smith.

GANESHA MAL—PLAINTIFF—APPELLANT

versus

IBRAHIM AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Joint khata*—Possession of one co-sharer, whether can be disturbed by another—Remedies of dispossessed co-sharer—Specific Relief Act (I of 1877), s.* 9.

The peaceful possession of a person is a substantial right the infringement of which gives rise to a cause of action and although if he is dispossessed, he has the right to sue under section 9 of the Specific Relief Act, he is not bound to do so. [p. 570, cols. 1 & 2.]

In the case of a joint *khata* of agricultural land one co-sharer ordinarily cultivates one field and other co-sharers cultivate other fields, but one co-sharer cannot dispossess the other against his will from the field of which he has possession. Where such dispossession takes place, the dispossessed co-sharer can sue to recover possession of the plot of which he has been deprived. [p. 570, col. 1.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 31st January 1918.

Mr. *Rup Ram*, for the Appellant.

Mr. *Ghulam Rasul*, for the Respondents.

JUDGMENT.—This is a suit for recovery of possession of 4 *biswas* and 14 *biswansis* of land out of a joint holding

from which it is alleged the plaintiff-appellant was dispossessed against his will by defendant Ibrahim. The parties are joint owners in the holding. It is admitted that the plaintiff has for the last 14 or 15 years cultivated 2 *bighas* 10 *biswas* and 14 *biswansis* through Nanda as tenant. In January 1917 the defendant is said to have taken illegal possession of the land in suit. The first Court gave a decree for possession of the land but the lower Appellate Court dismissed the suit. It held that the suit would have been maintainable under section 9 of the Specific Relief Act if brought within six months of the date of dispossession. As it was brought seven months after that date, the plaintiff has no remedy but to apply for partition.

Mr. Rup Ram on behalf of the plaintiff-appellant cites *Wazir Singh* v. *Mehtab Singh* (1) and *Jhangi* v. *Ramzan* (2) as authorities for the proposition that one co-sharer may, under certain circumstances, take and keep exclusive possession of a portion of *shamilat* land for his own use until partition, and that another joint owner is not by reason of the land being *shamilat* necessarily entitled to disturb his possession. For the respondents it is contended that these rulings are not applicable as the land in suit is not *shamilat deh*. In my opinion the principle of those rulings is applicable. In the case of a joint *khata* of agricultural land one co sharer ordinarily cultivates one field and other co-sharers cultivate other fields, and it is certainly not the law that one sharer can dispossess the other against his will from the field of which he has possession. In *Jhangi* v. *Ramzan* (2) it was stated that in accordance with well-known law and custom as to possession of plots of *shamilat* by individual co sharers, the defendants in forcibly dispossessing were *qua* plaintiff mere trespassers. In accordance with this principle I hold that plaintiff appellant's peaceful possession was a substantive right, the infringement of which gave rise to a cause of action. As pointed out, in that case also the plaintiff might have sued under section 9 of the Specific Relief Act but he was not bound to do so. Plaintiff cultivated *cheri* in the land in Kharif 1916 and it may very possibly have been lying vacant in the succeeding Rabi. That fact alone would not, however, entitle defendant to take possession without the plaintiff's consent. I hold that plaintiff is entitled to recovery of possession.

As to the claim for Rs. 7-8-0 on account of damages, I do not think that plaintiff can recover that amount in the Civil Court. It is a sum which would apparently be recoverable under section 14 of the Punjab Tenancy Act.

I accept the appeal so far as to give plaintiff a decree for possession of the land claimed. As plaintiff has only partially succeeded, I order that the parties should bear their own costs throughout.

Appeal accepted.

(1) 108 P. R. 1889.
(2) 5 Ind. Cas. 808; 13 P. R. 1910; 20 P. W. R. 1910; 60 P. L. R. 1910.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2354 OF 1917.

March 20, 1919.

Present:—Justice Sir Ernest Fletcher, KT., and Mr. Justice Cuming.

RAM GOBINDA CHOWDHURY —PLAINTIFF—APPELLANT

versus

RAJANI KANTA DAS AND OTHERS— RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 167—Notice to annul incumbrance—Service of notice, mode of—Personal service, whether necessary—Appeal, second—Finding as to service of notice, whether finding of fact.

A notice annulling an incumbrance under section 167 of the Bengal Tenancy Act must, wherever practicable, be served personally. Other methods of service can only be adopted where personal service cannot reasonably be effected [p. 571, col. 2; p. 572, col. 1.]

A finding of the lower Appellate Court that a notice annulling an incumbrance under section 167 of the Bengal Tenancy Act was properly served, is not a finding of fact and can be questioned in second appeal. [p. 572, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 14th of August 1917, reversing that of the Munsif, 3rd Court at Sadar, dated the 26th of May 1916.

RAM GOBINDA v. RAJANI KANTA DAS.

FACTS appear from the judgment.

Dr. *Sarat Chandra Basak* (with him Babu *Chandra Sekhar Sen*), for the Plaintiff Appellant.—Defendant No. 13 only contests this suit of the plaintiff. Defendant No. 13 was one of the purchasers of the equity of redemption from the defendants first party who executed the mortgage in favour of the plaintiff. Defendant No. 13 was also landlord of the tenures. Now the material question which has to be decided is whether there was a proper service of notice to annul the encumbrance. Defendant No. 13 says that the mortgaged property was sold under the provisions of the Bengal Tenancy Act in execution of a rent decree and purchased by him. He says he has annulled the encumbrance by a proper notice served under section 167, Bengal Tenancy Act. I submit the encumbrance has not been annulled, as there was no proper service as required by law. The notice ought to have been served on the plaintiff, who is a practising Pleader, at Hathagari personally. Here the service is clearly bad. As regards mode of service, refers to S. C. Sen's Bengal Tenancy Act, Appendix I, page 2, rule 2, and also Order V, rule 12 and rule 15. Rule 12 of Order V, Civil Procedure Code, is quite clear on the poin: it distinctly says that wherever it is practicable, service shall be made on the defendant in person.

Babu *Khitish Chander Sen*, for the Defendants-Respondents.—The finding is that the encumbrance was annulled and this being a finding of fact, the question was no longer open. The service of notice was perfectly good as the notice was served at the plaintiff's residence at Sikarpur.

[FLETCHER, J.—The man must be served.]

The point cannot, I submit, be re opened here, as it has been found as a fact by the learned District Judge that there was a proper service.

[FLETCHER, J.—He was a practising lawyer, it was practicable to serve him.]

Dr. *Basak* was not called upon to reply.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the plaintiff against the judgment of the learned District Judge of Chittagong, dated the 14th August 1917, reversing the decision of the Third Munsif of the same place. The plaintiff brought the suit to enforce a mortgage which was executed in his favour by the defendants first party. The defendants second party subsequently purchased the equity of redemption. Only one of them, namely the defendant No. 13, contested the suit. He was also the landlord of the tenure and his case was that the mortgaged property had been sold under the provisions of the Bengal Tenancy Act in execution of a rent decree and purchased by him and the other defendants second party and that proper notice had been served under section 167 of the Bengal Tenancy Act to annul the encumbrances. The question, therefore, is: "Was the encumbrance annulled?" The learned Judge of the lower Appellate Court has found that the encumbrance was annulled, and it is said that that is a finding of fact not open to question. I do not agree. The learned Judge has found facts from which he infers that proper notice complying with the terms of the Statute was served. What he has found is this. That the plaintiff is a Pleader and he ordinarily practises at a place called Hathagari where apparently he also resides, and the notice was not served on the plaintiff himself but was served on a blind man who had a house jointly with the plaintiff at a village called Sikarpur. The learned Judge, however, makes this finding that no doubt it would have been the better course to have served the Pleader himself at Hathagari. The learned Judge thought that the service at the residence that he had at Sikarpur with his uncle was a perfectly good service. The statutory rules that have been framed by the Government of Bengal under the provisions of the Bengal Tenancy Act are quite clear on this matter. Rule 2 provides that except as otherwise prescribed, a service of notice shall be effected in the manner prescribed for the service of summons on a defendant under the Code of Civil Procedure. So, one has got to look at the Civil Procedure Code and Order V, rule 12, is quite clear that where it is practicable, the service should be made on the defendant in person. Now, in this case, the Judge has found that it was practicable to serve the notice on the defendant in person. He says it would have been better to serve the Pleader at Hathagari. So obviously, in his opinion, it

was quite practicable to serve him there. If it was practicable, the other method of service does not apply, as provided by the Code in the event of the defendant not being found. It seems to me quite clear in this case that there was no proper notice served on the plaintiff to annul the encumbrance. In that view of the case, we must set aside the judgment of the learned District Judge and restore the decree passed by the Munsif with costs both in this Court and in the lower Appellate Court.

CUMING, J.—I agree.

Appeal decreed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 50 OF 1918.

June 10, 1919.

Present :—Mr. Ashworth, A. J. C.

RAGHUBAR DAYAL (AFTER HIS DEATH BISHAMBHAR DAYAL) AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BINDA PRASAD—DEFENDANT—RESPONDENT.

Fraud—Decree obtained by fraud, when can be set aside—Pleadings, particulars required in—Transfer of Property Act (IV of 1882), s. 52—Transfer pendente lite *—Transferee, whether can object to decree passed on ground of fraud.*

A fraudulent decree can only be impeached by a person who has been injured by it; but in order to succeed, he must indicate on what ground it is claimed that the decree was obtained by fraud, or set forth facts from which fraud may be directly and conclusively inferred. [p. 574, col. 2; p. 575, col. 2.]

Section 52 of the Transfer of Property Act, does not debar a transferee during the pendency of a suit from one party to the suit, from impeaching the decree therein on the ground of fraud by the parties to the decree effected by acts done after the transfer. [p. 574, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Sultanpur, dated the 19th February 1918.

The Hon'ble Mr. *Gokaran Nath Misra*, for the Appellants.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—The plaintiffs-appellants appeal from a decree of the Subordinate Judge of Sultanpur dismissing their suit for a declaration that the defendant has not got under-proprietary rights or any kind of right in respect of 69 Bighas 1 Biswa in the village of Bhain, Sultanpur district. They alternatively ask for a decree for possession, but in appeal it is admitted by their Counsel that they cannot get this in a Civil Court. By this admission their Counsel must also be held to give up the claim for a declaration that the defendant has no sort of right, as the admission implies that the defendant is at least a tenant. The allegations on which the suit was brought are these :—

The village Bhain is divided into two Mahals—one the Mahal of Asghar Ali Khan and the other that of Wazir Ali Khan. It is with the latter only that we are concerned in this suit and it will be called in this judgment "the Mahal." One-half of the Mahal Wazir Ali Khan was owned by the three sons of Nawazish Ali Khan, Mehndi Husain Khan, Abid Husain Khan and Yusuf Husain Khan (hereinafter called the three brothers). The other half was owned by Hadi Husain Khan, but his half was also in the possession of the three brothers under a charge securing them the possession of it until the money charged was paid. The defendant Binda Prasad was a tenant of 69 Bighas 1 Biswa in the Mahal. On the 16th October 1890 the whole Mahal was mortgaged to one Baiju, who was succeeded in his interest by Ramanand. The mortgage was for the sum of Rs. 19,000 and was a possessory mortgage. The brothers mortgaged thereby their own half share of the Mahal and also their possessory rights as charge-holders in the other half share. In the year 1903 Ramanand mortgagee issued a notice of ejectment against Binda Prasad defendant in respect of the 69 Bighas 1 Biswa. Binda Prasad contested the notice by a suit under section 56 and set up a perpetual lease, dated the 6th June 1863. On the 15th June 1903 the Assistant Collector, who was trying the case, held the lease to be invalid and a fictitious document, but cancelled the notice of ejectment owing to certain formal defects in it. Ramanand appealed to the Commissioner from this decision and was successful, the ejectment of Binda Prasad being ordered on the 23rd July 1904. A second appeal

to the Board of Revenue was filed by Binda Prasad but failed. After this adverse decision in the Rent Courts Binda Prasad filed a suit in the Court of the Subordinate Judge of Sultanpur asking for a declaration not merely that he was a perpetual tenant but that he had under-proprietary rights by virtue of the lease of 1363, that is to say, he claimed that under the lease he had both a heritable and transferable interest. In this suit Ramanand mortgagee was the chief defendant, but the three brothers were also impleaded as having an interest by reason of their right to the equity of redemption. It is admitted by Counsel on both sides that in Oudh such a declaratory suit can be filed by a tenant notwithstanding a Rent Court decree for ejectment. When this suit was filed, the three brothers put in a written statement confessing judgment. Ramanand, however, contested the suit. On the 5th June 1905 during the pendency of the suit the three brothers executed a second mortgage of the half of the Mahal of which they were the owners to one Lala Hingu Mal, the brother and predecessor-in-interest of plaintiff No. 1. This mortgage was not possessory. Out of the total consideration of Rs. 6,000 a sum of Rs. 5,720 was left in deposit with Hingu Mal, for the purpose of being paid to Ramanand by the mortgagors in redemption of his prior possessory mortgage and (after seven days) on the 12th June 1905 taking this money out of deposit the mortgagors redeemed Ramanand's mortgage. Nine days after the execution of this mortgage Binda Prasad's suit in the Court of the Subordinate Judge of Sultanpur was dismissed, it being held that the lease of 1863 conferred no heritable and transferable interest. Binda Prasad appealed to the District Judge of Rae Bareli, the respondents being the three brothers and Ramanand. On the 18th September 1905, Ramanand put in an application asking to be struck off as a defendant, on the ground that his mortgage having been redeemed he was no longer interested in the suit. Then the three brothers and Binda Prasad filed a compromise wherein, in consideration of the raising of Binda Prasad's rent from Rs. 105 to Rs. 150, the brothers admitted the claim of Binda Prasad to be an under-proprietor. The District Judge on the 18th September 1905 passed a decree declaring Binda Prasad to be an under-proprietor. It is this decree which is stated to be void on the ground of fraud. Subsequently Hingu Mal, the predecessor-in interest of plaintiff No. 1, brought a suit on the foot of his mortgage of the 5th June 1905 and obtained a decree for sale of the one-half of the Mahal mortgaged to him thereby. The date of the decree is the 12th January 1912. On the 14th February 1914 in pursuance of this decree the mortgagee, Hingu Mal, himself purchased the half of the Mahal. Later on the possessory right of the three brothers as charge-holders of the other half of the Mahal was sold in execution of a simple money decree due to some other creditor and was purchased by plaintiff No. 2 on the 29th May 1915. Thereafter plaintiffs Nos. 1 and 2 issued another notice of ejectment against the defendant Binda Prasad, who in spite of the previous decree for his ejectment by the Commissioner of Fyzabad of the 23rd July 1904 had avoided ejectment by filing the declaratory suit mentioned above. This time Binda Prasad resisted the notice of ejectment on the strength of the decree of the District Judge of Rae Bareli, dated the 8th September 1905, and on the 30th of October 1916 succeeded in getting the notice cancelled by the Assistant Collector who was trying the case. This decree was upheld on appeal by the Commissioner of Fyzabad. Hence this present suit, asking for a declaration that Binda Prasad defendant has no under-proprietary rights and that the plaintiffs are not bound by the compromise decree of the 18th September 1905.

The learned Sudordinate Judge of Sultanpur has dismissed the suit on the following findings :—

(*a*) that the decree of 18th September 1905 was neither collusive nor fraudulent:

(*b*) that neither plaintiff No. 1 nor plaintiff No. 2 had any right to maintain the suit, inasmuch as the former obtained his interest in one-half of the Mahal as mortgagee after the institution of the suit which ended in Binda Prasad being declared to have under-proprietary rights and the latter was merely a purchaser at a much later date of the rights of the brothers *qua* charge-holders to hold

possession of the other half of the mahal:

(*c*) that Binda Prasad was an under-proprietor by virtue of the decree of the 18th September 1905 behind which it was unnecessary to go:

(*d*) that the suit was barred by limitation under Article 120 of the Limitation Act, it really being a suit to avoid the decree of the 18th September 1905 and six years having elapsed from the date of that decree:

(*e*) that under the principle of *lis pendens* as set forth in section 52 of the Transfer of Property Act, the plaintiff No. 1 could not sue on the strength of his mortgage of the 5th June 1905, because that mortgage was executed during the pendency of the suit which ended in Binda Prasad being declared an under proprietor.

It may be conceded to the appellants that the learned Subordinate Judge was wrong in holding that the plaintiff No. 1 had no right to maintain the suit because his interest as mortgagee came into existence after the filing in 1905 (or at the end of 1904) of the declaratory suit by Binda Prasad in the Court of the Subordinate Judge of Sultanpur. Assuming that the compromise decree of the 18th September 1905 was obtained by fraud against the plaintiff No. 1 and had the effect of defrauding him, that decree had the same effect as if the three brothers had assigned to Binda Prasad under-proprietary rights on the date of the decree. Such an assignment would obviously diminish their mortgagee's existing security. Again the Subordinate Judge was wrong in holding that section 52 of the Transfer of Property Act was a bar to the plaintiff No. 1 impeaching the decree of the 18th September 1905. It is true that the mortgage in favour of Hingu Mal was effected by the three brothers while Binda Prasad's declaratory suit was pending and as such it could not affect the rights of Binda Prasad under that decree. There is, however, no question of the transfer *per se* affecting those rights. Section 52 cannot be held to have the effect that a transferee during the pendency of a suit from one party to the suit is debarred from impeaching the decree on the ground of fraud by the parties to the decree effected by acts done after the transfer. Again the Subordinate Judge is wrong in holding that the suit is barred by limitation. The plaintiffs were not in a position to claim that Binda Prasad's assertion of under-proprietary rights affected their rights as persons in possession of the Mahal until they had acquired such possession. It may be that the plaintiffs are unable to obtain a decree that the defendant has not got under-proprietary rights in the 69 Bighas 1 Biswa until they get rid of the decree of the 18th September 1905, but this will not prevent them bringing a suit for declaration that Binda Prasad has no under-proprietary rights. It will only mean that such a suit cannot be successful. Again, the Subordinate Judge is wrong in holding that the failure of Hingu Mal, when he sued to enforce his mortgage, to implead Binda Prasad as a person interested would debar him from maintaining that Binda Prasad had not under-proprietary rights. Binda Prasad's under-proprietary rights could not be adversely affected by any decree for sale, nor were they admitted by Hingu Mal to exist. The ruling quoted by the lower Court does not appear to be applicable.

At the same time the plaintiffs' suit must fail on various grounds. The Subordinate Judge was clearly right in holding that the plaint fails to indicate on what grounds it is claimed that the decree of 1905 was obtained by fraud or to set forth facts from which fraud may be directly and conclusively inferred. The appellants invoke paragraphs 10 and 15 of the plaint, but it is clear that these paragraphs fail to state certain facts which it is necessary to establish before the decree of 1905 can be held to be fraudulent. For instance, if Hingu Mal was aware at the time of taking his mortgage that the three brothers had already confessed judgment by their written statement and if he was also aware that this suit for a declaration by Binda Prasad was in progress, he cannot plead that the decree was obtained behind his back. Neither paragraph 10 nor 15 of the plaint sets forth that he was not aware of these things: nor has any evidence as a matter of fact been furnished by the plaintiffs to show that he was unaware. That the plaint did not set forth the facts

on which the allegation of fraud was based with sufficient clearness is also evident from the difficulty which the appellants' Counsel has found in stating those facts in argument in appeal. He has had to change his ground two or three times Ultimately the position he appears to take up is this. The three brothers had determined to acknowledge Binda Prasad's under-proprietary rights by virtue of the lease of 1863. They knew that the first mortgagee Ramanand who was in possession would not admit these rights. They, therefore, determined to get Ramanand's mortgage redeemed by Hingu Mal, and at the same time keep Hingu Mal in ignorance that this case was in progress. The redemption of Ramanand's mortgage was successfully effected by means of money obtained from Hingu Mal, but before Ramanand notified to the Court that he had no further interest in the case Binda Prasad's suit was dismissed on the objection of Ramanand taken in his written statement. Binda Prasad was, therefore, compelled to appeal and Ramanand during this appeal withdrew as respondent as he had no further interest. The three brothers then, colluding with Binda Prasad, agreed to a decree affirming his under proprietary rights. I may here state that I do not agree with the Subordinate Judge that, because Binda Prasad agreed to pay a higher rent as under-proprietor than he had been paying as mere lessee, the three brothers must be acquitted of any fraudulent intention. A fraud on another person does not cease to be a fraud because one of the parties to the fraud receives some inducement to join in the fraud from the other party. But it is impossible to believe that Hingu Mal was ignorant of the fact of this case between Binda Prasad and his mortgagors being in progress or of the fact that his mortgagors were admitting Binda Prasad's claim. Hingu Mal was a resident of Sultanpur, where the case was being tried. It is perhaps possible that he was not aware of Binda Prasad's appeal to the District Judge of Rae Bareli, but there is no evidence to prove that he was unaware of it and it was necessary for the plaintiffs, in order to make out that the decree was fraudulent, to produce some evidence that he was not aware of it. One would have expected that if the decree was passed behind the back of Hingu Mal, he would have taken steps to object to it when he heard of it, but he never did anything of the sort. Assuming, however, that the decree was a fraudulent one intended to defraud Hingu Mal, it would be necessary to show that he was defrauded. It is clear he was not defrauded. He obtained a decree for sale of one-half of the Mahal mortgaged to him and in execution of that decree the mortgaged share was sold and he obtained his full mortgage money. Again, neither plaintiff No. 1 nor plaintiff No. 2 can succeed in this suit so long as they are bound by the decree of the 18th September 1905. This is not a suit to set aside that decree, and, if it were, it would be barred by limitation. The plaintiffs cannot, after claiming as their cause of action an assertion by Binda Prasad of his rights as under-proprietor within six years, turn round and say that their real cause of action is the passing of this fraudulent decree. Again neither plaintiff is in a position to avoid the decree on the ground of it being fraudulent. Plaintiff No. 1, at the date of the filing of this suit and indeed at the date of his issuing the notice of ejectment on Binda Prasad, was not the successor-in-interest of Hingu Mal, as mortgagee. He was his successor as purchaser of the property when sold at the instance of Hingu Mal. Hingu Mal's mortgage has ceased to exist as he has been paid up by the money realised in execution sale. A fraudulent decree can only be impeached by a person who has been injured by it. The contention of the appellants' Counsel that such a decree is void and not voidable has not been supported by any authority and requires no consideration. A further bar to the success of the plaintiffs' suit is that, even if we were to assume that the decree of 18th September 1905 was fraudulent and void, there is no evidence to show that Binda Prasad has not got the rights of an under-proprietor apart from that decree. It has been contended in appeal, though this point was not made in the lower Court, that the plaintiff No. 1, as successor-in interest of Hingu Mal, has acquired all the rights of the first mortgagee Ramanand by reason of Ramanand having been redeemed by money paid by Hingu Mal. It is, therefore, maintained that he can take advantage of the Rent

KALI PROSUNNA v. ASGAR.

Court decree of the Commissioner who ordered the ejectment of Binda Prasad. But inasmuch as Hingu Mal's mortgage has been satisfied, no right remains to him as mortgagee. The plaintiffs cannot, therefore, take advantage of the fact of Hingu Mal having paid off a prior mortgagee. This being so, it is not necessary to determine whether the payment of Ramanand out of the money left with Hingu Mal by the three brothers, when these three brothers sold Hingu Mal the equity of redemption, and subsequently drawn by the three brothers to pay off Ramanand, will bring into operation the provisions of section 74 of the Transfer of Property Act. It has been held by the Allahabad High Court, when money is raised by the mortgagor on a second mortgage and is used by him for paying off the first mortgage, the second mortgagee cannot take advantage of this section, for the payment has not been made by him. See *Baijnath* v. *Murlidhar* (1) and *Maharaj Singh* v. *Balwant* (2). The case of *Raja Ali Mohammad Khan* v. *Deputy Commissioner of Barabanki* (3) relied on by the appellants' Counsel does not conflict with these rulings. It only holds that where a second mortgagor's money is used subsequent to the date of the second mortgage and apart from the consideration for that second mortgage, it will be no answer that the actual person who handed the money over was the mortgagor. The other ruling relied on by the appellants, *Swaminatha Pillai* v. *Krishna Iyer* (4), is only authority for holding that a prior mortgage debt partly discharged by money advanced by a subsequent mortgagee entitles the subsequent mortgagee to priority against an intermediate mortgagee to the extent to which his money was applied to pay off the earlier debt It is true that in this case the money used appears to have been money paid out of the amount received from the subsequent mortgagee as consideration for the mortgage to him, but the point in question does not appear to have been raised in that case and the report in Indian Cases is not full enough to justify that case being cited as an authority on this point.

Consequently I find that the plaintiffs-appellants are debarred from getting a declaration by the existence of the decree of the 18th September 1905 declaring Binda Prasad to have under proprietary rights in the plots in suit, that they have not been injured by this decree and so are not in a position to ask that it should be held ineffectual against them on the ground of fraud, that even if they have been injured avoidance of the decree is barred by limitation, that there is no proof that the decree was obtained by fraud and that the plaintiffs have failed to prove that the defendant has not got under-proprietary rights apart from the decree. Accordingly I dismiss this appeal with costs.

Appeal dismissed.

(1) 4 A. L. J. 349; A. W. N. (1907) 85.
(2) 28 A. 508; 3 A. L. J. 274; A. W. N. (1906) 117.
(3) 9 O. C. 259.
(4) 28 Ind. Cas. 966; 28 M. L. J. 484; 38 M. 548.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1282 OF 1917.

May 29, 1919.

Present :—Mr. Justice Newbould.

KALI PROSUNNA BASU ROY CHOUDHURY—PLAINTIFF—APPELLANT

versus

Sheikh ASGAR (TALUKDAR) AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 153—Rent suit—Adverse possession of third parties, finding on—Question of title, whether decided—Appeal, second, whether lies—Finding on question not in issue, effect of.

The finding of a Court in a rent suit on a question of adverse possession which does not arise at all, is not a decision on a question of title and is consequently not open to second appeal under section 153 of the Bengal Tenancy Act. [p. 577, col. 1.]

Where a Court records a finding on a question which is not in issue in the suit, such finding is inoperative. [p. 577, col. 2.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Dacca, dated the 10th of March 1917, affirming that of the Registrar Munsif, Munshiganj, dated the 14th of February 1916.

FACTS appear from the judgment.

Babu *Trailokya Nath Ghose* (with him Babu *Promothanath Banerji*), for the Respondents.—The second appeal is not competent under section 153 of the Bengal Tenancy Act. The defendant

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says that he is a tenant neither of the plaintiff nor of his co sharers. It appears that the Courts below have not gone into the question of title; so it cannot be said that any question of title has been decided so as to make the case fall within the purview of section 153 of the Bengal Tenancy Act. Refers to *Doorga Narain Sen* v. *Ram Lal Chhutar* (1), *Shilabati Debi* v. *Rodrigues* (2). Even if the co-sharer landlord is a party defendant, that will not make the case appealable unless the question of title is actually decided. Refers to *Hurry Mohun Mozoomdar* v. *Dwarka-nath Sein* (3).

Babu *Surendra Nath Guha*, for the Appellant.—The appeal is competent for this reason that the *pro forma* defendants, who are co sharers of the plaintiff, have been held to have acquired by adverse possession a right to realise from the tenant the rents due to the plaintiff's share. So it appears that the lower Courts have decided a question of title. I want to show that my title to recover rent cannot be lost by the possession of my co sharer. *Ayennessa Bibi* v. *Sheikh Isuf* (4).

JUDGMENT.—This is an appeal against the decision in a rent suit In my opinion, the preliminary objection taken on behalf of the respondents that no appeal lies must prevail.

The appeal is valued at Rs. 7-11 annas and no question has been decided which under section 153, Bengal Tenancy Act, makes a second appeal lie in this Court. It is contended that on the question regarding title to land in dispute, conflicting claims have been decided. The learned Subordinate Judge starts his judgment by stating that he would confine himself to the determination of the question whether the relationship of landlord and tenant subsists between the plaintiff and the defendants, and it is not necessary for him to enter into the question of title. This itself indicates that no question of title has been decided. It is true, as pointed out, that at the end of the judgment the learned Subordinate Judge has come to a finding that the *pro forma* defendants had been in adverse possession to the plaintiff and thereby his right to recover rent from the defendants was barred by lapse of time. But apart from the opening remarks which I have quoted, this decision was a decision which must be inoperative because it decides a question that never arose in the suit. The *pro forma* defendants never set up title adversely to that of the plaintiff, or alleged that they had dispossessed him. If the Court in its judgment comes to a finding on a point which is not in issue in the suit, such a finding cannot have any effect.

I, therefore, hold that under section 153 of the Bengal Tenancy Act no appeal lies, and I accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 7 C. 830; 3 Ind. Dec. (N. S.) 761.
(2) 12 C. W. N. 448; 35 C. 547.
(3) 18 W. R. 42.
(4) 14 Ind. Cas. 722; 16 C. W. N. 849.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1608 OF 1918.

February 15, 1919.

Present:—Mr. Justice Scott-Smith.

JAMIAT SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat RAJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 10—Suit for recovery of trust property against trustee of shrine and his donee—Limitation—Trustee of shrine, whether competent to acquire private property.

A suit for recovery of property against a person in whom the property has become vested in trust for the upkeep of a shrine and against his assign who is not an assign for valuable consideration, for instance a donee, is covered by the provisions of section 10 of the Limitation Act. [p. 578, col. 2.]

The custodian of a shrine who is not a member of a religious fraternity is not incompetent to acquire private property of his own [p. 578, col. 1.]

Second appeal from the decree of the District Judge, Ambala, dated the 14th February 1918.

Mr. *Sewa Ram Singh*, for the Appellant.

Mr. *Gullu Ram*, for the Respondent.

JUDGMENT.—In the suit out of which the present appeal arises plaintiffs sued *Musammat* Raji, donor, and *Musammat* Kishni, donee, for ejectment of the latter from two plots of land gifted by the former to

the latter. The suit was brought on the ground that the land was attached to the *gurdawara* of Shahid Ganj and that *Musammat* Raji had no authority to alienate them. The plots are (*a*) 6 *bighas*, 19 *biswas* and (*b*) 11 *bighas*, 15 *biswas*. The first Court held that the plot (*a*) was attached to the *gurdawara* and that *Musammat* Raji had no power to make a gift of it but that the plot (*b*) was gifted to Ram Singh, the husband of *Musammat* Raji, and was not attached to the *gurdawara* and that, therefore, the plaintiffs had no *locus standi* to object to the gift of it. It, therefore, gave a decree as regards plot (*a*) and dismissed the suit as regards plot (*b*). The lower Appellate Court agreed as regards plot (*b*) with the decision of the first Court As regards plot (*a*) it was of opinion that the only suit which plaintiff could bring in regard to it was one for a declaration and that such a suit was time-barred not having been brought within six years of the date of gift.

Plaintiffs have filed a second appeal to this Court. With reference to plot (*a*) it is quite clear from the revenue records that it was originally granted for the up-keep of the shrine. The *muafi* file shows that the *muafidar* had no power to alienate it. This fact is not seriously contested before me. The lower Appellate Court's view that the only suit that could be brought in regard to this plot was one for a declaration does not appear to be correct. The learned District Judge relies upon *Kazi Hassan* v. *Sagun Balkrishna* (1). In that case the plaintiffs sued to recover possession of certain lands, alleging that they had been granted in *wakf* to their ancestor and his lineal descendants to defray the expenses for, or connected with, the services of a certain mosque; that their father and cousins, who were *mutwallis* in charge of the said property, had illegally alienated some of these lands, and had also ceased to render any service to the mosque It was held in that case that the plaintiffs were entitled to sue to have the alienation set aside and the *wakf* property restored to the service of the mosque. It was also held that *wakf* property could not be alienated and that any person interested in the endowment could sue to have the alienations set aside and the property restored to the trust. In the present case the plaintiffs do not sue for possession for themselves. They sue to dispossess the alienee. In other words, they wish that the property should be restored to the purpose for which it was granted. It is not contended now by Counsel for respondents that the suit for dispossession of the donee cannot lie.

It is, however, contended that the suit is barred by time and the following authorities are cited:—*Narain Singh* v. *Ishar Singh* (2), *Asa Ram* v. *Paras Ram* (3) and *Achar Singh* v. *Badhawa Singh* (4). In the case reported as *Asa Ram* v. *Paras Ram* (3) the plaintiff brought a suit as reversioner to contest an alienation made by the last manager of the endowed property and asked for the dispossession of the assignee in favour of the endowment. It was held that the limitation applicable to such a suit was that prescribed by section 120 of the Second Schedule to the Limitation Act. In *Narain Singh* v. *Ishar Singh* (2) the facts were somewhat similar and it was held that Article 120 applied. In both these cases, however, the alienation was for valuable consideration and, therefore, section 10 of the Limitation Act did not apply. Section 10 is as follows:—"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time." Now the present suit is one against a person in whom property has become vested in trust for the upkeep of a shrine and against her assign who is not an assign for valuable consideration and, therefore, in my opinion, section 10 of the Limitation Act

(1) 24 B. 170; 1 Bom. L. R. 649; 12 Ind. Dec. (N. S.) 651.

(2) 8 P. R. 1899.
(3) 9 P. R. 1904.
(4) 15 Ind. Cas. 285; 124 P. R. 1912; 2 P. L. R. 1913; 132 P. W. R. 1912.

applies and the suit is not barred by time. I, therefore, hold that the plaintiffs are entitled to a decree as regards plot (*a*).

As regards plot (*b*), however, the case stands on a different footing. The record shows that it was gifted to Ram Singh as *dharamarth*. The meaning of the word *dharamarth* was considered in *Gurdit Singh* v. *Sher Singh* (5) to be a charitable grant or a religious endowment. There is no evidence of any sort to show that the gift of this plot was made to Ram Singh in his capacity as custodian of the shrine. It was, in my opinion, made to him as a private person. Mr. Sewa Ram Singh refers to Article 89 of Rattigan's Digest, which is to the effect that all property acquired by individual members of a religious fraternity belongs as a general rule to the religious institution to which they are attached; and from this he argues that plot (*b*), which was acquired by Ram Singh, belongs to the shrine of which he was a custodian. In my opinion this argument has no force. Ram Singh was the custodian of a shrine and not one of the members of a religious fraternity. No authority was cited in support of the proposition that the custodian of a shrine such as Ram Singh cannot acquire private property of his own. I, therefore, hold that the plaintiffs have no *locus standi* in regard to plot (*b*).

I accept the appeal and modifying the order of the lower Appellate Court restore the decree of the first Court, declaring that the gift is invalid so far as the plot of 6 *bighas*, 19 *biswas* is concerned and ordering *Musammat* Kishni's ejectment therefrom and dismiss his suit as regards the plot of 11 *bighas*, 15 *biswas*. The parties shall bear their own costs throughout.

Appeal accepted.

(5) 14 Ind. Cas. 247; 73 P. R. 1912; 106 P. L. R. 1912; 63 P. W. R. 1912.

MADRAS HIGH COURT.

CIVIL APPEAL No. 272 OF 1917.

August 1, 1919.

Present:—Sir Abdur Rahim, Kt., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

VEERAPPA CHETTI—DEFENDANT No. 2—APPELLANT

versus

RAMASWAMI CHETTI—AND ANOTHER—PLAINTIFF & DEFENDANT No. 1.—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 18, 21, 39 (b)—Jurisdiction of Courts, territorial changes in—Sale by Court which ceased to exercise jurisdiction, validity of—Acquiescence by judgment-debtor, whether binds purchaser at sale by Court to which jurisdiction, is transferred—Estoppel—Evidence Act (I of 1872), s. 115—Transfer of Property Act (IV of 1882), s. 41, applicability of.

A notification declaring that certain property or the area wherein it is situate is transferred from the jurisdiction of one Court to that of another, must be read as speaking retrospectively and as declaring that from and after its date, the former Court ceased to have jurisdiction over the subject-matter. [p. 582, col. 2.]

Where a Court which issued an order of attachment of certain property had been deprived of jurisdiction over the property but it ordered the sale of the property notwithstanding, the judgment-debtor not objecting:

Held, (1) that the purchaser at the sale acquired no title to the property and that a purchaser at a sale ordered subsequently by the Court to which the jurisdiction over the property was transferred was entitled to possession; [p. 583, col. 2.]

Secni Nadan v. *Muthuswamy Pillai*, 53 Ind. Cas. 213; 37 M. L. J. 234; 26 M. L. T. 223; (1919) M. W. N. 640, *Subbaraya Mudaliar* v. *Rakki*, 1 Ind. Cas. 73; 32 M. 140; 5 M. L. T. 27 and *Ramakrishna Chetty* v. *Subraya Iyer*, 18 Ind. Cas. 64; 38 M. 101; 24 M. L. J. 54; (1913) M. W. N. 303, distinguished.

(2) that the fact that the judgment-debtor did not object to the purchase by the plaintiff, however it might bind the former, did not create any estoppel against an auction-purchaser at a sale held by the right Court. [p. 583, col. 2.]

Mahomed Mozuffar Hossein v. *Kishori Mohun Roy* 22 C. 909 at p. 919 (P. C.: 22 I.A. 149; 5 M. L. J. 101; 6 Sar. P. C. J. 583; 11 Ind. Dec. (N. S.) 602, explained.

Madell v. *Thomas*, (1891) 1 Q. B. D. 230 at p. 238; 60 L. J. Q. B. 227; 64 L. T. 9; 39 W. R. 280, *Prayag Raj* v. *Sidhu Prasad Tewari*, 35 C. 877 at p. 895; *Parsidh Narain Singh* v. *Janki Singh*, 7 C. L. J. 644, not approved.

Section 41 of the Transfer of Property Act only provides that a transfer from an ostensible owner confers title on the transferee. Where title is ostensibly in a person and the real owner further acknowledges the title as true, persons who seek to prove that the title is illusory will not be permitted to do so. What is denied is the right to adduce evidence that the *prima facie* title is not the real title. The principle does not apply to execution creditors,

who are not, under all circumstances, estopped by considerations affecting the judgment-debtor. [p. 583, col 2.]

It is not a general rule of law that an order for sale by a Judge who has no jurisdiction to direct it can be upheld on the ground that the judgment-debtor did not oppose it. The justification for such a rule of estoppel is the legislative provision in that behalf. That provision must be regarded as an exception to the general rule that orders passed without jurisdiction are nullities. This exceptional rule of estoppel should not be extended further than is warranted by its language. [p. 584, col. 1.]

Sections 18 and 21 of the Civil Procedure Code do not bind in terms persons like execution creditors. [p. 584, col. 1]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 22 of 1916.

FACTS.—An application for attachment was made to the Ramnad Sub-Court in execution of a decree transferred to it for execution but before the attachment was ordered, the territorial jurisdiction in respect of the attached properties had been transferred to the Sivaganga Sub-Court. After the attachment by the Ramnad Court, another creditor of the same judgment-debtor got these properties attached by the Sivaganga Court on a decree in his favour. Subsequent thereto the Ramnad Court sold away the properties by public auction. Afterwards the Sivaganga Court held its sale and plaintiff purchased the property and brought this suit to recover possession.

The questions were (1) whether the sale by the Ramnad Court was valid; (2) whether the judgment-debtor not having questioned the sale in the Ramnad Court, his estoppel would bind an auction-purchaser of his rights; (3) whether plaintiff, having applied for rateable distribution in the former sale, was estopped from impeaching it later on.

Mr. *A. Krishnaswami Aiayr*, for the Appellant.—Objections as to place of suing will not be allowed if not taken at the earliest opportunity. Section 21, Civil Procedure Code. This principle regarding suits culminating in decrees has been applied to execution proceedings culminating in sales. A decree, which could not have been impeached in the course of the proceedings, cannot be impeached in an independent proceeding; see *Gomathan Alamelu* v. *Komandur Krishnamacharlu* (1).

(1) 27 M. 118.

This has been applied to sales in *Velayutha Muppan* v. *Subramanian Chetti* (2). The law nowhere says that a sale can be assailed after confirmation but says the reverse. See Order XXI, rules 90 and 92. For confirmation has the effect of an out and-out conveyance and the judgment-debtor is estopped finally, and he has no more disposable interest left to him in what was sold away. So one who poses as having purchased 'the right, title and interest' of the judgment-debtor in Court-auction has in fact got nothing, for there was nothing left. See as to the effect of a statutory confirmation of title *Ganapathy Mudaliar* v. *Krishnamachariar* (3). The fact that plaintiff is a purchaser in Court-auction does not improve his position. If the judgment-debtor, having no disposable interest left, could not have privately conveyed the properties to another by mortgage or sale, still less could it be said that a simple money decree-holder could be enabled to reach the properties to realise his dues. The estoppel binding the judgment-debtor binds an auction-purchaser also. See *Suppa Bhattar* v. *Suppu Sokkaya Bhattar* (4), *Prayag Raj* v. *Sidhu Prasad Tewari* (5).

[SESHAGIRI AIYAR, J.—Even stranger purchasers?]

Yes. The principle has been applied to all kinds of estoppel affecting title. See *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (6), *Poreshnath Mukerji* v. *Anathnath Deb* (7), *Debendra Nath Sen* v. *Mirza Abdul Samed Sero i* (8), following *Madell* v. *Thomas* (9), *Thuljaram Row* v. *Gopala Aiyar* (10).

(2) 16 Ind. Cas. 498; 24 M. L. J. 70; 13 M. L. T. 207; (1913) M. W. N. 136.

(3) 44 Ind. Cas. 955; 41 M. 403; 23 M. L. T. 198; 27 C. L. J. 367; 34 M. L. J. 463; 4 P. L. W. 310; (1918) M. W. N. 310; 22 C. W. N. 553; 16 A. L. J. 353; 20 Bom. L. R 580; 8 L. W. 427 (P. C.).

(4) 30 Ind. Cas. 962; 29 M. L. J. 558; 18 M. L. T. 402; 2 L. W. 1005; (1915) M. W. N. 829.

(5) 35 C. 877 at p. 885.

(6) 22 C. 909 at p. 919 (P. C.); 22 I. A. 129; 5 M. L. J. 101; 6 Sar. P. C. J. 583; 11 Ind. Dec. (N. S.) 602.

(7) 9 C. 265 (P. C.); 9 I. A. 147; 5 Shome L. R. 127; 6 Ind. Jur. 542; 4 Sar. P. C. J. 384; 4 Ind. Dec. (N. S.) 826.

(8) 1 Ind. Cas. 264; 10 C. L. J. 150.

(9) (1891) Q. B. D. 230 at p. 238; 60 L. J. Q. B. 227; 64 L. T. 4; 39 W. R. 280.

(10) 40 Ind. Cas. 611; (1917) M. W. N. 234; 21 M. L. T. 229; 32 M. L. J. 434.

Suppa Bhattar v. *Suppu Sokkaya Bhattar* (4) follows *Sayam Ramamoorthi* v. *Secretary of State for India* (11).

'As a link in the chain of title' the estoppel binds. Further, this is a case of direct purchase by me. The fact that the plaintiff had attached earlier to the sale does not matter, as attachment creates no interest in property.

My next point is that as on the date of my application for attachment the Ramnad Court had jurisdiction to grant the relief prayed for, that jurisdiction continues in spite of the notification. For the notification cannot be taken to apply to pending matters. The principle *re* the effect of a new statute is applicable. Thus a right of appeal to a particular tribunal is itself a right and cannot be taken away by statute. *Colonial Sugar Refining Co.* v. *Irving* (12). As to pending suits, see *Subbaraya Mudaliar* v. *Rakki* (13) and *Ramakrishna Chetty* v. *Subraya Iyer* (14). There can be no such thing as an automatic transfer. See the Full Bench decision in *Seeni Nadan* v. *Muthuswamy Pillai* (15).

My third point is that plaintiff, having put in an application for rateable distribution at my sale, even though he had himself attached the properties sold, thereby elected to abide by the sale and cannot be allowed to impeach it at his option.

Mr. *T. R. Venkatrama Sastri*, for the Respondents.—The power to entertain applications for execution is not conclusive as regards power to attach or sell. The latter is a different and independent power which must exist when exercised. See section 39, clause (2), Civil Procedure Code. See also *Kasi Viswanatham Chetty* v. *Murugappa Chetty* (16), a case directly in point. So the fact that the application for attachment was made at a time when the Court had the necessary jurisdiction is not sufficient.

To say that because the judgment-debtor is estopped, an auction purchaser of his rights would also be estopped, involves the anomaly that where a judgment-debtor refuses or deliberately omits to question an attachment or sale by a wrong Court, the decree holder who has rightly taken proceedings in the right Court would find himself denied his relief.

The cases relied on for the appellant are all cases of mortgages and so inapplicable to the present case.

The original attachment by the appellant being without jurisdiction and, therefore, invalid, my attachment was valid and binding and, therefore, the sale was an alienation in violation of my attachment, and so null and void as regards all claims arising under my attachment. It is not correct to say that the plaintiff, who seized the properties on a date when there was no estoppel binding even the judgment-debtor, should be bound by what transpires subsequently, simply because the judgment-debtor does not choose to question such subsequent proceeding in a wrong Court.

In all the cases cited the estoppel was already existing when the second purchaser came in. It is not so in the present case. The plaintiff is not a privy. See *Richards* v. *Jenkins* (17) following the case in *Richards* v. *Johnston* (18).

Mr. *A. Krishnaswawy Aiyar*, in reply.—The present is a case where the proprietary title is itself in question. So the distinction between cases of auction-purchasers and purchasers at private sales has no application Attachment by itself creates no interest in the property seized.

[ABDUR RAHIM, J.—But it forbids alienations ?]

It does. But merely because the plaintiff has made an attachment, it cannot be said he has acquired any title by priority, so as to oust the appellant who has acquired an indefeasible title under a direct purchase which has not at all been questioned. See also *Parsidh Narain Singh* v. *Janki Singh* (19), *Shenbagamuthu Pillai* v. *Palaganathan Chetty* (20) and Appeal No. 169 of 1916.

On the question of estoppel see also Bigelow, page 630

(11) 19 Ind. Cas. 656; 36 M. 141; 24 M. L. J. 469.

(12) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R 513.

(13) 1 Ind. Cas. 73; 32 M. 140; 5 M. L. T. 27.

(14) 18 Ind. Cas. 64; 38 M. 101; 24 M. L. J. 54; (1913) M. W. N. 303.

(15) 53 Ind. Cas. 213; 37 M. L. J. 284; 26 M. L. T. 223; (1919) M. W. N. 640.

(16) 48 Ind. Cas. 79; 33 M. L. J. 750; 23 M. L. T. 24; (1918) M W. N. 132.

(17) (1887) 8 Q. B. D 451; 58 L. J. Q B. 293 58 L. T. 591; 35 W. R. 355.

(18) 1859) 4 H. & N. 660; 1 F & F 447; 28 L. J. Ex. 322; 5 Jur. (N. S.) 520; 157 E R. 1007; 18 R. R 672.

(19) 7 C. L J. 614.

(20) 42 Ind. Cas. 552; (1917) M. W. N. 561.

VEERAPPA CHETTI v. RAMASWAMI CHETTI.

JUDGMENT.—The facts of the case are not in dispute. The 2nd defendant obtained a decree against the 1st defendant in the Temporary Subordinate Judge's Court at Ramnad on the 8th of April 1913. It was transferred for execution to the permanent Sub-Court and an application for attachment was made to that Court on the 18th of April 1913. On the 21st of April 1913, the Taluk in which the property sought to be attached was situated was transferred from the jurisdiction of the Ramnad Sub-Court to that of the Sivaganga Sub-Court. Even after the transfer, the Ramnad Court issued an order of attachment on the 25th of June 1913. The property was sold on 10th November 1913 and the 2nd defendant became the purchaser. The sale was confirmed on the 11th of December 1913. The judgment-debtor, the 1st defendant, did not object to the confirmation.

Plaintiff, on the other hand, instituted a suit against the 1st defendant in the Sub-Court at Sivaganga and obtained a decree in December 1912. He attached the same properties on the 17th September 1913. The sale was on 30th June 1914 and plaintiff became the purchaser. The present suit is for possession.

The Sub-Judge has given a decree to the plaintiff. The 2nd defendant has appealed. Three main contentions were put forward by Mr. A. Krishnaswami Aiyar. It was first contended that, by the transfer of territorial jurisdiction, the Ramnad Court did not cease to have jurisdiction, as at the time of the application for attachment it had jurisdiction. The recent Full Bench ruling, *Seeni Nadan* v. *Muthuswami Pillai* (15), that an application to the Court which passed the decree would be one in accordance with law does not affect the present case. The permanent Sub-Court of Ramnad which executed the decree was not the Court which passed the decree. Mr. Krishnaswami Aiyar referred to the analogy of cases in which it was held that the conferring of appellate jurisdiction on a new Court would not deprive the suitor to whom the right of preferring appeal had accrued already from filing the appeal in the old appellate tribunal [*vide Colonial Sugar Refining Co.* v. *Irving* (12)]. Reference was also made to *Subbaraya Mudaliar* v. *Rakki* (13) and *Ramakrishna Chetty* v. *Subraya Ayer* (14), in which it was held that pending suits are not transferred *ipso facto* by the vesting of jurisdiction in another Court. I do not think the analogy holds good. The essence of the notification is the deprivation of jurisdiction of one Court and the conferring of it on another. Therefore, the notification must be read as speaking retrospectively and as declaring that from and after its date, the first Court ceased to have jurisdiction over the subject-matter. Moreover, the language of clause (*b*) of section 39 of the Code of Civil Procedure, to which the learned Vakil for the respondent drew our attention, shows that the legislature conferred the power of dealing with immoveable property only on the Court which had territorial jurisdiction over it. This was the view taken in *Subbiah Naicker* v. *Ramanathan Chettiar* (21) and the cases following it. *Kasi Viswanatham Chetty* v. *Murugappa Chetty* (16) is an express decision on the point. This view was not dissented from by the learned Chief Justice in the recent Full Bench judgment, *Seeni Nadan* v. *Muthuswamy Pillai* (15), and the other two learned Judges have expressly re-affirmed this view. I am not satisfied that it is wrong. I am, therefore, of opinion that the Ramnad Court had no jurisdiction to attach or sell the property on the dates on which it exercised those powers.

I shall now deal with the second branch of the argument which Mr. Krishnaswami Aiyar pressed on us with great force and ability. The argument is this. Even granting that the Ramnad Court had no jurisdiction, as the attachment, sale and the confirmation of it were effected without objection by the judgment debtor, he was precluded from disputing the title conveyed. If it was not open to him to question the title, the plaintiff who purchased the property subsequently took only what the judgment-debtor could have conveyed and that consequently no title passed to the plaintiff For the first portion of this contention reliance was placed on *Velayutha Muppan* v. *Subramaniam Chetti* (2). It was held in that case that, at any rate, after

(21) 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; 1 L. W. 251; (1914) M. W. N. 205.

confirmation of the sale, the judgment-debtor was not entitled to impeach the title which he obtained under the certificate of sale. Reliance was also placed on sections 18 and 21 of the Code of Civil Procedure. Although these sections apply in terms only to suits, it was hardly disputed that execution applications would be within the principle. I am willing, therefore, to proceed on the ground that if the judgment debtor sued to recover possession on the ground that the sale by the Ramnad Court was a nullity because of want of jurisdiction, he would be estopped from re-opening the earlier proceedings.

Does that infirmity affect the plaintiff? It was held by the Judicial Committee in *Dinendronath Sannial* v. *Ramkumar Ghose*(22): "There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone. In the latter the sale must be made by public auction conducted by a public officer of which notice must be given as directed by the Act and at which the public are entitled to bid. Under the former the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law, adversely to the judgment debtor and freed from all alienations or encumbrances effected by him subsequently to the attachment of the property sold in execution." In *Richards* v. *Johnston* (18), which was approved and followed by eminent Judges in *Richards* v. *Jenkins* (17), it was held that an execution creditor is not affected by the estoppel against the judgment-debtor. The learned Vakil for the appellant drew our attention to a sentence in the judgment of Kay, L. J, in *Medell* v. *Thomas* (9), wherein the Lord Justice says that the trustee in bankruptcy and execution creditor are affected by the same estoppel as the judgment-debtor. The observation was entirely *obiter* and the two other Lord Justices who took part in the case did not express concurrence with it. But it was strenuously argued that the Judicial Committee in *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (6) have definitely laid down this proposition. As, in my opinion, this case has been the parent of misconceptions which have affected many decisions, I shall examine it in some detail. In that case the property in suit stood in the name of the wife. To a mortgage by the wife the husband was an assenting party. On the mortgage a decree was obtained. During execution a person who obtained a decree against the husband put forward the contention that the property really belonged to the husband and that the wife was only a *benamidar*. Their Lordships held that the decree-holder was estopped from putting forward such a contention. The principle of the decision was that where title is ostensibly in a person and the real owner further acknowledges the title as true, persons who seek to prove that the title is illusory will not be permitted to do so. What is denied is the right to adduce evidence that the *prima facie* title is not the real title. Under section 41 of the Transfer of Property Act, the Legislature has provided that a transfer from the ostensible owner confers title on the transferee. It is this kind of estoppel which really confers title that their Lordships were dealing with. They should not be understood as having disapproved *Richards* v. *Johnston* (18) and *Richards* v. *Jenkins* (17) and to have laid down that an execution creditor, under all circumstances, is estopped by considerations which affect the judgment-debtor. The same observations apply to *Poreshnath Mukerji* v. *Anathnath Deb* (7). The contrary view would attribute to the Judicial Committee a departure from *Dinendronath Sannial* v. *Ramkumar Ghose* (22) and from the high authority of the learned Lord Justice who decided *Richards* v. *Jenkins* (17). I do not see sufficient ground for reading *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (6) in that way. Mr. Justice Mookerjee, for whose opinion I have very great regard, takes the view that *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (6) has overruled all previous pronouncements of the Judicial Committee. With all respect I am unable to agree

(22) 7 C. 107 at p. 118 (P. C.); 4 Shome L. R. 236; 8 I. A. 65; 10 C. L. R. 281; 4 Sar. P. C. J. 213; 5 Ind. Jur. 376; 8 Ind. Dec. (N. S.) 619.

For the same reason I am unable to accept the broad statement as to estoppel contained in *Trayag Raj* v. *Sidhu Prasad Tewari* (5) and in *Parsidh Narain Singh* v. *Janki Singh* (19).

There is also another aspect of the case which leads to the same conclusion. Whatever may be the general position of an execution-creditor in regard to cases over which a Court has jurisdiction, the principle of *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji* (8) should not be extended to cases where the judgment-debtor is sought to be affected by a rule of procedure relating to jurisdiction. I may illustrate my position by reference to the latest decision of the Judicial Committee in *Setrucherla* v. *Maharaja of Jeypore* (23). In that case, the Sub-Judge of Vizagapatam directed the sale of property not within his jurisdiction. In this Court, on appeal, the procedure was justified on the principle enunciated in sections 18 and 21 of the Code of Civil Procedure. The Judicial Committee pointed out that as the Code of Civil Procedure was not applicable to the Agency Tracts where the property was situate, the order for sale was *ultra vires*. It is clear that, in the opinion of the Board, it is not a general rule of law that an order for sale by a Judge who has no jurisdiction to direct it can be upheld on the ground that the judgment-debtor did not oppose it. The justification for such a rule of estoppel is the legislative provision in that behalf. That provision must be regarded as an exception to the general rule that orders passed without jurisdiction are nullities. Consequently this exceptional rule of estoppel should not be extended further than is warranted by the language. The sections do not bind in terms persons like execution-creditors and I am not prepared to extend the estoppel to them. Mr. Krishnaswami Aiyar seemed to suggest that an auction-purchaser would be in a worse position than an execution-creditor. I see no justification in principle for this contention. Even if it is accepted, the plaintiff does not lose his right as decree holder by becoming a purchaser.

(23) 51 Ind. Cas 185; 37 M. L. J. 11; 17 A L. J. 694; (1919) M. W. N. 502; 26 M. L. T. 127; 21 Bom. L. R 914; 30 C. L. J. 209; 23 C. W. N. 1033; 10 L. W. 362 (P. C.).

Mr. Venkatarama Sastriar sought to distinguish *Mahomed Mozuffer Hossein* v. *Kishori Mohun Roy* (6) and *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji* (8) on the ground that there was an attachment at the instance of his client before the sale to the 2nd defendant. I am not prepared to base my decision on this distinction. It has been held that an attachment confers no right and I do not think that the sale following on it can really affect the title of the 2nd defendant, if otherwise valid. Moreover, an attachment under section 64 affects private alienations and not compulsory sales.

Mr. Krishnaswami Aiyar contended lastly that as the plaintiff applied for rateable distribution, he is estopped from impeaching the 2nd defendant's title. The facts which led to the application are not clear, as was pointed out by the Sub-Judge. Even otherwise, the materials for basing a decision on section 115 are wanting. There is no question of anybody being misled to his prejudice.

For all these reasons, I am of opinion that the decree of the Subordinate Judge is right and would dismiss the appeal with costs.

Appeal dismissed.

M. C. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1012 OF 1918.

November 13, 1918.

Present:—Mr. Justice Shadi Lal.

BUTA SINGH—PLAINTIFF—APPELLANT

versus

LALLA—DEFENDANT—RESPONDENT.

Easements Act (V of 1882), s. 13—Partition of joint property—Easements enjoyed before partition, how affected—Easement of necessity—Extinguishment of easement—Burden of proof.

On a severance of tenements by a partition of joint property and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent and continuous and necessary for enjoying any of the undivided shares when the partition is effected, pass to the co-parceners to whom such shares are respectively allotted in severalty. [p. 585, col. 1.]

SHIBA PROSAD JANA *v.* HATI MAITY.

An easement of necessity does not lose its character as such by the mere fact that some other tenement exists over which the right might be enjoyed.

A person who alleges the extinguishment of a right of easement must prove such extinguishment by some agreement or rule of law.

Second appeal from the decree of the District Judge, Ferozepore, dated the 11th December 1917.

Mr. *Bihari Lal*, for the Appellant.

Mr. *Ganpat Rai*, for the Respondent.

JUDGMENT.—The learned District Judge finds, and there is ample evidence in support of that finding, that the plaintiff originally had the right to pass his water through the drainage which existed in the common court yard; and the only question is whether the partition of the courtyard had the effect of destroying his right of easement. I am unable to agree with the learned Judge that it was the plaintiff's duty to establish an express or implied agreement that the previous drainage system was to continue after the partition. I consider that the *onus* lay upon the defendant to shew that the right, which the plaintiff possessed prior to the partition, has been extinguished by some agreement or rule of law.

The principle of law, which finds expression in section 13 of the Indian Easements Act, is that on a severance of tenements by a partition of joint property, and in the absence of a contrary intention expressed or necessarily implied, all such easements, as are apparent and continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the co-parceners to whom such shares are respectively allotted in severalty. Mr. Ganpat Rai for the respondent does not dispute the validity of this proposition of law; but he contends that the easement is not one of necessity, and that the plaintiff can discharge his water through the land purchased by him from one Tulsi Ram. Now, in the first place, I am not prepared to hold that the fact that the plaintiff has got another tenement through which he can pass his water deprives the easement in question of the character of an easement of necessity. In determining the question whether the easement is an easement of necessity we cannot take into consideration some other tenement which has nothing to do with the tenement in question. In the second place, it is clear from the judgment of the learned District Judge that the level of the land purchased from Tulsi Ram is higher than that of the courtyard and that it would be necessary to pass a pipe underneath it in order to find an outlet for the water. I do not think that the plaintiff is under any obligation to resort to this method of discharging his water, and that he is precluded by any law from availing himself of the right which undoubtedly he had at the time of the partition and which has been interfered with by the defendant only recently.

Holding as I do that it is the defendant's duty to prove that the plaintiff's right of easement has been in any way extinguished and that he has failed to discharge the *onus*, I accept the appeal and setting aside the decree of the lower Appellate Court restore that of the Court of first instance with costs throughout.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 60 OF 1918.

May 20, 1919.

Present :—Mr. Justice Chatterjea and Mr. Justice Duval.

SHIBA PROSAD JANA AND ANOTHER —APPELLANTS

versus

HATI MAITY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9—Appeal—Death of appellant—Representatives not brought on record—Abatement of appeal, setting aside of—Fraud of agent, whether sufficient cause.

Where an appeal abates owing to the failure to bring the legal representatives of the deceased appellant on record, the fact that the agent of the representatives of the deceased appellant colluded with the other side and did not apply within the statutory period for substitution, is sufficient cause under rule 9 of Order XXII of the Civil Procedure Code for setting aside the order directing the appeal to abate. [p. 586, cols. 1 & 2]

Appeal against the order of the Subordinate Judge, 2nd Court, Midnapore, dated the 9th January 1918,

HARBANS LAL v. NATHU.

FACTS appear from the judgment.

Babu *Shib Chandra Palit* (with him Babu *Khirode Narain Bhuian*), for the Appellants.—The learned Subordinate Judge has made a clear error of law in not granting the application preferred before him for the restoration of the appeal. We have shown that our agent played us false and that ought to be a sufficient ground for the restoration of the appeal or at least an enquiry ought to be instituted to meet the ends of justice. The facts mentioned in my petition would constitute a sufficient cause for non-appearance under Order XXI, rule 9, Civil Procedure Code. The allegations stated in the petition should have been enquired into.

Babu *Sarada Charan Maity*, for the Respondent.—I submit the application and the affidavit do not make out a sufficient cause. If there was any collusion, it was on 6th December and since then they did not do anything. No application for substitution was made within the required period.

Babu *S. C. Palit* not called upon to reply.

JUDGMENT.—This appeal is against an order refusing an application to set aside the abatement of an appeal which was pending before the Subordinate Judge of Midnapore.

The appellant died on the 8th June 1917 and six months expired on the 8th December of that year. No application for substitution having been made within that period, an order of abatement was made on the 21st December and the present application was made on the 7th of January 1918.

The main ground upon which the application was made was that the appellants' agent Surja Narain, who had been sent for making an application for substitution, on the 6th December 1917, in collusion with the respondents, did not make the application and further that he informed the petitioners that the application had been made by him. The petitioners say that subsequently they came to know of this fraud and then they made the application.

The Subordinate Judge has not made any inquiry into these allegations, but disposed of the application on the ground that no sufficient reason for non-appearance had been shown by the applicants and that if their *mohurir* had played false, they might sue him for compensation.

We think that if the facts stated in the petition are true, they would constitute a sufficient reason for non-appearance within the meaning of Order XXII, rule 9. The allegation of collusion made in the application has not been gone into and no evidence has been taken.

In the circumstances we set aside the order of the Court below and remand the case to that Court in order that there may be an enquiry into the matter. Both parties will be at liberty to adduce evidence.

Costs, one gold *mohur*, to abide the result.

Order set aside; Case remanded.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 862 OF 1918.

January 24, 1919.

Present:—Mr. Justice Martineau.

HARBANS LAL—PLAINTIFF—PETITIONER

versus

NATHU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Payment of interest by principal debtor—Limitation, whether extended as against surety.

The liability of a surety being co-extensive with that of the principal debtor, the benefit accruing to a creditor under section 20 of the Limitation Act is not restricted against the payer alone, but is enforceable against any one liable for it. [p. 587, col. 1.]

Therefore, a payment of interest by the principal debtor within the period of limitation gives a fresh starting point for limitation against the surety under section 20 of the Limitation Act. [p. 587, col. 2.]

Civil revision from the order of the Judge, Small Cause Court, Dasuha, District Hoshiarpur, dated the 26th July 1918.

Lala *Faqir Chand*, for the Petitioner.

JUDGMENT.—The only question in this case is whether a payment of interest by the principal debtor within the period of limitation gives a fresh starting point for limitation against the surety under section 20 of the Limitation Act. The

lower Court has held, following *Gopal Daji* v. *Gopal* (1), that it does not, and has passed a decree for the amount due to the plaintiff against the 1st defendant, the principal debtor, alone, dismissing the suit against the surety Nathu as time-barred.

In the case followed by the lower Court the learned Judges said in their judgment that the principal was not the person liable to pay the debt of the surety, so that, even if the payment of interest could be regarded as a payment of interest on the debt of the surety, still it was not made by a person liable to pay the surety's debt, and on this ground they held that the payment did not give a fresh starting point for limitation against the surety.

With all respect I am unable to agree with the view of the learned Judges of the Bombay High Court. Although both the surety and the principal are liable to pay the debt to the creditor, there is only one debt and the debt due from the surety cannot be treated as a debt distinct from that due from the principal. The liability of the surety is co-extensive with that of the principal-debtor, as laid down in section 128 of the Contract Act.

The decision of the Bombay High Court has been dissented from by the Madras High Court in *Velayudam Pillai* v. *Vaithyalingam Pillai* (2), in which it is remarked that section 20 of the Limitation Act does not restrict the benefit accruing to the creditor to his remedy against the payer alone, but that, according to the language of the section, the debt being kept alive, the result must be to make it enforceable against any one liable for it.

A similar view was taken in England in *Frisby, In re, Allison* v. *Frisby* (3) in construing section 8 of the Real Property Limitation Act, 1874.

Section 20 of the Indian Limitation Act provides that where interest on a debt is before the expiration of the prescribed period paid as such by the person liable to pay the debt, or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. The section does not lay down that the period is to be computed from the date of payment only as against the principal debtor or the person making the payment. The creditor is, in my opinion, entitled to the benefit of the section against any person liable for the debt.

I hold, therefore, that the suit in the present case is within time against the surety. I accept the application and alter the decree to one for Rs. 69 8 and costs against both the respondents. The respondent Nathu will pay the petitioner's costs in this Court.

Revision accepted.

(1) 28 B. 248; 5 Bom. L. R. 1020.
(2) 17 Ind. Cas. 619; 12 M. L. T. 610; 24 M. L J. 66.
(3) (1889) 43 Ch. D. 106; 61 L. T 632; 59 L. J. Ch. 94; 39 W. R. 65.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2030 OF 1917.

March 19, 1919.

Present:—Justice Sir Ernest Fletcher, KT, and Mr. Justice Cuming.

RAJAT KAMINI DEBI AND OTHERS—DEFENDANTS NOS. 5, 8 AND 9—APPELLANTS

versus

Raja SATYA NIRANJAN CHAKRABARTY—PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Maintenance payable under agreement—Right to recover maintenance, whether transferable—Transferee becoming owner of part of property charged with payment of maintenance, effect of—Apportionment of claim—Transfer of Property Act (IV of 1882), s. 60.

Under a deed of maintenance a Hindu widow was entitled to get Rs. 100 as well as certain quantity of rice per annum, with the payment of which the properties mentioned in the schedule to the deed of maintenance were charged. The plaintiff, who was a purchaser of a portion of the properties charged with the payment of the maintenance, also purchased the right of the widow to receive the said sum of money and rice. In a suit by the plaintiff to recover the whole arrears payable and deliverable to the widow out of the charged properties not purchased by him:

Held, (1) that the plaintiff, having become a partial owner of the charged properties, was bound under section 60 of the Transfer of Property Act to apportion the money which he sought to recover as between the properties acquired by him which were subject to the charge and the rest of the charged properties; [p. 589, col. 1.]

(2) that the widow's claim under the deed of maintenance was not a mere personal right but

was one which the widow had under a deed of covenant for which there was a charge on certain properties and that it was capable of transfer. [p. 589, col. 1.]

Appeal against the decree of the District Judge, Birbhum, dated the 1st June 1917, affirming that of the Munsif, Suri, dated the 29th June 1916.

FACTS appear from the judgment.

Dr. *Jadunath Kanjilal*, for the Appellants. —A certain Hindu widow had a life-interest in her husband's properties. In consideration of a *khorposhnama* she relinquished her claim to the life-interest in favour of her deceased husband's brothers, who contracted to pay her Rs. 100 per annum and 39 maunds of rice. The plaintiff in the present suit purchased that right of *khorposh* from the widow. Certain properties were charged, under the *khorposhnama*, with the payment of Rs. 100 and the fixed quantity of rice. There was a sale of a portion of the property mentioned in the *khorposhnama* and it was acquired by the plaintiff. The present suit was subsequently instituted by the plaintiff as an assignee of the widow to recover the sum of money and quantity of rice to which the widow was entitled under the *khorposhnama*. The learned Judge has decreed the suit against the properties not purchased by the plaintiff. This order cannot be sustained. It is quite illegal. Why should the properties not held by the plaintiff and which are held by the defendants be made liable to pay the whole of the arrears? The plaintiff cannot proceed against any of the mortgaged properties. The plaintiff is bound to apportion the money which he seeks to recover as between the properties acquired by him which were subject to the charge and the rest of the mortgaged properties.

Further, I contend that the right which the widow possessed was a personal right and so incapable of transfer. The transfer made by the widow to the plaintiff is illegal.

Babu *Bankim Chandra Mukerji*, for the Respondent.—How can my learned friend get round the express stipulation of the deed? The *khorposhnama* clearly says that the plaintiff grantee can proceed against any of the mortgaged properties. As regards the point raised by the other side that the Hindu widow could not have legally transferred her right, there is no substance in that contention.

Dr. *Kanjilal* replied

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the defendants Nos. 5, 8 and 9 against the decision of the learned District Judge of Birbhum, dated the 1st of June 1917, affirming the decision of the Munsif at Suri. The suit was brought by the plaintiff as an assignee to recover a certain sum and the value of certain rice payable and deliverable to a Hindu widow. The widow, whose name is Srimati Provash Kamini Debi, in consideration of releasing her life-interest in her husband's properties obtained from her two brothers in-law—brothers of her deceased husband—a document which is called a *khorposhnama*, that is, a deed of maintenance. Under the terms of that document, she was entitled to receive the sum of Rs. 100 per annum in cash and 39 maunds of rice. The plaintiff purchased from that Hindu widow, who was the defendant No. 7 in the suit, this right. Under the *khorposhnama*, the properties set out in the schedule to the plaint were charged with the payment of the sum and rice payable and deliverable to the widow. The plaintiff subsequently acquired a portion of the property mentioned in the *khorposhnama* from the purchaser thereof at a sale in execution of a decree for rent that had been obtained by the landlord. But it has been found as a fact and cannot be challenged in this Court that the sale was not made free from encumbrances and that the encumbrance created by the *khorposhnama* as regards the property purchased by the plaintiff has not been annulled. The plaintiff then brought the present suit, and it was partly decreed by the Court of first instance for the sum of Rs. 773 odd. The learned Judge of the lower Appellate Court has decreed the whole of the suit against the properties not purchased by the plaintiff. He has held that the properties of the defendants, which are all the properties other than those acquired by the plaintiff, are liable to pay the whole of the arrears, and the reason he thinks so is that there is a clear stipulation in the *khorposhnama* that the grantee can proceed against any of the mortgaged properties. That obviously is an insufficient reason. The case is covered quite clearly by the las

few words of the final clause of section 60 of the Transfer of Property Act. A mortgagee having become a partial owner of the equity of redemption is bound to apportion the money which he seeks to recover as between the properties acquired by him which were subject to the charge and the rest of the mortgaged properties. The reason given by the learned Judge that the deed authorises the mortgagee to proceed against any of the mortgaged properties means nothing. It only states what the law provides.

The other point raised is not well founded and that is this: That this is a personal right to the Hindu widow. It is not a personal right at all. It is a claim which the widow had under a deed of covenant for which there was a charge on certain properties, and it was capable of transfer in the same manner as in other cases. The mere fact that the grantee of the deed of covenant happens to be a Hindu widow does not prevent her from transferring her interest, if she thinks fit so to do.

The judgment and decree of the learned Judge of the lower Appellate Court must be set aside and in lieu of the findings arrived at there must be a declaration that the plaintiff is entitled to recover the arrears that have been found due in the lower Appellate Court from the properties acquired by him and the other properties mentioned in the charge by the *khorposhnama*, and the case will be remitted to the primary Court for the purpose of ascertaining what amount of the arrears ought to be borne and paid by the properties held by the defendants. There will be no order as to the costs of this appeal, both parties having partially succeeded. The order of costs made by the lower Appellate Court will remain as it is.

CUMING, J.—I agree.

Decree set aside.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 937 OF 1917.

February 17, 1919.

Present:—Mr. Justice Shadi Lal and Mr. Justice LeRossignol.

HAZURA SINGH—DEFENDANT—APPELLANT

versus

SUNDAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Land Acquisition Act (I of 1894), ss. 18, 30, 54—Reference under s. 30—Decision, whether portion of award—Appeal, whether lies—Distinction between reference under s. 18 and one under s. 30.

The decision of a Court given under a reference made under section 30 of the Land Acquisition Act is a portion of an award and is appealable under section 54 of the Act. [p. 590, col. 1.]

The only distinction between a reference made under section 18 of the Land Acquisition Act and one made under section 30 thereof, is that the reference under the latter section is made solely on the question of title by the Acquisition Officer of his own motion, while the reference under the former section is made on the application of persons interested in the compensation money and not by the acquiring officer on his own motion. [p. 590, cols. 1 & 2.]

Miscellaneous first appeal from the order of the District Judge, Jullundur, dated the 15th March 1917.

Messrs. *Badr-ud-din* and *Faqir Chand*, for the Appellant.

Mr. *Dalip Singh*, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings taken by Government under the Land Acquisition Act, I of 1894. A portion of the land taken up was the property of *Musammat* Partapi, a Jat widow, who had made a gift of it to Hazura Singh, the present appellant. The Acquisition Officer made his award on the 15th June 1916 in favour of Hazara Singh. An application dated the 8th May 1916 by Sundar, one of the widow's reversioners, to the effect that Hazura Singh was not entitled to the compensation money, the Acquisition Officer rejected, whereupon Sundar put in a similar application to the Deputy Commissioner, who rejected it but directed Sundar to make a further application to the Acquisition Officer. Upon that second application the Acquisition Officer by order of the 11th August 1916 made a reference to the District Court which he considered to be a reference under section 30 of the Land Acquisition Act,

The District Judge taking action on that reference has held that Hazura had no better title in the land acquired than the widow and consequently was entitled during the lifetime of the widow only to interest on the compensation money and he has directed that the compensation money be held in deposit and invested and the interest thereof be paid to Hazura Singh.

Hazura Singh appeals, and the grounds urged before us are that the reference by the Acquisition Officer was irregular inasmuch as no reference could have been made under section 30 but under section 18; that the order made by the District Judge is wrong inasmuch as he should have directed that the money should be invested in the purchase of land; that inasmuch as a widow can sell land for necessity the compensation should have been paid to the appellant; and finally, that the respondent, Sundar, is not the only reversioner and as his was the only application made within time to the Land Acquisation Officer, only his share of the compensation money should have been withheld from the appellant.

For the respondent it is contended that inasmuch as the reference to the Court was made under section 30 of the Act no appeal lies

In our opinion the contentions of neither side can be upheld. To dispose first of the respondent's contention, we hold that the decision of a Court given under a reference made under section 30 of the Act is a portion of an award and consequently an appeal lies against it under section 54 of the Act. In fact we draw no distinction between a reference made under section 18 of the Act and one made under section 30 except this, that the reference under section 30 is made solely on the question of title by the Acquisition Officer of his own motion, whilst the reference under section 18 is made on the application of persons interested in the compensation money and not by the acquiring officer on his own motion,

The first order passed by the Acquisition Officer on Sundar's second petition to him was that a reference would have to be made under section 18 of the Act, but in his final order of the 10th August 1916 he purported to make the reference under section 30, but inasmuch as his reference was made clearly on the application of an objector the reference must be regarded as one made under section 18 of the Act.

On the merits we see no reason whatever to interfere. The appellant has referred to section 32 of the Act, but the case is really governed by section 31 (2) and section 33 of the Act. *Prima facie* the gift by the widow to appellant was invalid and the compensation money for the land remains impressed with the character of the land and inasmuch as Hazura Singh's title to the land is in doubt, so also is his title to the compensation money so far as the principal at any rate is concerned. Indeed we are informed that a declaratory decree has been obtained by reversioners to the effect that the gift by the widow to Hazura Singh shall not affect their reversionary rights and inasmuch as such a decree obtained by one reversioner is available for the protection of the rights of other reversioners, the objection of Sundar protects the whole property.

For these reasons we see no reason to interfere and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 49 OF 1918.

March 7, 1919.

Present:—Mr. Justice Oldfield, Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

RAJAGOPALA AIYANGAR—PLAINTIFF—APPELLANT

versus

SINGARAVELU THEVAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Joint family consisting of a person, his father and grandfather—Allocation of share to father—Other shares not specified, effect of——Grandfather and grandson, whether continue joint—Partition deed, construction of.

There is no rule of Hindu Law that a father cannot separate himself without disrupting the joint family. He can leave the family after taking

his own share, just as any other co-parcener who is not a father can do. When, therefore, a man becomes divided from his father, his sons retain a joint status with the latter. [p. 594, col. 1.]

By a deed of partition one *S*, his son and grandson as representing one branch and his brother Sevu and his sons and grandsons as representing the other branch effected a division of their family properties, the reason being that *U.*, the son of *S.*, was leading an extravagant life. The properties were divided into two shares; one share was allotted to Sevu's branch and one-twelfth out of the other share was given to *U.* and the rest to *S.* and the son of *U.* The share of *U.* alone was specified:

Held, that both by law and by the construction of the document *S.* and his grandson, *i. e.*, the son of *U.* did not become separated *inter se.* [p. 594, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Spencer, in Appeal Suit No. 223 of 1917, preferred against the decree of the Court of the Subordinate Judge, Negapatam, in Original Suit No 90 of 1915.

FACTS appear from the judgment.

Mr. *K. Bhashyam Aiyangar*, for the Appellant.—When the son separates, the question is whether grandson and grandfather are in law united or severed.

There is no presumption either way. So far as persons in the same degree are concerned, the separation of one implies perhaps the separation of the others.

Ram Pershad Singh v. *Lakhpati Koer* (1) and *Balabux* v. *Rukhmabai* (2) are the two cases relied on against me. But no presumption arises when the whole thing is contained in a document, as in the present case. That shows clearly that the share of no member was defined. The son's interest is not in any way dependent on or connected with the father's interest.

Mr. *S. Varadachariar*, for the Respondents.—In view of the established rule of Hindu Law that the division is *per stirpes* and not *per capita*, the division of the father necessarily involves the division of the son as well.

[SESHAGIRI AIYAR, J.—But division is also *per capita* as between members of the same branch. Therefore, is the general rule always that division is *per stirpes*?]

Necessarily both happen.

In *Manjanatha* v. *Narayana* (3) all that was held was that some of the sons may separate leaving the rest united with the father. The present case is that of a grandson.

[SESHAGIRI AIYAR, J.—I do not see how that makes a difference.]

There is. Suppose the father is out away. Can he give afterwards his son in adoption?

[SESHAGIRI AIYAR, J.—Yes he can. That is a present right.]

That means that the father can still put an end to the son's right in the joint family.

[SESHAGIRI AIYAR, J.—The question of the case of a divided son being given in adoption is still not settled.]

In *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni* (4) the existence of the son was held to be a bar to the grandson's suit for partition.

[SESHAGIRI AIYAR, J.—The law here is different].

Subba Ayyar v. *Ganasa Ayyar* (5) explains the *per stirpes* rule. See also *Sudarsanam Maistri* v. *Narasimhulu Maistri* (6). Each branch is a legal unit for the the purpose of effecting a division.

[OLDFIELD, J.—Division in a joint family means that every member acquires a divided status. So it makes no difference whether it is a son or a grandson.]

[SESHAGIRI AIYAR, J.—The rule is that where there is a division that is total.]

The nature and extent of the presumption are defined in *Rangasami Naidu* v. *Sundarajulu Naidu* (7) and *Subba Reddi* v. *Alagammal* (8).

And the document also bears it out that there was a complete division. The cutting off of the son was no doubt the occasion for the partition which, however, was total partition as regards all the members or at least of the son's branch.

JUDGMENT.

OLDFIELD, J.—The suit, out of which this letters patent appeal arises, was brought on a mortgage executed by 1st and 3rd defendants; and the only question is whether the minor 2nd defendant, 2nd respondent, grandson of 1st defendant and nephew of 3rd defendant, is liable as a member of the joint family

(1) 30 C. 231; 30 I. A. 1; 7 C. W. N. 162; 5 Bom. L. R. 103; 8 Sar. P. C. J. 380.
(2) 30 C. 725; 30 I. A. 130; 7 C. W. N. 642; 5 Bom. L. R. 469; 8 Sar. P. C. J. 470.
(3) 5 M. 362; 6 Ind. Jur. 518; 2 Ind. Dec. (N. S.) 352.
(4) 16 B. 29 (F. B.); 8 Ind. Dec. (N. S.) 497.
(5) 18 M. 179 at p. 182; 5 Ind Dec. (N. S.) 474.
(6) 25 M. 149; 11 M. L. J. 353.
(7) 35 Ind. Cas. 52; 31 M. L. J. 472.
(8) 47 Ind. Cas. 552; 34 M. L. J. 596; 8 L. W. 84.

composed of them and the sons of 3rd defendant, 4th and 5th defendants. The appeal is against the decision of Spencer, J., that he is not liable, having ceased to be a member of the joint family in 190[illegible], when a partition evidenced by Exhibit I took place.

In 1905 the family was composed of those already referred to, Uthrapathi, the father of 2nd defendant, and Sevu, the brother of 1st defendant, with his two sons. Under Exhibit I, the family property was divided into four portions, one being allotted to 1st, 2nd and 3rd defendants, one to Uthrapathi, one to Sevu and his sons and one being retained as the common property of 1st, 2nd and 3rd defendants' and Sevu's branches, each to enjoy half the produce. Spencer, J., held and respondents contend that 2nd defendant did not become a member of a co-parcenary with 1st and 3rd defendants. The question is whether this conclusion is right. Here, Mr. Varadachari for respondents has, as I understood him, argued that, when a father has become divided from the grandfather or from collaterals, his son either cannot or at least must be presumed not to retain a joint status with the latter.

This contention, whatever its exact scope, is, in my opinion, without substance. The right of a co parcener to claim partition against his grandfather and against his father's collaterals was recognised in *Nagalinga Mudali* v. *Subbiramaniya Mudali* (9) and *Subba Ayyar* v. *Ganasa Ayyar* (5), as co-extensive with his right to claim it against any other member of the family, and the same is implied in the judgments in *Manjanatha* v. *Narayana* (3). For respondents reliance has been placed on the *dicta* of Muthuswami Ayyar, J., in the latter case, that "as between different branches division should be by the stock" and that "when a joint family is broken up by division, regard should be had to the successive vested interests of each branch," the argument being that, where and so far as a joint family originally consists in branches, division in which each is regarded as a unit, is all that is contemplated by the learned Judge; and reference has also been made to the description of Bhashyam Ayyangar, J., in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (6), of the joint family as forming corporate bodies within a larger corporate body, each capable of owning or acquiring property. But in the first of these cases, apart from the general tendency of the decision, the learned Judge was not concerned with the effect of division on status but only with the method by which shares should be calculated; and I would respectfully adopt the opinion expressed in the present case by the learned Chief Justice that the indication of that method in a particular deed for the purpose of the severance of particular members entails nothing as to the intention of others or of those members *inter se* to remain joint. In the second case the question was of a partition, but it was not of ordinarily divisible property but of the rights of the co-parceners or a group of them to property separately acquired by such group. There is, so far as has been shown, no special restriction on a partition, to which a grandson or nephew is a party, and no special presumption arises in respect of it, the ruling being only that stated in *Balabux* v. *Rukhmabai* (2), that it must be proved like any other fact.

In this case the principal evidence as to the intention of those concerned consists in the terms of the partition deed Exhibit I, and as they are clear, it is unnecessary and it would not be admissible to consider the other evidence on the record relating to subsequent conduct. Exhibit I is headed "partition deed"; its last clause refers to the parties to it as henceforth bound by no pecuniary relations but only those of friendship; another clause refers to a division of moveables as having already taken place; and these are the only portions of the document relied on as directly supporting a complete division. But the two first are common features of partition transactions, which might easily be included, whatever the particular intention, and the last is inconclusive in the absence of details as to the shares of those who received them. On the other hand the stated motive for the partition, Uthrapathi's extravagance, affords strong reason for holding that, although there is nothing definite on the point, the remaining members of his branch intended to make no further change than his exclusion involved and to hold the property assigned to them as joint tenants; and this is particularly clear as regards the share of the property to be held by them in common with Sevu's branch, of

(9) 1 M. H. C. R. 77.

which division was deferred. For the view for which respondents contend, Uthrapathi, as the natural guardian of 2nd defendant, would have been able at any time to nullify the arrangement and by compelling a division to obtain control of his son's share. Spencer, J., in fact drew an inference from the reference in Exhibit I to 1st defendant as 2nd defendant's guardian and the absence of similar reference in the case of 3rd defendant's minor sons in favour of the divided status of each of them. But, with all due deference, the inference is the other way. For whilst no special reference to the guardian of the latter would be necessary when their father, 3rd defendant, was executing the document and there was no conflict of interests between them and him, the case was different between the 2nd defendant and Uthrapathi, who was to be excluded; and the mention of 1st defendant as the former's guardian in the first clause is intelligible only on the assumption that he was the managing member of a joint family, to which both belonged. The allegation that all the members of the family became divided in status, but that some of them were to hold portions of the property as tenants-in-common is improbable in the extreme and, in the absence of anything in Exhibit I to support it, cannot be accepted. Construing Exhibit I in what appears to me the manner naturally consistent with its terms, I would allow the appeal and modify the decree of the Subordinate Judge by making 2nd defendant's share liable under the suit mortgage, as found by the lower Court's judgment. The time allowed to 2nd defendant for payment is 3 months from this date. The 2nd defendant will pay plaintiff's costs throughout.

SESHAGIRI AIYAR, J.—By Exhibit I one Singaravelu, his sons and grandsons as representing one branch, and his brother Sevu and his sons as representing the other branch effected a division of their family properties. The occasion for this arrangement, as recited in the deed, was because Uthrapathi, the son of Singaravelu, was leading an immoral life and wasting the family property. The properties were divided into two shares and after allotting one share to Sevu and his sons, in the other share one-twelfth of the whole property was given to Uthrapathi. There was a question whether one-twelfth was the proper share which was due to Uthrapathi. There was also another question as to whether he got any share in certain properties which were left undivided. In this Letters Patent Appeal we are not concerned with these minor questions The point in dispute is whether by this partition there was a severance of interest among the members of Singaravelu's branch *inter se*, or whether it was an arrangement by which Uthrapathi alone was sent out of the family, the other members remaining undivided. Mr. Justice Spencer has discussed some questions relating to presumptions as to partition in a Hindu family being partial or complete. With all deference, I am unable to see any necessity for discussing such a question, where the construction of a document is what we are concerned with. The presumptions the learned Judge referred to may probably help if there is any difficulty in construing the deed of partition. In the opinion I have formed of its contents I find no ambiguity in the document which would enable me to seek the aid of extraneous evidence to construe it.

Mr. Varadachariar relied upon some recitals in the deed as indicating that the partition was intended to sever the interests *per se* of the members of Singaravelu's family. He alluded to the fact that the minor was represented by a guardian. I do not consider that that circumstance has any bearing upon the question. His interests had to be safeguarded anyhow, and the very fact that the father who was the legal guardian was discarded in favour of the grandfather, indicates that the father was to be sent out of the family. The next circumstance which the learned Vakil relied on was the fact that the two main branches entered into the partition. The point he raised was if the object was to send away Uthrapathi alone, why should there be a division between the two main branches. The answer is plain. Sevu apparently did not want to have anything to do with his spendthrift nephew, and he naturally asked his brother to separate his share. The next circumstance relied on was the clause at the end of the partition deed that the members mentioned in the deed should have no more connection with each other. Persons acquainted with this part of India would not attach any special significance

to such a clause It is a formula adopted invariably in every deed of partition; and it would not have entered into the head of the draftsman to think that he was by this clause providing for the separation of the son from the father. These are all the facts relied on by the learned Vakil. On the other hand, there is an omission in Exhibit I which is almost conclusive against an intention to effect a severance *inter se*. Whereas the share of Uthrapathi is set apart and a special schedule is annexed to represent his share, no such schedule of special shares of the grandfather and of the grandsons separately was annexed. This shows that it was the intention of the parties that the son should go out of the family leaving the father and the grandsons undivided. I feel very little doubt in arriving at the conclusion that the document did not effect a partition *inter se* among the members of the branch of Singaravelu.

Notwithstanding this conclusion on the facts Mr. Varadachariar's question of law has to be decided. He said that on the language of the instrument the legal consequence necessarily follows that the father Uthrapathi and his son Manikam were divided. If I understood the learned Vakil right his contention was that, as the principle of division in Hindu families is *per stirpes* and not *per capita*, the allotment of a share to the father carried with it the separation of his son from the main branch; he further argued that the fact that the son's share was not specifically set apart cannot weigh against this principle of Hindu Law. I do not agree with this contention. There is no rule, as I understand it, in Hindu Law that a father cannot separate himself without disrupting the joint family. He can leave the family after taking his own share just as any other co parcener, who is not a father, can do. The Hindu Law clothes him with a further right of effecting a partition among his sons, whether they like it or not. The reference of the learned Vakil to the theory which for a long time gained currency in Bombay, that a minor son cannot sue for partition against the wish of his father, does not lend any support to this contention. Moreover, as against the view in *Apaji Narhar Kulkarni* v. *Ramchandra Ravji Kulkarni* (4) it may be mentioned that for a long time beginning with *Nagalinga Mudali* v. *Subbiramania Mudali* (9) the view in Madras had been consistent that a minor son can compel the father to give him his share.

The decision in *Manjanatha* v. *Narayana* (3) strongly supports the view taken by the learned Chief Justice. That was a case of the sons bringing suits against their father, and uncles and cousins. There was a decree in the suit. After the share of these sons had been separated, the question arose whether the other members of the family remained undivided. Mr. Justice Muthuswami Ayyar in a very elaborate judgment held that the suit of the sons did not effect a severance of the family in its entirety. This is what he said: "It seems to me anomalous to hold that in a case where two brothers, each of whom may have several sons and grandsons, desire to separate, all the members should be forced to separate the sons and grandsons from their father and grandfather.... Again, it appears to me that each co-parcener is at liberty to elect to separate from the joint family, but I am aware of no text which recognizes his power to force a separation among others against their will." I think that the principle above enunciated applies with equal force to the present case. In a later case, *Sudarsanam Maistri* v. *Narasimhulu Maistri* (6), Mr. Justice Bhashyam Ayyangar said this: "According to usage and custom, the remaining members of an undivided family, from which one or more alone has become divided, continue as an undivided family in its normal state and not as members who after partition have become re united." If I may say so, this exactly represents the practice which prevails throughout the whole of Southern India. For these reasons I am of opinion that by allotting a share to Uthrapathi neither by law nor by the construction of the document Singaravelu the father and Manikam the grandson became separated *inter se*. The effect of the deed was to leave these two members undivided, while the son alone ceased to belong to the joint family. I, therefore, agree with the conclusion at which the learned Chief Justice has arrived and would allow this appeal with costs.

BAKEWELL, J.—I agree.

M. C. P.

Appeal allowed.

JAHANA *v.* WALI.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 1522 OF 1915.
February 18, 1919.
Present :—Mr. Justice Scott Smith and Mr. Justice Wilberforce.
JAHANA AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
WALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art 120—Declaration of title, suit for—Limitation, commencement of—Custom—Succession—Pagwand *versus* chundawand *—Burden of proof.*

A suit for a declaration of his title to immoveable property by a person in possession as proprietor is not barred, if brought within six years from the time when the defendant attempts to oust him from the land, although a right to sue the defendant who had been recorded as owner of the property in the Settlement Record had already accrued and become barred [p. 596, col. 1.]

Ordinarily, under customary law, sons, whether by the same or different wives, share equally, and, therefore, where a party alleges that the rule of *chundawand* governs the succession in any particular case, the burden of proving the custom of *chundawand* would be on the person who alleges it. [p. 596, col 1.]

First appeal from the decree of the Subordinate Judge, 1st class, Sargodha, dated the 26th February 1915.

Mr. *Duni Chand*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The parties to this litigation are, as will appear from the subjoined pedigree table, the descendants of Mehra by his two wives, *Musammat* Bhagbhari and *Musammat* Ghulam Bibi.

Musammat BHAG BHARI=MEHRA=*Musammat* GHULAM BIBI.

Wali, defendant No. 1.	Muhammad, defendant No. 2.	Ali,	Mali,	Jahana, plaintiff.	Jallu,	Karm Ali, defendant No. 9.
					Daula, plaintiff.	
Mughli, defendant No. 3.	Pathani, defendant No. 4.	Gahna.		Tabu, defendant No. 6.	Taja, defendant No. 7.	Murad, defendant No. 8.

They own land as follows:—

(*A*) 417½ *kanals* at village Jahanpur, Tahsil Bhera

(*B*) 845½ *kanals* of land at village Mari, Tahsil Sargodha.

(*C*) 1,337½ *kanals* also at village Mari.

On the death of Mehra the lands *A* and *B* were entered in the names of his seven sons in equal shares. Land *C* came to the family upon a partition of the *shamilat*, the date of which is not mentioned. Plaintiffs say that they follow the custom of *chundawand* and that their share and that of Karm Ali, who is *pro forma* defendant, is one-half in plots *A* and *B* and not three-sevenths as entered in the Revenue Records. In regard to plot *C* the allegation is that plaintiffs and Karm Ali acquired it by reason of the fact that they alone paid *tirni* dues in village Mari. The plaintiffs in paragraph 7 of their plaint stated that on an application for partition of the land made by Wali and Muhammad, they came to know of the wrong entry in the papers and, therefore, they brought the present suit as regards plots *A* and *B*. The partition record has not been sent for, but it appears from the statement of Muhammad, defendant, at page 62 of the paper-book that an application for partition was filed in *Bisakh*, *i. e.*, April 1914. The present suit was instituted on the 29th May 1914.

The lower Court dismissed the suit as to plots *A* and *B* holding that it was barred by time and as to plot *C* holding that plaintiffs had not proved their exclusive proprietary right thereto. The plaintiffs have appealed to this Court and we have heard arguments on their behalf by Mr. Duni Chand, Advocate.

We shall first deal with the question of limitation. The lower Court based its decision on *Akbar Khan* v. *Turaban* (1). Mr. Duni Chand relies upon the following

(1) 1 Ind. Cas. 557; 31 A. 9; 5 A. L. J. 637; A. W. N. (1908) 252; 4 M. L. T. 444.

rulings:—*Allah Jilai* v. *Umrao Hussain* (2), *Hakim Singh* v. *Waryaman* (3) and *Khem Singh* v. *Kesar Singh* (4). The authorities in question appear to support the view that the present suit is not barred by time.

In *Hakim Singh* v. *Waryaman* (3) it was held that a suit for a declaration of his title to immoveable property by a person in possession as proprietor is not barred, if brought within six years from the time when the defendant attempts to oust him from the land, although a right to sue the defendant who had been recorded as owner of the property in the settlement record had already accrued and become barred.

Now, applying this rule to the facts of the present case, it is quite clear that the plaintiffs' right to sue for a declaration in regard to the settlement entries accrued many years ago and had become time-barred, but a new cause of action accrued to them when the defendants applied for partition and attempted to take advantage of the entry in their favour. The case in *Khem Singh* v. *Kesar Singh* (4) was very similar to the present one. The facts are as follows —

"In 1882, plaintiffs and defendants were recorded owners of their joint holding in the proportion of 3 7ths and 4/7ths shares, respectively. In 1885-86, for some unknown reason, plaintiffs were recorded as owners of $\frac{1}{3}$rd. In 1891 one of the co-sharers complained against the correctness of the entry but without success.

"The incorrect entry was repeated in the present settlement. In 1906, defendant applied for partition on the strength of the entry of 1891 and plaintiffs sued to obtain a declaration that they were entitled to 3/7ths share as recorded in 1882.

"It was held, that the plaintiffs' suit was within time and was governed by Article 120 and not by Article 96 of the Indian Limitation Act, XV of 1877, and that a fresh cause of action accrued to them in 1906."

The case was decided by a Division Bench of this Court which followed *Hakim Singh* v. *Waryaman* (3) and distinguished *Akbar Khan* v. *Turaban* (1).

We, therefore, are of opinion that the plaintiffs' suit for a declaration in regard to plots *A* and *B* was not barred by time.

The lower Court has not come to any decision on the merits, namely, whether plaintiffs are entitled to $\frac{3}{7}$rds of one-half of plots *A* and *B* or only to 2 7ths as recorded in the revenue records. We have, therefore, examined the evidence on the record for ourselves and proceed to decide the point.

The question is whether the parties follow the rule of *chundawand* or that of *pagwand*. Now, ordinarily sons, whether by the same or different wives, share equally (see Article 7 of Rattigan's Digest of customary law) and the *onus*, therefore, lies upon the plaintiffs to prove that they follow the rule of *chundawand*. The question is discussed in the General Code of Tribal Custom in the Shahpur District by Wilson at page 6. The author says that all the sons take equal shares without regard to the number or tribe of the mothers. At page 42 will be found the answer of the tribes as to whether sons succeed equally or whether regard is paid to uterine descent. All the tribes replied that no such regard is paid and that all legitimate sons, whether by the same or different mothers, take equal shares. In a note at page 43 the author says many instances were given in which sons by different mothers share equally (*pagwand*), and the only instances in which the sons shared according to the number of mothers (*chundawand*) were a few among the Khokhars in which the father made the division in his lifetime and one among the Hindus. The *pagwand* rule is, he says, practically universal throughout the district. Under these circumstances the *onus* lay very heavily upon the plaintiffs to prove that they followed the custom of *chundawand*.

Counsel refers to the agreement of the proprietors of *mauza* Jahanpur printed at page 3 of the paper book. This agreement appears in the settlement papers of 1857. The proprietors agreed that the division of heritage should take place according to the number of wives, and not according to the number of sons. In spite of this not a single

(2) 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810.
(3) 140 P. R. 1907; 187 P. W. R. 1907.
(4) 7 Ind. Cas. 528; 88 P. W. R. 1910; 122 P. L. R. 1910.

instance has been cited from Jahanpur village in which the sons of a proprietor inherited according to the rule in question. The agreement would, therefore, seem to have never been acted upon.

Counsel has referred to the oral evidence of the plaintiffs' witnesses to the effect that Gondals, to which tribe the parties belong, follow the rule of *chundawand*. The only instance, however, cited was one from the village of Khan Muhammadwala, which is said to be half a mile from Jahanpur. The defendants' witnesses on the other hand say that the rule of inheritance is *pagwand*.

Counsel has also referred to an entry in a former Patwari's diary which is printed at page 56 of the paper-book. The Patwari who made this entry has not been produced as a witness and we are, therefore, unable to regard it as proved or of any weight at all.

We consider that the plaintiffs have absolutely failed to discharge the heavy *onus* which lay upon them. The fact that upon the death of Mehra all his sons were entered as inheriting equally in both the villages is a very strong proof that they follow the custom of *pagwand*. Added to this is the fact that in the subsequent settlements no application was made to have the entries changed.

In regard to plot *C* the contention, so far as we understand it, is that the plaintiffs and Karm Ali have all along lived in Mauza Mari and cultivated the land there and paid the *tirni* dues for grazing their cattle on the *shamilat*, whereas the other defendants have lived in Mauza Jahanpur and have not paid *tirni* dues in Mauza Mari. It is, however, not clear whether defendants Nos. 1 to 8 have paid *tirni* in Mauza Mari or not. There is absolutely no documentary evidence on the record to prove that this plot of land was allotted to the plaintiffs and defendant No 9 on the partition of the *shamilat* as stated in paragraph 8 of the plaint. The fact that it was entered in the names of the descendants of Mehra shows on the contrary that it was allotted to them. Plaintiffs have failed to show that they and defendant No. 9 are exclusively entitled to this plot of land, nor have they proved that there is any custom by which, if they and defendant No. 9 alone had paid *tirni* dues, the land would have been theirs by right to the exclusion of defendants Nos. 1 to 8. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

S. N. Dey
Advocate, High Court
[illegible] Mymensingh

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 242 OF 1917.

March 20, 1919.

Present :—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Newbould.

Haji MOHAMED NAGOR—APPELLANT

versus

ABDUL JALIL AND OTHERS—RESPONDENTS.

Muhammadan Law—Wakf *for religious and charitable purposes*—*Evidence to show contrary intention of settlor, whether admissible.*

Where *wakfs*, which have been created by document, in terms establish religious and charitable trusts, evidence is not admissible to show that the settlor had no intention to give effect to the trusts or that the trusts were not in fact given effect to. [p. 598, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Mymensingh, dated the 6th June 1917.

Babus *Dwarka Nath Chuckerbutty*, *Gopal Chandra Chuckerbutty* and *Pankaj Kumar Ganguly*, for the Appellant.

Babus *Jogesh Chunder Roy*, *Jatindra Mohan Chowdhury* and *Annada Charan Karkoon*, for the Respondents.

JUDGMENT.

CHAUDHURI, J.—The plaintiff sued for declaration that he was entitled to a 12 annas share of the properties left by his brother, Mahommed Chhaber. He challenged two *wakfs* executed by his brother, one on the 17th June 1904, and the other on the 12th January 1912. He also challenged a *hiba bil ewaz* in favour of the 4th defendant, an infant. This infant is the son of one Jalil, who is defendant No. 2. Jalil was taken into the family by the settlor when he was quite a young boy and Jalil was brought up in his family. The defendants are the settlor's wife, Jalil, Jalil's wife and this infant son. The documents were all challenged in the plaint as having been

executed secretly and in collusion, and it was said that the settlor was not in possession of sound sense and he did not execute them honestly and independently and knowing their purport and meaning. The bulk of the evidence given in this case was on those points, to show his mental incapacity and secret and collusive dealing with the properties. The learned Subordinate Judge has found that the documents were properly executed by the settlor and that he had sufficient mental capacity when he executed them.

Those findings are not now challenged. The ground now taken is that both the *wakfs* are illusory, and so far as the *heba* is concerned, it is not valid and operative inasmuch as the necessary formalities were not carried out and there was no intention of immediate transfer.

These *wakfs* have been created by documents, and it seems to us that the language employed in them is not ambiguous. The documents in terms establish religious and charitable trusts and evidence is not, therefore, admissible to show that the settlor had no intention to give effect to the trusts or that the trusts were not in fact given effect to. That was decided in the case of *Kulsom Bibee* v. *Golam Hossein Cassim Ariff* (1). The learned Subordinate Judge has held that so far as the first *wakf* is concerned, it is not a valid document inasmuch as substantial property was not given by it to charitable purposes. He comes to that conclusion from the facts; that only $\frac{1}{4}$th of the income of certain properties was given for religious purposes, and he relied upon the observations made by Lord Robertson in *Mujib-un-nissa* v. *Abdur Rahim* (2) and held that the deed did not show that substantial property was given for charitable purposes. So far as that case is concerned, it dealt with a document which was described as a deed of family endowment. It began with the words that it was a family endowment and ended in the same way. There was a provision made in it for charitable purposes after defrayal of "necessary expenses" set out in detail therein and it was held, having regard to the terms of the endowment for charitable purposes, that it was not a proper *wakf*. That case does not by itself give us sufficient help.

By the first document no doubt $\frac{1}{4}$th only is given to charitable purposes and the remainder to certain persons. That the man had charitable intention cannot be disputed. He carried out the religious trust in his lifetime. He managed the charities for a great number of years, and it is clear from his conduct during his lifetime that he was pious and charitable. He was an old man and a Haji. He had other properties than those he dedicated at the time he made the first *wakf*. He made it at the same time as one of his brothers made one. Several years passed thereafter, and after his brother's death some question arose about the *wakf* which had been made by his brother, in consequence of which he appears to have taken legal advice about the *wakf* he had made and then made the second *wakf*. The learned Subordinate Judge says that it was probably due to the current decisions and the view taken by the Privy Council about the dedicated substantial property that he was advised that the first *wakf* was not a proper *wakf* and would not stand in a Court of law. The second *wakf*, which was then made by him, includes properties of a larger value, in fact practically all his immoveable properties. He makes a settlement in respect of 12 annas of the income of these properties for religious purposes and gives $\frac{1}{4}$th to the *mutwalli* for his maintenance.

We think the learned Subordinate Judge has rightly found that his object was not the aggrandisement of his family. In fact his family then consisted of his wife and Jalil as adopted member of his family, who had a son, the 4th defendant. He had separated from his brothers and it cannot be said having regard to the terms of the second document that his idea was to keep the properties for the benefit of Jalil. The terms are very clear. We think that the intention was to create a valid religious endowment, which ought to be given effect to. The document does not support the contention that it has been given a colour of piety. It is practically an admitted fact that he was religiously inclined and that he actively supported charities during his lifetime. We think, having regard

(1) 10 C. W. N. 449.
(2) 23 A. 233 (P.C.); 5 C. W. N. 177; 28 I. A. 15; 11 M. L. J. 56; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829.

to the decision in *Ramanadan Chettiar* v. *Vava Levvai Marayokar* (3) and also to, amongst others, the lists laid down in *Abul Fata Mahomed* v. *Rasamaya Dhur* (4) and the ruling in *Baelul Ghani Mia* v. *Adak Patari* (5), that the decision arrived at by the learned Subordinate Judge is correct. The second *wakf* incorporates the properties dealt with in the first and we hold it is valid and operative.

So far as the *heba bil ewaz* is concerned, the gift is in clear terms. There is an intention expressed that it was to take immediate effect, and from the documents produced and the evidence given there is no doubt whatsoever that effect was given to it. The learned Subordinate Judge has found that there is no evidence to show that the minor did not get possession of the property. It is quite clear that Jalil as the infant's guardian looked after the property which was given by this *heba*, that, rents were collected by a person employed by him, named Amal Majid, on his son's behalf and that documents which have been produced, including receipts, show that they were both taken and given in the name of the infant through his guardian. The formalities were carried out. The evidence is practically one way. The Koran and string of beads were made over in exchange. The fact of the exchange is also recited in the document itself. We see no reason for taking a different view from that taken by the learned Subordinate Judge.

A question was also raised as regards the properties mentioned in Schedule 5. These properties are covered by the document Exhibit L. The document stands in the name of the plaintiff, his brothers and Jalil. It was urged on behalf of the appellant that Jalil's name was there as representing Mahammed Chhaber, as Mahammad Chhaber, it was said, was absent at the time and Jalil's name was used ; but in addition to this document there is the fact that the names of these persons were registered and the plaintiff knew of such registration in the name of Jalil and not in the name of his brother Chhaber. He was a party to the document Exhibit L and the learned Subordinate Judge correctly held that the *onus* lay heavily on the plaintiff to show that the document did not show the real state of things.

We are unable to find that any ground has been made out in this appeal to vary the findings arrived at by the learned Subordinate Judge. We, therefore, dismiss this appeal with costs. We assess the hearing-fee at Rs. 500.

NEWBOULD, J.—I agree.

Appeal dismissed.

(3) 39 Ind. Cas. 235; 40 M. 116; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 C. W. N. 531; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21; 21 M. L. T. 215 (P. C.).

(4) 22 C. 619 (P. C.); 22 I. A. 76; 6 Sar. P. C. J. 572; 11 Ind. Dec (N. s.) 412.

(5) 19 Ind. Cas. 896; 17 C. W. N. 1018.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 456 OF 1918.

March 22, 1919.

Present:—Mr. Justice Pratt.

NATHMAL GHAMIRMAL—PLAINTIFF

versus

MANIRAM RADHAKISSON—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 73, O. XXI, r. 55—Execuiton of decree—Money paid to remove attachment, whether liable to rateable distribution.

Money paid under rule 55 of Order XXI of the Civil Procedure Code to remove an attachment is not subject to rateable distribution, and is payable only to the attaching creditor. [p. 601, col. 1.]

Section 73 of the Civil Procedure Code is restricted in its application to assets held by the Court which were realised or obtained by process of execution. [p. 601, col. 2.]

Mr. *Inverarity*, for the Plaintiff, Attaching Creditor.

Mr. *Mulla*, for the other Judgment-Creditor.

JUDGMENT.—The judgment-creditor in this case applies for payment of the money received by the Sheriff under a warrant of attachment issued in execution of the decree in Suit No. 456 of 1918. The Prothonotary refused to issue an order in Form No. 64, holding that the money was an asset available for rateable distribution.

The judgment-creditor had taken out a warrant in Form No. 48 for attachment of

the moveable property of the judgment debtor under Order XXI, rule 43.

The bailiff entered judgment-debtor's shop and showed the warrant to a partner in the judgment-debtor's firm and pointed out that if the money were not paid, he would seize and keep in his custody the moveable property in his shop. The judgment-debtor then paid the decretal amount with costs of execution and Sheriff's poundage.

The question is whether this amount is available for rateable distribution among the other judgment-creditors who had made previous execution applications.

Section 295 of the Civil Procedure Code of 1882 has been considerably enlarged under section 73 of the present Code. The former referred to assets "realised by sale or otherwise in execution of a decree," and the latter refers to "assets held by a Court." The phrase "assets realised by sale or otherwise" was construed in the case of *Purshotamdass Tribhovandass* v. *Mahant Suraibharthi Haribharthi* (1) to be assets which have been realised from the property of the judgment-debtor by sale or otherwise. The words "or otherwise" were explained in the judgment by reference to sections 291 and 305—equivalent to Order XXI, rules 69 and 83—that is where money is paid to stop a sale or is raised by private alienation to set aside a sale. This decision was based on the position of section 295 in the Code of Civil Procedure, where it appeared under Chapter XIX of the Code dealing with execution of decrees and under the sub-division to that chapter referring to sale and delivery of property. As a result of this construction it was held that monies paid by a judgment-debtor under arrest in full satisfaction of the decree were not assets realised in execution by sale or otherwise, because the process of execution had not been directed against the property.

Following this case, it was held in *Gopal Dai* v. *Chunni Lal* (2) and in *Vibudhapriya Tirthaswami* v. *Yusuf Sahib* (3) that money paid to remove an attachment was not within section 295, as an attachment was not a process of sale or conversion otherwise of property.

The correctness of the reasoning in *Purshotamdass' case*(1) seems to have been doubted in *Manilal Umedram* v. *Nanabhai Manekkal* (4), where Sir Lawrence Jenkins explained that the word "realised" implied that property had been converted into or obtained in cash or some other form available for immediate distribution. Hence, if money is paid into Court it is obtained or realised, even though there has been no sale or conversion of the judgment-debtor's property. On this meaning of the word "realised" it was not necessary to limit the words "or otherwise," as Sir Charles Sargent did in *Purshotamdass' case* (1), to processes of execution *eiusdem generis* with sale.

I think the amendment in the present Code of Civil Procedure was intended to overrule *Purshotamdass' case*(1) and to provide that all assets held by the Court are available for rateable distribution, by whatever process of execution they may have been obtained. I also think that the assets must have been obtained in execution. The reference to costs of realisation and the position of the section in the Code at the end of Part II on execution seems to me to lead irresistibly to this conclusion. This was also the view taken by Bakewell, J., in *Suikeena Katum* v. *Mahomed Abdul Aziz* (5). The asset, therefore, must be something obtained in execution in a form available for distribution among the judgment-creditors.

Under section 73, therefore, I think it necessary to establish (1) that the money is an asset held by the Court, and (2) that it has been realised or obtained in execution.

To turn now to the present case, there is no doubt as to the first point that the money is an asset held by the Court. As to the second point, it is argued that it has not been realised in execution as the warrant of attachment was not in fact executed. This seems to me to be a mere quibble. It matters not whether the property was actually taken into custody by the bailiff or not. Physical contract, it may be noted, is not necessary to actual seizure under Order XXI, rule 43—*Multan Chand Kanyalal* v. *Bank of Madras* (6), see

(1) 6 B. 588; 3 Ind. Dec. (N. S.) 847.
(2) 8 A. 67; A. W. N. (1886) 1; 4 Ind. Dec. (N. S.) 1070.
(3) 28 M. 380 15 M. L. J. 202.
(4) 28 B. 264; 6 Bom. L. R. 11.
(5) 29 Ind. Cas. 239; 38 M. 221 at p. 224.
(6) 27 M. 346.

also *Bissicks* v. *Bath Colliery Co.* (7). The warrant directed a seizure and after seizure, release of the goods from custody if the judgment debt was not paid. This, I take it, is what happened and in any event the money was paid under stress of the warrant. The warrant is a process of execution and it was the warrant that procured the payment of the money.

If the matter were *res integra*, I should hold that the money was an asset held by the Court and realised in execution, and, therefore, liable to rateable distribution. But it has been held in *Sorabji Coovarji* v. *Kala Raghunath* (8) that the money paid to remove an attachment under Order XXI, rule 55, is not subject to rateable distribution, the reasoning being (1) that the money was not realised in process of execution, and (2) that rateable distribution would nullify the provisions of rule 55. The first ground follows the cases decided on the words "sale or otherwise," which are held to mean sale or other process of execution provided for in the Civil Procedure Code—*Seur Bux Bogla* v. *Shib Chunder Sen* (9), *Prosonnomoyi Dassi* v. *Sreenauth Roy* (10) and *Vibudhapriya Tirthaswami* v. *Yusuf Sahib* (3). But these cases all followed *Purshotamdass' case* (1) in restricting the process to one of sale or conversion of the property, and I venture to doubt whether this is not too restrictive a construction under the amended section, in which the words "sale or otherwise" have been dropped and in which there is merely an implication that the assets should have been realised or obtained in execution proceedings. I also venture to doubt the correctness of the second reason. Order XXI, rule 55, operates effectively where there is one decree-holder. If there are a number of decree-holders, there is no scope for the rule, for the judgment-debtor has no motive for paying off one judgment-creditor when the same property is liable to be re-attached by the others. To allow one decree-holder to be paid off in full when the property is insufficient to discharge other judgment-debts might possibly be undue preference and defeat the object of the section which is equal distribution of all the monies received in execution. Again, why should a judgment-creditor, whose attachment has been removed under Order XXI, rule 55, be in a better position than a judgment creditor who has taken the trouble of bringing the property to sale? Lastly, if the money paid under Order XXI, rule 55, to remove an attachment is not available for rateable distribution, then *a fortiori* money paid to stop a sale under Order XXI, rule 83, would also not be so available. But even under the old section it was assumed by Sir Charles Sargent in *Purshotamdass' case* (1) that money paid to stop a sale is available for rateable distribution. So that the interpretation put upon the section in *Sorabji Coovarji* v. *Kala Raghunath* (8) makes the new section more restrictive than the old one, and this is not what the Legislature intended.

I agree with the decision in *Thiraviyam Pillai* v. *Lakshmana Pillai* (11) that money paid under rule 55 is an asset held by the Court and is, like the money paid to stop a sale under rule 83 available for distribution. But I differ from that case, in that I think that section 73 is restricted to what is paid into Court by virtue of process of execution.

I have ventured to express my opinion as to the construction of the section, but I feel bound to follow the decision in *Sorabji's case* (8) and I, therefore, direct the Prothonotary to issue the payment order in Form No. 64.

This order should not be issued for three weeks pending an appeal.

The attaching judgment-creditor's costs including the costs of the previous application to be costs in the execution. The other judgment-creditors to pay their own costs.

Order accordingly.

(7) (1878) 3 Ex. D. 174; 47 L. J. Ex. 408; 38 L. T. 168; 26 W. R. 215.

(8) 12 Ind. Cas. 911; 33 B. 156; 13 Bom. L. R. 119.

(9) 13 C. 225; 6 Ind. Dec. (N. S.) 649.

(10) 21 C. 809; 10 Ind. Dec. (N. S.) 1169.

(11) 47 Ind. Cas. 538; 41 M. 616; 35 M. L. J. 150; (1918) M. W. N. 524.

SULOCHANA DEBI v. JAGATTARINI DEBI.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 108 OF 1917.

June 10, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Panton.

SULOCHANA DEBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAGATTARINI DEBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Will, construction of, principle of—Intention—Hindu Law—Widow, devise in favour of—Estate taken by widow—"Malik" and "full proprietary right," meanings of—Gift over, validity of.

Where one of the clauses in a Will was in these terms: "On my demise my present wife *J.*' shall get all these immoveable properties and become full owner and enjoy and hold possession thereof, with regard thereto, my daughter and daughter's sons or kinsmen shall not be competent to raise objection" and the Will further authorised the widow to alienate or sell any portion of the aforesaid immoveable properties, for the purpose of performance of religious acts or pilgrimages or necessary expenses, or the whole of the properties in the event of extreme necessity:

Held, that an absolute interest in the immoveable properties left by the testator was conferred on his widow. [p. 603, col. 2.]

The effect of the use of the word *malik* is to confer on the donee a heritable and alienable estate: the context may, however, qualify or cut down the full proprietary rights that the word *prima facie* imports. [p. 603, col. 2.]

The expression 'full proprietary right' implies absolute power of alienation. [p. 603, col. 2.]

Where a testator grants an absolute interest in the estate to his widow, the gift over of what might remain undisposed of by her would be inoperative in law. [p. 604, col. 1.]

The question in expounding a Will is, not what the testator meant, but what is the meaning of his words. The Court must discover what was the intention of the testator from the words he has used. Although it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, the Court cannot give effect to any intention which is not expressed or plainly implied in the language of the Will. Those who take under a Will are bound by the expressed intention of the testator. If that expressed intention is unfortunately different from what he really intended, so much the worse for those who wish the actual intention to prevail. [p. 604, col. 2.]

Appeal against the decree of the Subordinate Judge, Birbhum, dated the 13th January 1917.

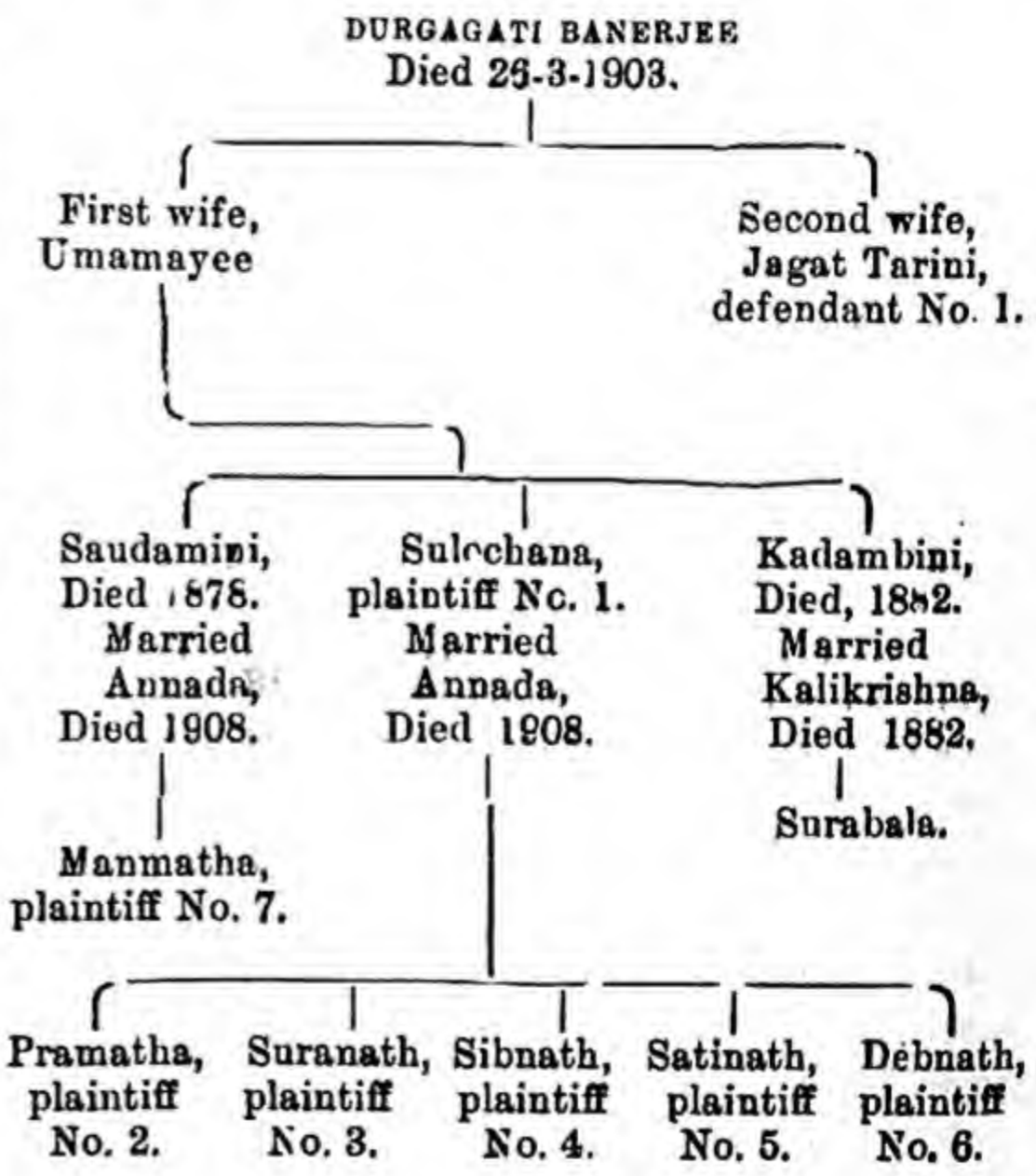
Babus *Provash Chandra Mitra, Haradhan Chatterjee* and *Promatha Nath Banerjee*, for the Appellants.

Babus *Hemendra Nath Sen, Bipin Behary Ghose, Jogendra Narayan Mazumdar* and *Bankim Chandra Mookerjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for construction of a Will, for administration of the estate covered thereby, and for incidental reliefs.

Rai Durgagati Banerjee Bahadur made a testamentary disposition of his properties on the 6th February 1902, and died on the 26th March 1903. His widow as executrix obtained Probate of the Will on the 27th August 1903. She has since then from time to time alienated immoveable properties comprised in the estate of her husband. The present litigation was commenced on the 27th November 1911 by the sons of his two daughters as also the surviving daughter for construction of the Will and for declaration that the alienations will not be binding upon them as reversionary heirs after the death of the widow. The claim has been resisted by the widow and her transferees, on the allegation that she took an absolute interest in the estate under the Will.

The relationship of the members of the family will appear from the following genealogical table:—



The Subordinate Judge has held that the first defendant took an absolute interest in the estate under the Will and has accordingly dismissed the suit, without

investigation of the question raised in the fifth issue, namely, whether the alienations were made for legal necessity. On the present appeal, the only question discussed at the Bar relates to the exact nature of the interest taken by the first defendant in the estate of her husband under the terms of his Will.

The Will consists of ten clauses. The first clause recites an earlier Will executed on the 14th April 1882. The second and third clauses mention family events which had happened since then and induced the testator to revoke the first Will. The third clause recites that his moveable properties, including Government securities and ornaments, were the Stridhan properties of his second wife, who would continue to possess and enjoy them as owner with power of disposition. The fifth clause contains two recitals, namely, first, that his immoveable properties (enumerated in the schedule) were his self-acquired and exclusive properties, and secondly, that although some of these properties stood in the name of his deceased first wife, he himself was the real owner and was in enjoyment of the income thereof. The sixth clause, which has formed the centre of controversy, is in these terms: "On my demise, my present wife Srimati Jagattarini Debi shall get all these immoveable properties and become full owner (*sampurna malik*) and enjoy and hold possession thereof; with regard thereto, my daughter or daughter's son or kinsmen shall not be competent to raise objection." The seventh clause authorises the widow to alienate or sell any portion of the aforesaid immoveable properties (for the purpose of performance of religious acts or pilgrimages or necessary expenses) or the whole of the properties in the event of extreme necessity. She is further authorised to grant, if necessary, leases in perpetuity or for a term. The eighth clause authorises the widow to sell at a fair price, if necessary, the dwelling house and garden at Suri, to apply the sale proceeds in the purchase or erection of a house in the holy city of Benares or at Calcutta and to reside in it. The ninth clause provides that on the death of the widow, the surviving daughter Sulochana would get, enjoy and hold possession of such of the immoveable properties as shall exist, and on the death of the daughter, her sons who shall remain alive, shall get a moiety share of the said properties, the other moiety to be taken by Manmathanath, the son of the predeceased daughter Saudamini. The tenth clause appoints his wife as executrix of the Will with authority to pay debts and collect dues.

There is, in our opinion, no room for serious controversy that the sixth clause confers on the widow an absolute interest in the immoveable properties left by her husband. As was ruled by this Court in *Kollany Koer* v. *Luchmee Pershad* (1) and by the Judicial Committee in *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (2), the effect of the word "Malik" is to confer on the donee a heritable and alienable estate; but as was observed by the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha* (3) the effect of the word "Malik" may be modified by the context, in other words, the context may qualify or cut down the full proprietary rights that the word *prima facie* imports. Illustrations of such qualification may be found in *Shib Lalshan Bhakat* v. *Srimati Tarangini Dasi* (4), *Pandarpa Nath Ghose* v. *Jogendra Nath Bose* (5), *Kunchoo Money Dossee* v. *Troylucko Mohiney Dossee* (6), *Hara Kumari Dasi* v *Mohim Chandra Sarkar* (7) and *Harilal Franlal* v. *Bai Rewa* (8). In the case before us, the testator was, however, not content with the word "Malik"; he used the expression "Sampurna Malik" *i. e.*, full proprietor, and it is difficult to imagine what more emphatic and unambiguous expression he might have used if he wished to create an absolute interest in favour of his widow. Now there can be no dispute that the expression "full proprietary right" implies absolute power of alienation: *Saroda Sundari Dassi* v.

(1) 24 W. R. 295.

(2) 24 I. A. 76; 24 C. 834; 1 C. W. N. 387; 7 Sar. P. C. J. 155 (P. C.); 12 Ind. Dec. (N. S.) 1224.

(3) 35 I. A. 17; 30 A. 84; 7 C. L. J. 131; 5 A. L. J. 67; 12 C. W. N. 241; 18 M. L. J. 7; 10 Bom. L. R. 59; 3 M. L. T. 141 (P. C.).

(4) 8 C. L. J. 20.

(5) 6 Ind. Cas 141; 12 C. L. J. 391.

(6) 10 C. 342; 8 Ind. Jur. 410; 5 Ind. Dec. (N. S.) 229.

(7) 12 C. W. N 412; 7 C. L. J. 540.

(8) 21 B. 376; 11 Ind. Dec. (N. S.) 253.

Kristo Jiban Pal (9). We must hold accordingly that the effect of the sixth clause is to create an absolute interest in favour of the widow, and this view accords with the decision of the Judicial Committee in *Fateh Chand* v. *Rup Chand* (10): see also *Padam Lal* v. *Tek Singh* (11), *Amarendra Nath Bose* v. *Shuradhany Dasi* (12), *Ramachandra Rao* v. *Ramachandra Rao* (13).

The question next arises, is there anything in the other parts of the Will which qualifies the effect of the sixth clause? Our attention has not been drawn to any specific provision which has such effect; but it has been argued that the seventh and eighth clauses would be superfluous if under the sixth clause the widow were deemed vested with authority to alienate the estate left by her husband. There is no force in this contention. The seventh and eighth clauses do not contradict or qualify but only confirm and amplify the provisions of the sixth clause. Stress has finally been laid on the ninth clause which provides for the devolution of the residue, if any, left at the time of the death of the widow. That clearly does not restrict the extent of the interest created by the sixth clause. It is indisputable that notwithstanding such a provision, there may be a prior absolute interest in favour of the widow: *Sures Chandra* v. *Lalit Mohan Dutta* (14), where it was pointed out that if the widow took an absolute interest in the estate devised, the gift over of what might remain undisposed of by her would be inoperative in law. See also *Manikyamala Bose* v. *Nandakumar Bose* (15), where reference is made to section 111 of the Indian Succession Act; *cf.* illustration (*a*) and the effect of illustrations as explained by the Judicial Committee in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (16). The case is thus very different from that before the House of Lords in *Comiskey* v. *Fowring-Hanbury* (17 where, although an absolute gift was in terms made to the widow, there was clear indication that the estate was to be kept intact by her for transmission to the nieces of the testator, in whose favour there was an executory gift to take effect on her death. The decision just mentioned, however, illustrates what room there is for divergence of judicial opinion upon the question of construction of ill expressed testamentary instruments.

We have been pressed finally to hold that the testator could not possibly have intended to authorise his widow to alienate all his estate just as she might please. But although, as the Judicial Committee observed in *Moulvie Mohamed Shumsool Hooda* v. *Shewukram* (18), it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, we cannot override the plain language used by the testator. Our only duty is to discover what was the intention of the testator, and we must make that discovery from the words he has used. As Lord Wensleydale said in *Abbott* v. *Middleton* (19), the question in expounding a Will is, not what the testator meant, but what is the meaning of his words. To the same effect is the observation of Lord Watson in *Scale* v. *Rawlins* (20): "We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of his Will." The truth is, intention and expression of intention are two different things. Those who take under the Will are bound by the expressed intention of the testator. If that expressed intention is unfortunately different from what he really intended, so much the worse for those who wish the actual intention to prevail."

As a last resort, the appellants have contended that the sixth clause is limited in its

(9) 5 C. W. N. 300.
(10) 37 Ind. Cas. 122; 38 A. 446; 18 Bom. L. R. 900; 20 M. L. T. 481; 21 C. W. N. 102; 4 L. W. 597; (1916) 2 M W. N 567; 26 C. L. J. 182; 43 I. A. 183 (P. C.).
(11) 29 A. 217; 4 A. L. J. 68; A. W. N. (1907) 19.
(12) 5 Ind. Cas. 73; 14 C. W. N. 458.
(13) 52 Ind. Cas. 94; 42 M. 283; 36 M. L. J. 306.
(14) 31 Ind. Cas. 405; 20 C. W. N 463; 22 C. L. J. 316.
(15) 33 C. 1306 at p. 1314; 4 C. L. J. 357; 11 C. W. N. 12.
(16) (1916) 2 A. C. 575; 86 L. J. P. C. 15; 43 Ind. App. 256; 115 L. T. 564; 32 T. L. R. 673 (P. C.).
(17) (1905) A. C. 84; 74 L. J. Ch. 263; 92 L. T. 241; 53 W. R. 402; 21 T. L. R. 252.
(18) 2 I. A. 7; 14 B. L. R. 226; 22 W. R. 409; 3 Sar. P. C. J. 405; 3 Suth. P. C. J. 43.
(19) (1858) 7 H. L. C. 68 at p. 114; 28 L. J. Ch. 110 5 Jur. (N. S.) 717; 11 E. R. 28; 115 R. R. 38.
(20) (1892) A. C. 342 at p. 344; 61 L. J. Ch. 421; 66 L. T. 542.

application to such properties alone as stood in the name of the first wife of the testator. The Subordinate Judge refused, and, in our opinion, correctly refused, to place this narrow construction upon the sixth clause; the immoveable properties mentioned therein are all those enumerated in the schedule referred to in the fifth clause. If this view were not adopted, the result would be an intestacy with regard to all the immoveable properties which stood in the name of the testator. We are not prepared to impute such an intention to the testator, in the absence of clear indication to that effect.

The result is that the decision of the Subordinate Judge, that the first defendant was given an absolute right to the properties devised by her husband, is affirmed and this appeal is dismissed with costs. The costs in this Court will be divided in the same manner as in the Court below.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 159 OF 1918.

February 4, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

SUBRAMANIA PILLAI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

KRISHNASWAMI SOMAYAJIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Religious Endowments Act (XX of 1863), s. 14—Temple—Appointment of trustee by temple committee—Suit for declaration that appointment is invalid and for injunction restraining interference with temple affairs—Sanction under s. 92, whether necessary—Jurisdiction of Civil Court.

A suit for a declaration that the appointment of a trustee by a temple committee is invalid and for an injunction restraining him from entering on his duties or interfering with the affairs of the temple and its properties is a suit virtually for the removal of a trustee and is not maintainable without the requisite sanction under section 92, Civil Procedure Code. The suit may also be treated as one in which direction of the Court is necessary for the administration of a public trust and falls under the section, at least under clause (*h*), sub-section (1). [p. 607, col. 2; p. 608, cols. 1 & 2.]

Jegangurulavaru v. *Durma Dossji*, 4 M. H. C. R. 2 *Ponnambala Mudaliyar* v. *Varaguna Rama Pandia Chinnatambiar*, 7 M. H. C. R. 117 and *Samaram Singaracharior* v. *Krishnaswami Iyengar*, 4 Ind Cas. 874; 19 M. L. J. 513, distinguished.

Such a suit does not come within the scope of section 14 of the Religious Endowments Act. [607 col. 1.]

A Civil Court can question the appointment of a trustee by a Devasthanam Committee, if the appointment is not made reasonably and in good faith [p. 607, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Tinnevelly, in Original Suit No. 1 of 1917.

FACTS.—Plaintiffs were two trustees of a temple. Defendants Nos. 1 to 7 formed the Temple Committee appointed under Act XX of 1863. Eighth defendant was appointed by them as trustee in place of one *K*. deceased. The appointment was proposed while *K*. was alive, as he was weak and incapable of attending to his work. But when the actual appointment was made, *K*. was dead and there was a vacancy. The question argued was that the suit was maintainable, as the Committee had no power to make the appointment against the will of the other trustees.

The Hon'ble Mr. *T. Rengachariar*, for the Plaintiffs-Appellants.—The Civil Courts have jurisdiction under section 9, Civil Procedure Code, which is not taken away by any provision whatsoever. See *Thiruvengadatha Aiyangar* v *Ponnappa Aiyangar*(1), *Sitharam Chetty* v. *Subramania Aiyar* (2), *Ponnambala Mudaliyar* v. *Varaguna Rama Pandia Chinnatambiar* (3), following two Sudder Decisions. See also *Subbayya* v. *Krishna* (4), *Rangasami Naicken* v. *Varadappa Naicken* (5). The Court has power to regulate the trust. See *Ganapathi Ayyar* v. *Vedavyasa Alasinga Bhattar* (6), where the Court vetoed an appointment made by the Committee; see also *Seshadri Ayyangar* v. *Nataraja Ayyar*(7). Whether the appointment is made in the proper exercise of the trust and whether the appointment is as additional trustee or to an existing vacancy. *Tirumalaiyappa Pillai* v. *Vengu*

(1) 25 Ind. Cas. 965; 38 M. 1176; 28 M. L. J. 209.
(2) 32 Ind. Cas. 211; 39 M. 700; 30 M. L. J. 29; 19 M. L. T. 2; 3 L. W. 43.
(3) 7 M. H. C. R. 117.
(4) 14 M. 186; 1 M. L. J. 95; 5 Ind. Dec. (N. S.) 132.
(5) 17 M. 462; 6 Ind. Dec. (N. S.) 321.
(6) 29 M. 534; 1 M. L. T. 127; 16 M. L. J. 435.
(7) 21 M. 179; 7 Ind. Dec. (N. S.) 438.

Aiyar (8). The English Law is given in *Vatcher* v. *Paull* 9) dealing with fraud on powers to appoint trustees.

Mr. *M. D. Devadoss*, for the Committee.—The case of the plaintiffs was that the Committee cannot appoint an additional trustee. But in fact the appointment was made to a vacancy. Such being the fact, Act XX of 1863 bars a suit brought without the sanction of the Court. See section 14.

[ABDUR RAHIM, J.—Section 14 cannot be meant to take away the jurisdiction of the Civil Courts, if they have any.]

That is anyhow the decision in *Pannambala Mudaliyar* v. *Varayuna Rama Pandia Chinnatambiar* (3), which was under Regulation VII of 1817 which contained no provision regarding suits.

Thiruvengadatha Aiyangar v. *Ponnappa Aiyangar* (1) is the case of filling up a vacancy.

The suit, if maintainable, is premature. For nothing has yet been done in pursuance of the appointment. So this is not a case for granting an injunction.

[SPENCER, J.—This is not a suit for the removal of a trustee but only for a declaration that the appointment is illegal.]

The effect at least is the same, as the moment a man is appointed he becomes a trustee.

[ABDUR RAHIM, J.—If so, he can be removed only for breach of trust.]

Or under section 14. The discretion has been properly exercised. We are not bound to accept any man recommended by the plaintiffs.

Mr. *T. R. Ramachandra Aiyar*, for Defendant No. 8—(1) The suit as brought is not maintainable. The point that is now raised that the appointment to a vacancy is itself bad is new. My answer thereto is that in order to interfere with a settled scheme of administration the Committee should show adequate cause. But this is not the case here. For the appointment to a vacancy is their duty.

(2) Allegations against this defendant are not sufficient to furnish a cause of action. He, being appointed under a statutory power, presumed to be properly exercised, is a trustee even though the assent of the other trustees was not had, being unnecessary. Until the appointment is declared bad, he continues to be a trustee. The only suit contemplated is for the removal. Such a suit does not lie without sanction under section 14 of Act XX of 1863 or under section 92 of the Civil Procedure Code. For even a trespasser has been held to come under section 92. See *Neti Rama Jogiah* v. *Venkatacharlu* (10) ["even if illegally substituted as trustee"]. See also *Kaliswara Gurukkal* v. *Nataraja Tambiran* (11). See page 632 of Ganapathy Aiyar's "Hindu and Muhammadan Religious Endowments." Sanction is required to prevent multiplicity of suits. See also *Bishen Chand Baswat* v. *Nadir Hossein* (12), *Neti Rama Jogiah* v. *Venkatacharlu* (10). Even if the defendant be not a trustee but merely contend that he is such, the Code applies. See *Jugal Kishore* v. *Lakshmandas Raghunathdas* (13).

[ABDUR RAHIM, J.—But here the power of the appointing body itself is in question.]

They have the power to appoint. But the question is whether the appointment is proper. So the Code applies. For the Court will never say that anybody can challenge the appointment. For then no Committee will find itself safe.

[SPENCER, J.—There is no allegation of defect in the power of the Committee.]

None. Sanction is required unless the right be purely personal.

Mr. *Rangachariar*, in reply.—Section 92 is not a bar. For it applies only when the conditions mentioned in it are satisfied, *i. e.*, a breach of trust or a necessity for the direction, if the Court and the reliefs must be one of those mentioned in the section. See *Kalyana Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar* (14). There should be a check on the Committee's powers. That is the province of the Court.

Trustees are not like ordinary worshippers who should get sanction before suit: See *Samaram Singarachariar* v. *Krishnaswami*

(8) 28 Ind. Cas. 556; (1915) M. W. N. 280.
(9) (1915) A. C. 372 at p. 378; 84 L. J. P. C. 86; 112 L. T. 787.

(10) 26 M. 450.
(11) 3 Ind. Cas. 255; 19 M. L. J. 772; 6 M. L. T. 193.
(12) 15 C. 329 (P. C.); 15 I. A. 1; 12 Ind. Jur. 170; 15 Sar. P. C. J. 113; 7 Ind. Dec. (N. S.) 803.
(13) 23 B. 659; 1 Bom. L. R. 118; 12 Ind. Dec. (N. S.) 440.
(14) 38 Ind. Cas. 73; 40 M. 212; 31 M. L. J. 777; 20 M. L. T. 490; 5 L. W. 625; (1917) M. W. N. 400.

Iyengar (15). Where there is a right of suit independently of the Act, it does not apply: *Agri Sharma Embrandri* v. *Vistnu Embrandri* (16), *Chinna Rangaiyangar* v. *Subbraya Mudali* (17), *Jeyangarulavaru* v. *Durma Dossji* (18), *Syed Amin Sahib* v. *Ibram Sahib* (19).

JUDGMENT.

ABDUR RAHIM, J.—I am not disposed to agree with the learned Subordinate Judge that he had no jurisdiction to entertain the suit. The suit is instituted by two out of three trustees of a temple for a declaration that the appointment of the 8th defendant, which is practically in the vacancy created by the death of the third trustee, by the Devasthanam Committee is invalid and for an injunction restraining him from interfering with the affairs and the property of the temple. It is alleged in the plaint that this is not a proper appointment inasmuch as there was improper understanding between some of the members of the Committee and the 8th defendant as regards the former obtaining lease of certain buildings belonging to the temple at less than the proper rent. It is further alleged that the 8th defendant had agreed in consideration of his appointment to grant certain sites to some of the members of the Committee in the name of third persons. If those allegations are well-founded in fact—and that is a matter which could only be investigated at the trial—the appointment of the 8th defendant could not be said to be either reasonable or made in good faith. There are a number of rulings of this Court which lay down the principle that a Civil Court can question an appointment of a trustee by a Devasthanam Committee, if it is not made reasonably or in good faith [*vide Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar* (1), *Tirumalaiyappa Pillai* v. *Vengu Aiyar* (8), *Ganapathi Ayyar* v. *Vedavyasa Alasinga Bhattar* (6), *Seshadri Ayyangar* v. *Nataraja Ayyar* (7) and also the general observations of the learned Chief Justice and Seshagiri Aiyar, J., in *Sitharama Chetty* v. *Subramania Aiyar* (2)[1]. In *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar* (1) the appointment under consideration was that of additional trustees: in *Ganapathi Aiyar* v. *Vedavyasa Alasinga Bhattar* (6) the question was as regards the power of the Board of Revenue altering the scheme of management, and in *Seshadri Ayyangar* v. *Nataraja Ayyar* (7) the question which the Civil Court was asked to decide was the propriety of the suspension of a trustee by the Committee. But the principle applied in those cases would apply equally to the case of an improper appointment of a trustee in a vacancy caused by the death of a trustee.

But then the learned Pleaders for the respondents have argued that the suit would not lie because no sanction was obtained under section 14 of Act XX of 1863 or under section 92, Civil Procedure Code. As regards the first, I do not think the present suit comes within the scope of that Act. It is not a case of misfeasance, breach of trust or neglect of duty committed by a trustee. But I am of opinion that section 92, Civil Procedure Code, does apply. This is a case which may properly be described as one in which direction of the Court is necessary for the administration of the public trust within the meaning of that section, as held in *Neti Rama Jogiah* v. *Venkatacharlu* (10) and in *Kaliswara Gurukkal* v. *Nataraja Tambiram* (11). The mere fact that the 8th defendant had not yet taken charge of his office or taken possession of the properties as a co-trustee with the plaintiffs cannot make any difference, because the object of the suit is to obtain the direction of the Court as to whether the plaintiffs alone are to act in the matter of the trust or they must so act in conjunction with the 8th defendant. That view is supported by an observation of the Privy Council in *Bishen Chand Basawat* v. *Nadir Hossein* (12), as pointed out in *Kaliswara Gurukkal* v. *Nataraja Tambiran* (11).

Mr. T. Rangachariar, the learned Vakil for the appellants, however, argued that this is not a case for the removal of any trustee or for any other relief enumerated under section 92, Civil Procedure Code. Ordinarily, the removal of a trustee would mean the removal of a trustee from office by

(15) 4 Ind. Cas. 874; 19 M. L. J. 513.
(16) 3 M. H. C. R. 196.
(17) 3 M. H. C. R. 334.
(18) 4 M. H. C. R. 2.
(19) 4 M. H. C. R. 112.

reason of some act or omission in connection with his office of trustee, and here the 8th defendant has not, as already stated, entered upon the duties of trustee at all. But he has been undoubtedly appointed by the Devasthanam Committee by proceedings held according to the rules. Therefore, the Devasthanam Committee, so far as they are concerned, having the power to appoint a trustee, have done what they could in order to clothe the 8th defendant with the status and power of a trustee.

At the same time I am rather doubtful whether the prayer in the plaint comes within the words "removing any trustee." Even if they do not, I have no doubt that the relief is one which is contemplated by the residuary relief No. (*h*) under section 92, sub-section (1) of the Civil Procedure Code. Clause (*h*) says, "granting such further or other relief as the nature of the case may require." The object of this suit is to have it declared that the 8th defendant is not a trustee properly appointed and also to prevent him from acting in the capacity of a trustee. I should say that that is a relief cognate to removing a trustee.

It was also argued by Mr. Rangachariar that suits by trustees do not come within section 92, Civil Procedure Code. But I do not think that that contention is at all sound, and no authority has been cited in support of that proposition. If the terms of section 92, Civil Procedure Code, apply to a suit by trustees, there is no apparent reason why such a suit should be held to be exempted from its restrictive provisions. The plaintiffs not having obtained any sanction under section 92 of the Code the suit is not maintainable. In the result, the appeal must be dismissed with costs.

SPENCER, J.—I am of opinion that section 92, Civil Procedure Code, is a bar to the maintenance of the present suit. The decisions in *Jeyangarulavaru* v. *Durma Dossji* (18), *Ponnambala Mudaliyar* v. *Varaguna Rama Pandia Chinnatambiar* (3) and *Samaram Singaracharlar* v. *Krishnaswami Iyengar* (15), which were cited in the arguments, being all prior to the enactment of the Civil Procedure Code of 1908, in which clause (*a*) of sub-section (1) of section 92 and sub-section (2) appeared for the first time, must be read in the light of the law as it then was. In effect, this is a suit for the removal of a trustee from his office. No doubt the relief asked for in the plaint is for a declaration that the appointment of the 8th defendant is invalid and for a permanent injunction restraining him from interfering with the affairs of the temple. But it cannot be denied that the 8th defendant has been appointed as a trustee by a statutory body competent to make the appointment and, therefore, he is a trustee until he is removed from his office by a competent authority. There was at the time of appointment an existing vacancy, and under Act XX of 1863 the Devasthanam Committee have an inherent right to make appointments of trustees whenever vacancies occur. It is immaterial for the purposes of this suit what motives the members of the Committee had for making this particular appointment. They have as much power to appoint a bad man as trustee as to appoint a good man, in the exercise of their discretion. This is in fact an appointment of a man who, the plaintiffs say, ought not to be appointed, and the only means of getting rid of him is to bring a suit for his removal from office. The language of section 92, sub-section (2), Civil Procedure Code, is very clear. It declares that no suit claiming any of the reliefs specified in sub section (1) shall be instituted in respect of any such trust as is referred to in the section, except in conformity with the provisions of sub-section (1). One of the reliefs is that of removing a trustee. The only exception to this is the case where a trustee is sought to be removed under section 14 of Act XX of 1863 for misfeasance or neglect of duty. In either case sanction is required, either the sanction of the Advocate-General or the sanction of the District Court, and as the present suit has been instituted without sanction, it is not sustainable. I, therefore, agree with my learned brother that the appeal must be dismissed with costs.

M. C. P.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 524 OF 1919.

September 17, 1919.

Present :—Mr. Justice Ryves.

MATA PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Order directing further enquiry—Notice to accused, whether necessary—Penal Code (Act XLV of 1860), s. 420—Cheating—Guilty knowledge—Burden of proof.

Before a District Magistrate takes action under section 437 of the Criminal Procedure Code, he must give notice to the accused.

Accused pawned six rings which he said were of gold. Subsequently it was discovered that the rings were of silver gilt. Accused was charged with an offence under section 420 of the Penal Code:

Held, that the burden of proving that the accused knew that the rings were not what he suggested them to be was on the prosecution.

Criminal revision against the order of the District Magistrate, Agra, dated the 19th July 1919.

Mr. *J. M. Banerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case Mata Prasad was tried by a Magistrate on a charge under section 420 of the Indian Penal Code and acquitted. He had pawned six rings which he said were of gold It appeared subsequently that they were not made of gold but were made of silver gilt. The question was whether he knew that the rings were not what he suggested them to be. The Magistrate after examining the evidence for the prosecution came to the conclusion that he did not, or at any rate, gave him the benefit of the doubt. The reasons which he gave for coming to that conclusion seem to me sound. The District Magistrate, however, has ordered a re-trial; presumably he means a further enquiry. It does not appear from the record that he issued any notice to the accused before doing so. It has been ruled in this Court consistently from the Full Bench case reported in *Queen-Empress* v. *Chotu* (1) down to the case of *Dost Muhammad Khan* v. *Emperor* (2) that before a Magistrate takes action under section 437 of the Criminal Procedure Code, he should give

(1) 9 A. 52 (F. B.); A. W. N. (1886) 281; 5 Ind. Dec. (N. S.) 465.

(2) 15 A. L. J. 627.

notice to the accused. I must say in my opinion I think it is scarcely necessary to have a re-trial in this case, but if the Magistrate is still of that opinion, then he will give notice to Mata Prasad and give him an opportunity of showing cause as to why an order should not be passed to his prejudice. I may point out that the onus of proving the offence in this case, the guilty knowledge, lies on the prosecution. I allow the application and set aside the order of the learned Magistrate and direct that the record be returned.

Application allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 16 OF 1919.

March 25, 1919.

Present :—Mr. Fawcett, J. C.,

and Mr. Crump, A. J. C.

EMPEROR—PROSECUTOR

versus

NIHCHAL—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 530—Bench of Magistrates, conviction by—Quorum, *whether necessary—Each member, whether bound to hear whole evidence.*

For a conviction by a Bench of Magistrates to be legal, it must be by a *quorum* of the Magistrates as required by the rules, each member of which has heard the whole evidence in the case.

Report by the District Magistrate, Thar and Parkar, recommending that order by Bench Magistrates, Jamesabad, be set aside.

Mr. *T. G. Elphinston* (Public Prosecutor for Sind), for the Crown.

ORDER.—For the reasons given by the District Magistrate, we hold that the Bench Magistrates who convicted Nihchal were not competent to try and sentence him and that their proceedings were, therefore, void under section 530 of the Criminal Procedure Code. It may be pointed out that for a conviction by a Bench of Magistrates to be legal, it must be by the *quorum* of Magistrates required under the rules, each of the members of which has heard the whole evidence in the case.

We, therefore, quash the conviction and sentence, and direct the fine, if paid, to be refunded,

Conviction and sentence quashed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 540 OF 1919.

October 11, 1919.

Present:—Mr. Justice Ryves.

DHARAM DEO PANDEY—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Further enquiry, order directing—Notice to accused, whether necessary.

Before further enquiry can be ordered under section 437 of the Criminal Procedure Code, notice must be given to the person who has been discharged.

Criminal revision against the order of the District Magistrate, Ghazipur, dated the 6th August 1919.

Dr. *J. N. Misra*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This case must go back, because under the rulings of this Court; I invite the learned District Magistrate's attention to one of them, *Kharga* v. *Emperor* (1)] it is necessary to give notice to the person who has been discharged under section 437 before further enquiry can be ordered. If, therefore, the District Magistrate is still of opinion that further enquiry under section 109 is necessary, (*sic*) it seems to me on a perusal of the judgment of the Magistrate himself that he has probably arrived at the right conclusion. But this, however, is a matter entirely discretionary with the District Magistrate.

Order accordingly.

(1) 22 Ind. Cas. 183; 12 A. L. J. 167; 36 A. 147; 15 Cr. L. J. 39.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 92 OF 1917.

August 15, 1917.

Present:—Mr. Prideaux, A. J. C.

NANAKRAM—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 4 (b)

195, 476, 537—Order under s. 476, whether complain—S. 195 (5), scope of—Want of complaint, whether irregularity or illegality.

An order under section 476, Criminal Procedure Code is not a complaint. [p. 611, col. 2.]

The provisions of section 195.(5) of the Criminal Procedure Code only apply when a Court has, on the application of some person, sanctioned the trial of any of the offences named in section 195 and cannot apply to a case sent to a Magistrate under section 476, Criminal Procedure Code, for an order under the latter section is not a sanction. [p. 611, col. 2.]

Though want of sanction under section 195 of the Criminal Procedure Code may not vitiate a trial, yet where there has been no complaint under section 195 as regards the offence of which the applicant has been found guilty, the absence of a complaint is not a mere irregularity but is fatal to the trial. [p. 612, col. 1.]

Criminal revision of the judgment, dated the 12th May 1917, passed by the Sessions Judge, Nerbudda Division, in Criminal Appeal No. 64 of 1917.

Messrs. *M. Gupta* and *Gangadhar Sitaram*, for the Applicant.

The Hon'ble Mr. *G. P. Dick* (Standing Counsel), for the Crown.

ORDER.—One Seth Kunjlal Deochand, whose *munim* the present applicant Nanakram is, filed Suit No. 71 of 1915 in the Court of the Sub-Judge, Khandwa, against Sandoo and others for the recovery of Rs. 2,000 on a mortgage-deed, dated the 23rd February 1903, said to have been executed by Sandoo. The original mortgage-deed was said to be lost, but was subsequently found to have been filed in the record of Suit No. 813 of 1905 filed by the same plaintiff against Sandoo in the Court of the Munsif, Burhanpur. Nanakram, who had been examined as a witness, stated in it that no payment was made towards the debt of the suit; but when shown the bond, Exhibit P-10, was forced to admit that Rs. 154 had been paid towards the debt. Nanakram had also stated that there was no separate *khata* of the mortgage-debt in the account-books kept by him; but it is shown that for the years Samvat 1959 to 1962 there was such a separate *khata*. The result of the proceedings instituted under section 476 was that the Sub-Judge considered that Nanakram had committed offences under sections 193 and 463, Indian Penal Code, and he laid complaint in the Court of the first class Magistrate. The concluding portion of his order runs:

NANARAM v. EMPEROR.

"I hence order the prosecution of the accused Nanakram for offences under sections 193 and 463, Indian Penal Code" Nanakram thereupon applied to this Court to get that order quashed. It was dealt with as Criminal Revision No 227 of 1916 and the application was dismissed by me on the 17th October 1916. The case was tried and Nanakram was charged by the Magistrate as follows: "That you abetted the fraudulent and dishonest filing of a plaint for Rs 2,000 claim in the Court of the Sub-Judge, Khandwa, knowing that the claim was false in Suit No. 71 of 1915 and thereby committed an offence punishable under section 209-109, Indian Penal Code, and that in the said case you made the following statements: 'There is no separate *khata* in our account-books for the mortgage-debts in suit and that no payments had been made towards the debt in suit," knowing these statements to be false. He was charged separately under section 193, Indian Penal Code, in respect of each statement. The Magistrate considered that he was justified in proceeding against the accused under section 209/109, Indian Penal Code, and under section 195, sub-section (5) of the Criminal Procedure Code. The trial resulted in Nanakram being acquitted on the two charges of perjury on the technical ground that the Sub-Judge had failed to read over to him his depositions and in his conviction of the offences under section 209/109. He was awarded one year's rigorous imprisonment. In appeal the learned Sessions Judge has confirmed the conviction and sentence. Against that decision the present application for revision has been filed.

The first question raised here is that as the Sub-Judge in his proceedings under section 476 did not lay a complaint against the applicant for an offence falling under section 209, Indian Penal Code, the Magistrate under the provisions of section 195, Criminal Procedure Code, had no power to entertain it, it being one of those offences of which no Court can take cognizance except with the previous sanction or complaint of the Court concerned or of a Court to which that Court is subordinate. There is nothing to prevent a Court fulfilling the provisions of section 195 by making an ordinary complaint in any of the forms open to a private individual; but as a rule it should proceed, as in the present case, under section 476 to avoid the necessity of supporting the complaint like a private individual by a statement on oath in accordance with section 200, Criminal Procedure Code. It seems to me that an order properly passed under section 476 is both a complaint and more than a complaint. It is a judicial proceeding and an order of the Court, but it is not in my opinion a sanction 'within the meaning of section 195, Criminal Procedure Code.' The question before me is whether in this case there should have been a complaint with reference to the particular offence the applicant has been convicted of. The matter of the offence under this section was before the Sub Judge as disclosed by the proceedings under section 476, but he preferred to proceed under sections 193 and 463, Indian Penal Code, against the applicant. It is argued by the learned Standing Counsel for the Government that even if there is no complaint from the Sub-Judge as regards the offence of which the applicant has been convicted, and there is clearly no complaint as regards an offence under section 209/109, Indian Penal Code, yet under the provisions of section 195 (5), Criminal Procednre Code, the Magistrate was entitled to frame a charge under section 209/109, Indian Penal Code, as that offence was disclosed in the inquiry under section 476, Criminal Procedure Code, I am unable to accede to this proposition. In my opinion the provisions of section 195 (5) only apply when a Court has, on the application of some person, sanctioned the trial of any of the offences named under section 195 and cannot apply to a case sent to a Magistrate under section 476, Criminal Procedure Code, for an order under the latter section is not a sanction. The reason why the law apparently allows a Magistrate taking cognizance of a case started on complaint with previous sanction to frame a charge of any other offence disclosed by the facts, as long as it refers it to the offence for which the sanction was given, seems to me to be that in these cases it is difficult for the sanctioning Court to always ascertain the exact facts or to determine exactly all the offences which may be disclosed at the trial; but when a complaint

EMPEROR *v.* NAKCHHEDI.

is made under section 476 the Judge or Magistrate must move and should definitely know what offence or offences he committed. The matter becomes a public prosecution, and it is the duty of the prosecution to prove the exact offence of which complaint has been made of. I must hold that in the present case no complaint was made by the Sub-Judge as regards an offence under section 209, that no sanction for the prosecution of the applicant under that section has been obtained, and that as the matter reached the Magistrate in the form of a complaint and not as a sanction, section 195 (5) is not applicable and under these circumstances the trial is bad in law. Section 195 distinctly states that no Court shall take cognizance of an offence under section 209, Indian Penal Code, when such offence is committed in or in relation to any proceedings in any Court, except with the previous sanction or on the complaint of such a Court or of some other Court to which such Court is subordinate. It is argued that allowing this to be the case, section 537 (*b*) saves the conviction but as already stated there is no question of sanction in this case; the case was on a complaint. Though want of sanction under section 195 may not vitiate a trial, yet where there has been no complaint under section 195 as regards the offence of which the applicant has been found guilty, the absence of a complaint is not a mere irregularity. For these reasons I must set aside the conviction and sentence passed on the applicant. I do so and cancel his bail-bond.

Conviction and sentence set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 578 OF 1919.

October 10, 1919.

Present:—Mr. Justice Ryves.

EMPEROR—APPLICANT

versus

NAKCHHEDI MUSAHAR—OPPOSITE PARTY.

Criminal Tribes Act (III of 1911), s. 23, scope of—Previous conviction, whether must be after registration.

The operation of section 23 of the Criminal Tribes Act is not confined to offences that have been committed since the convict was registered. The second conviction referred to in the section does not signify that the previous conviction should have been obtained after the registration of the convict. It is enough for the purposes of the section if the convict has been previously convicted, whether before or after his registration.

Criminal reference by the District Magistrate, Ghazipur.

ORDER OF REFERENCE.—In this case Nakchhedi Musahar, a member of a registered criminal tribe, has been sentenced for an offence punishable under section 457, Indian Penal Code The accused was previously convicted for a similar offence on the 6th of November 1912. At that time Nakchhedi had not been registered. The Deputy Magistrate has interpreted section 23 of the Criminal Tribes Act to mean that the section applies only to offences that have been committed since the convict was registered and that a second conviction in that section means a second conviction *since the registration of the accused*. This view is supported by the wording of the section, which begins "Whoever being a member of any criminal tribe." This suggests that the first and the foremost element required by the section is that the accused should be a member of the criminal tribe, and as such he should be convicted. Moreover, Government Order No. 1131 VIII—340, dated the 13th January 1919, requires any Musahar who has been in jail for a non-bailable offence since 1910 to be registered as a member of a criminal tribe. This means that practically every one who is registered has already committed at least one offence and this being so, it seems hardly necessary to make any mention of a second offence in section 23. On the other hand, there is the ruling reported as *Emperor* v. *Adhin* (1). In this case it was held that it matters not whether the previous conviction was before or after the registration. In this case the accused does not appear to have been represented, but so long as this judgment stands I have no option but to report the case and recommend that the conviction be set aside and the Magistrate be directed to commit the case to the Court of Session.

(1) 36 Ind. Cas. 143; 14 A. L. J. 687; 17 Cr. L. J. 463.

JUDGMENT.—The case of *Emperor* v. *Adhin* (1) is binding on me. I must, therefore, accept the reference and direct the Magistrate to commit the accused to Sessions.

Order accordingly.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 714 OF 1918.

CRIMINAL REVISION PETITION NO. 577 OF 1918.

April 10, 1919.

Present :—Justice Sir William Ayling, KT.

M. R. RY. VELLANKI SRINIVASA JAGANNADHA RAO BAHADUR GARU—ACCUSED NO. 2—PETITIONER

versus

M. R. RY. GADICHERLA VENKATA GOPALAKRISHAN RAO BAHADUR, ZAMINDAR OF RAJUPETA—ACCUSED NO. 1—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 148, 439—Possession of land, dispute as to—Delegation of enquiry to Subordinate Magistrate, scope of—Order, final, on evidence partly recorded by Subordinate Magistrate, whether regular—Jurisdiction—Revision—High Court, interference by, limits of.

Where a 1st class Magistrate passes a final order under section 148, Criminal Procedure Code, on evidence partly recorded by a Subordinate Magistrate under his directions and partly recorded by himself, he cannot be deemed to have acted without jurisdiction so as to call for interference by the High Court in revision. [p. 614, col. 1.]

The essential requisite to give a Magistrate jurisdiction under section 145, Criminal Procedure Code, is that he must be satisfied that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction. [p. 614, col. 2.]

An enquiry by a Subordinate Magistrate, to whom a matter is referred under the provisions of section 145 of the Criminal Procedure Code, is not confined to a mere inspection of the locality and a report thereon [p. 614, col. 1.]

Kamal Kutty v. *Udayavarma Raja*, 17 Ind. Cas. 65; 36 M. 275; 12 M. L. T. 439; (19 2) M. W. N. 1151; 23 M. L. J. 499; 13 Cr. L. J 753, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Bezwada, in Miscellaneous Case No. 14 of 1918.

FACTS appear from the judgment.

Mr. *P. Sonasundram*, for the Petitioner.—The Deputy Magistrate's order is void, as he should not have acted on the evidence recorded by a Subordinate Magistrate. He should not have delegated that function to his subordinate, but should have recorded the whole evidence himself.

Mr. *V. Rimesam*, for the Respondent and the Public Prosecutor (Mr. *E. R. Osborne*), for the Crown.—It was within the competence of the Deputy Magistrate to have directed enquiry by his subordinate. He was seized of jurisdiction, and once he proceeded to act in the exercise of jurisdiction, any subsequent irregularity will not vitiate the proceedings or call for the interference of the High Court in revision.

Moreover, the whole investigation was not conducted by the Sub-Magistrate. The Deputy Magistrate received and recorded further evidence that was tendered to him.

ORDER.—In this case the Sub-Divisional Magistrate passed a preliminary order under section 145 (1), Criminal Procedure Code. He then passed proceedings directing the Sub-Magistrate of Tiruvur to hold a local enquiry, record evidence on both sides as to possession and submit his report with the records. The Sub-Magistrate examined 24 witnesses, exhibited a number of documents and submitted his report with the records. The Sub-Divisional Magistrate examined 8 more witnesses himself and then passed orders on all the evidence thus recorded by himself and the Sub-Magistrate, declaring one party to be in possession.

It is argued (1) that the Sub-Divisional Magistrate's action in directing the Sub-Magistrate to take evidence was not authorized by section 145, and that he was not entitled to consider the evidence so recorded, (2) that his action rendered the final order passed by him void, as being without jurisdiction.

For both propositions reliance is placed on the judgment of Wallis, J., in *Arumuga Gounden* v. *Venkata Subbier* (1), which certainly seems to support them.

(1) 31 M. 82; 17 M. L. J. 535; 6 Cr. L. J. 384; 3 M. L. T. 108.

CHAUTHI AHIR *v.* EMPEROR.

The true scope of section 148, Criminal Procedure Code, seems to me to be a very doubtful matter, and if it were necessary for this case to determine it, I should feel constrained to refer the case for the decision of a Divisional Bench. The question does not appear to have been seriously argued before the learned Judge in *Arumuga Gounden* v. *Venkata Subbier* (1) and he contents himself with quoting three earlier rulings [*Baikunt Kuar, In re* (2), *Hanumanthappa* v. *Hussain Saib* (3) and *High Court Proceedings, 13th November* 1868, No. 1492 (4).] In the former case Prinsep, J., certainly says that the local enquiry "should be restricted solely to some question relating to the feature of property about which the dispute has arisen, and that it should not be directed to any matter which can be proved before the Magistrate by oral evidence such as the question of actual possession." This dictum seems to entirely ignore the very wide definition of "inquiry" in section 4 (*k*), Criminal Procedure Code; and I may add that if it were the intention of the Legislature to make the enquiry a mere 'inspection' as the learned Judge seems to think, it would have been quite easy to say so. The two Madras cases merely lay down that it is not open to the Sub-Divisional Magistrate to depute the whole investigation to the Sub Magistrate and to decline to receive any evidence himself, as he is bound to do under section 145 (4).

But assuming that the Sub-Divisional Magistrate's action in proceeding partially on evidence recorded under his order by a Subordinate Magistrate and not by himself is irregular, I am clearly of opinion that this does not affect his jurisdiction, or warrant the interference of this Court in revision The whole question of the circumstances in which this Court would interfere with orders under section 145, Criminal Procedure Code, has been considered in *Kamal Kutty* v. *Udayavarma Raja* (5). The judgment in that case (to which I was a party) says (p. 286*): "The essential requisite to give a Magistrate jurisdiction under section 145, Criminal Procedure Code, is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction". This ruling, so far as I am aware, has not been subsequently questioned and with all respect to the view expressed in *Arumuga Gounden* v. *Venkata Subbier* (1), I must follow it, especially as I see no reason to alter my opinion.

I must, therefore, dismiss the present revision petition.

M. C. P.

Petition dismissed.

(2) 3 C. L. R. 134.
(3) 2 Weir 118.
(4) 2 Weir 97; 4 M. H. C. R. App. 20.
(5) 17 Ind. Cas. 65. 36 M. 275; 12 M. L. T. 439; (1912) M. W. N. 1154; 23 M. L. J. 459; 13 Cr. L. J. 753.

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ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 630 OF 1919.

October 10, 1919.

Present:—Mr. Justice Ryves.

CHAUTHI AHIR—PETITIONER

versus

EMPEROR (NASIB AHIR AND OTHERS)—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation, order for, at what stage to be made.

An order under section 250 of the Criminal Procedure Code for compensation should be passed simultaneously with the order of discharge or acquittal, and not in a separate proceeding. [p. 615, col. 1.]

Criminal reference by the Sessions Judge, Benares, dated the 1st September 1919.

ORDER OF REFERENCE:—This is an application for the revision of an order of the District Magistrate of Jaunpur, remanding a case to the Bench of Magistrates who had passed an order for compensation under section 250, Criminal Procedure Code, without having recorded any objection which the complainant might have to make. The learned District Magistrate considered

the defect in procedure as merely technical, but in view of the rulings referred to in this application it must be held that the defect is material and cannot be corrected by a subsequent proceeding. An order under section 250, Criminal Procedure Code, should be passed simultaneously with the order of discharge or acquittal and not in a separate proceeding. Moreover, the applicant's complaint was found to be not merely frivolous and vexatious but absolutely false. It has been held that the provisions of section 250, Criminal Procedure Code, cannot be appropriately applied in such cases The record will be submitted to the Hon'ble High Court with the recommendation that the order for compensation under section 250, Criminal Procedure Code, be set aside.

JUDGMENT.—I accept the reference and set aside the order for compensation.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 53 OF 1917.

May 10, 1917.

Present:—Mr. Prideaux, A. J. C.

MADHO PRASAD AND ANOTHER—APPLICANTS

versus

JAGGANSI—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 145, 435—Proceedings under s 145—Revision—High Court, power of interference of, when can be exercised—Jurisdiction—Procedure—Party not given opportunity to appear, effect of.

Ordinarily orders passed under section 145 of the Criminal Procedure Code will not be interfered with under section 435 of the Code, but where an order purporting to be under the former section exceeds the powers given by it, the High Court will interfere, especially where there has been material irregularity which has prejudiced a party to the proceedings. [p. 616, col. 1.]

Proceedings under section 145 of the Criminal Procedure Code are not within jurisdiction unless the procedure prescribed therein is strictly adhered to. Where it appears that a party to the dispute has had no opportunity of appearing and putting in his written statement, the proceedings will be set aside. [p. 616, col. 1.]

Criminal revision of the order of the Additional Commissioner and Sub-Divisional Magistrate, Ramtek, in Criminal Miscellaneous Case No. 2 of 1917, dated the 15th February 1917.

Mr. *G. V. Deshmukh*, for the Applicants.

Mr. *P. R. Naidu*, for the Non-Applicant.

ORDER.—On the 5th February 1917 information was laid under section 145 of the Criminal Procedure Code by the Sub-Inspector of Police, Deolapar, in the Court of the Sub-Divisional Magistrate, Ramtek, to the effect that there was a dispute regarding three fields situated at Mauza Karwahi between Madho Prasad and Ramnarayanlal on the one hand and Jagansi Gond on the other and that the said dispute was likely to cause a breach of the peace. The Sub-Divisional Magistrate directed the parties to appear before him on 15th February 1917 at Deolapar and to put in written statements of their respective claims as to actual possession of the property in dispute and as the case appeared to be one of some emergency, the Magistrate attached the three fields pending decision of the case. On the 15th February 1917 the case was taken up, not at Deolapar, but at Chorbaoli, a village some nine miles from Deolapar. It was called at 3 P. M. The Sub-Divisional Magistrate in his order states that he had issued orders to the Sub-Inspector the previous day that the case would be heard at Chorbaoli and as Madho Prasad and Ramnarayanlal were absent when the case was called, the Magistrate proceeded *ex parte* and passed an order stating that finding Jagansi was in possession of the property in dispute, he should retain possession until evicted therefrom in due course of law. Against that order, the present application for revision is filed by Madho Prasad and Ramnarayanlal. I am satisfied that the Magistrate's order which is not on record said to have been issued on the 14th to the Sub-Inspector telling him to inform the present applicants that they should attend at Chorbaoli in place of Deolapar, was not served on them in time to allow them to be present. They had engaged Mr. Parakh, Pleader, to represent them in the case. Mr. Parakh, who is present in the Court, tells me that he reached Deolapar with his clients at 8 or 9 A. M. on the morning of the 15th February. He put up with the Sub-Inspector there, but was told nothing as regards the change in the place of hearing until about 4 o'clock in the

afternoon, when apparently on a chit received from the Sub-Divisional Magistrate's reader the Sub-Inspector told the Pleader that the Court was at Chorbaoli that day. Mr. Parakh, Pleader, states that on his way back he enquired at Chorbaoli and was told that the case had been disposed of. The Sub-Divisional Magistrate at that time was absent from the bungalow. This was on the evening of the 15th. There is no reason to doubt Mr. Parakh's word. Whether it is the fault of the Sub-Divisional Magistrate's clerk or of the Sub-Inspector that information did not reach the applicants in time, it is not my business to decide, but I am clearly of opinion that it was not possible for the two applicants to attend the Court at Chorbaoli at the time the case was called. Therefore, if the Sub-Divisional Magistrate's order is open to revision, I have no hesitation in setting it aside. Counsel for Jagansi argues that this Court cannot interfere with the order in revision. I am referred to section 435 of the Criminal Procedure Code and to *Murat Singh* v. *Paika Bai* (1) in support of this proposition. It seems to me that this Court cannot under section 435 ordinarily interfere with orders passed under Chapter XII of the Criminal Procedure Code; but where an order purporting to be under section 145 exceeds the powers given by the section, this Court can interfere. Irregular and illegal proceedings under Chapter XII are subject to the revisional jurisdiction of this Court. See *Pandurang Govind, In re* (2), *Pandurang Govind Pujari, In re* (3), *Dewan Chand* v. *Queen-Empress* (4), *Dhani Ram* v. *Bhola Nath* (5) and *Abdulla Khan* v. *Gunda* (6). I hold the proceedings under section 145 of the Criminal Procedure Code are not within jurisdiction unless the procedure prescribed there is strictly adhered to and, therefore, when a party to the dispute has had no opportunity of appearing and putting in his written statement, this Court can set the proceedings aside. This Court is not entitled to interfere merely because there has been an irregularity in the proceedings or an erroneous decision on a question of fact or law, but it can and will interfere when there has been a material irregularity which has prejudiced a party to the proceedings. *Parmessar Singh* v. *Kailaspati* (7). The irregularity here has prevented the applicants from having a fair trial. I do not question the Magistrate's power to proceed *ex parte* against a party in proceedings under section 145, Code of Criminal Procedure, when that party having due notice of the date fixed for hearing fails to attend in person or by Pleader to put in a written statement of his claim, but in the present case the applicants were not given notice in time that the case would be heard at Chorbaoli and they are entitled to be heard and must be heard before the final order under section 145 is passed. I set aside the order of the Sub-Divisional Magistrate, dated 15th February 1917, and direct that the case be proceeded with and dealt with according to law. It is pressed here that the case should not be returned to the Court of the Sub-Divisional Magistrate, Ramtek, for disposal. Mr. Bourne, as seems clear from paragraph 4 of the District Magistrate's reply to the notice calling upon him to show cause why the order should not be set aside, has since the disposal of the case made a local enquiry into the question of possession, an enquiry made on the application of Jagansi, the non-applicants, for making a false report in this case to the Police. Under these circumstances as the Sub-Divisional Magistrate, Ramtek, must have made up his mind on the question of possession, the case will be now disposed of by such other Magistrate as the District Magistrate may direct.

Order set aside.

(1) 17 C. P. L. R. 133; 1 Cr. L. J. 877.
(2) 24 B. 527; 2 Bom. L. R. 84; 12 Ind. Dec. (N. S.) 882.
(3) 25 B. 179; 2 Bom. L. R. 755.
(4) 2 P. R. 1899 Cr. (F. B.).
(5) 23 P. R. 1902 Cr.; 135 P. L. R. 1902.
(6) 7 P. R. 1907 Cr; 24 P. W. R. 1907 Cr.; 71 P. L. R. 1908; 6 Cr. L. J. 113.
(7) 35 Ind. Cas. 801; 1 P. L. J. 336; 17 Cr. L. J. 369; 1 P. L. W. 95; (1917) Pat. 1.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 457 OF 1919.

September 12, 1919.

Present:—Mr. Justice Ryves.

MANGHAI RAM—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 228—Scuffle in verandah of Court—Offence.

Accused had a scuffle with some person in the verandah of a Court room. The Chaprasi of the Court intervened and put an end to it. No interruption was caused to the Court and it was found that there was no intention on the part of the accused to insult the Court:

Held, that the accused was not guilty of an offence under section 228 of the Penal Code.

Criminal revision against the order of the Sessions, Judge, Allahabad, dated the 22nd June 1919.

Mr. *K. R. Dang*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case there is a discrepancy between the finding of the learned Sessions Judge and of the Magistrate as to the facts. I have examined the record and there is no doubt that the Magistrate has come to the right conclusion on the facts. Manghai Ram, who was a witness for the prosecution in a case which was then being heard before the Magistrate, tried to come into the Court room from the verandah. Shanker, who appears to have been in some way related to the accused in that case, prevented him. There was a scuffle between the two and some sort of an assault. Mahabir, who was a Chaprasi of the Court, intervened and told Manghai not to come inside the Court room. When this happened, the Court appears to have taken action under section 480 of the Criminal Procedure Code and on the facts found, namely, that there had been this assault in the verandah of the Court room, convicted Manghai Ram under section 228 of the Indian Penal Code, holding that this conduct amounted to "a contempt of Court as defined in that section," and sentenced him to pay a fine of Rs. 50. Manghai applied in revision to the learned Sessions Judge, who rejected the revision on what seems to me a misconception of the actual facts. The Judge seems to have been of the opinion

that Manghai struck the Chaprasi and held that it was the duty of the Chaprasi, who was acting as a servant of the Court, to prevent a witness from coming into the Court room before he was called, and went on to hold that the accused in striking the Chaprasi undoubtedly intentionally insulted the Court. As a matter of fact it was never suggested by anybody that the accused had struck the Chaprasi. On the facts found it seems to me that the conviction cannot be sustained. There is no mention in section 228 of "contempt of Court." It is quite obvious that Manghai, when he slapped Shanker in the verandah of the Court because Shanker prevented him from going inside the Court room, had no idea whatever of intentionally insulting the learned Magistrate. He cannot, therefore, be convicted of intentional insult. He might, however, be convicted if it was proved that he had caused an interruption to the Magistrate. There is nothing whatever on the record to show that he did so There is no note made by the Magistrate at the time, no evidence, and nothing is said in the judgment on the point. It seems to me, therefore, that the conviction must be quashed. I, therefore, set it aside, acquit the accused, and direct that the fine, if paid, be refunded.

Conviction quashed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 176 OF 1917.

October 22, 1917.

Present:—Mr. Prideaux, A. J. C.

PURAN SINGH AND ANOTHER—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476, proceedings under—Notice to accused, whether necessary.

In order to validate proceedings under section 476 of the Criminal Procedure Code, notice is not legally necessary to the accused, but it is desirable that such notice should be given more especially where the matter has not been already judicially dealt with. [p. 618, col. 2.]

Petition of revision of the order of the Sessions Judge, Jubbulpur Division, dated 4th

November 1916, reversing the order of the Sub-Divisional Magistrate, dated 20th October 1918.

Dr. *H. S. Gour*, for the Applicant.

Messrs. *C. B. Parakh* and *V. V. Chitale*, for the Non-Applicant.

The Hon'ble Mr. *G. P. Dick*, for the Crown.

ORDER.—In Civil Revision No. 316 of 1916, Stanyon, A. J. C., in his order, dated the 24th February 1917, held that Sheikh Abdul Rahiman, the plaintiff in the case he was dealing with, had made a false claim. He held that the receipt, dated the 4th September 1914, filed by the plaintiff was a forgery and the suit that was based on it a false suit. The concluding paragraph of his judgment runs: "I leave to the discretion of the lower Court to decide whether any action is necessary under section 476 of the Criminal Procedure Code, 1898." On the return of the case, the Small Cause Court Judge proceeded under section 476, Criminal Procedure Code, and finding there was a *prima facie* case against Abdul Rahiman, Imamali, Hemnath and Puransingh decided that they should be prosecuted and directed a complaint to be laid before the First Class Magistrate.

Puransingh and Hemnath filed this application for revision against that order. After they had filed their application, Abdul Rahiman and Imamali have filed similar applications, Criminal Revisions Nos. 187 and 188 of 1917. This order will dispose of all three applications.

As regards the applications of Hemnath, Imamali and Abdul Rahiman there seems to me no ground to disturb the order of the Small Cause Court Judge laying a complaint to the First Class Magistrate. This Court has found the receipt to be a forgery and the Small Cause Court Judge, on a reconsideration of the evidence before him in the case, as he explains in his answer to the Rule issued in Puransingh's case, has in his discretion determined that there is a *prima facie* case against all four applicants. There are obviously no valid grounds on which his decision to bring three out of the four applicants to trial can be challenged. I have no hesitation in dismissing the application of Hemnath and rejecting summarily the applications of Abdul Rahiman and Imamali.

In Puransingh's case it is, however, urged that notice was not given to him to appear and show cause before the Small Cause Court Judge passed the order impeached in these revisions. That is so. Two attempts were made to serve Puransingh at Raipur. They failed because he is said not to live at that place, though the summons in the Small Cause Court suit was served on him there. The Small Cause Court Judge, in place of waiting and issuing a fresh notice, wrote that Puransingh's whereabouts were not correctly known and proceeded to pass his order. It is argued for Puransingh that want of notice vitiates the order. It has been held, I have no doubt correctly, that notice is on the face of the section not legally necessary: see *Ram Piari Rai* v. *Emperor* (1), *Baperam* v. *Gouri Nath Dutt* (2) and *Queen-Empress* v. *Matabadal* (3). But notice, although not legally necessary, is desirable, more especially where the matter has not been already judicially dealt with; *Empress* v. *Narotam Das* (4). Here the question of the receipt being genuine or a forgery had been judicially dealt with and, therefore, I do not think that want of notice in Puransingh's case invalidates the proceedings against him. I, therefore, also dismiss his application.

Application dismissed.

(1) 16 Ind. Cas. 515; 10 A. L. J. 247; 13 Cr. L. J. 707.

(2) 20 C. 474; 10 Ind. Dec. (N. S.) 320.

(3) 15 A. 392; A. W. N. (1893) 146; 7 Ind. Dec. (N. S.) 970.

(4) 6 A. 98; A. W. N. (1883) 225; 3 Ind. Dec. (N. S.) 665.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 491 OF 1919.

September 15, 1919.

Present :—Mr. Justice Ryves.

SHEO NARAIN SINGH AND ANOTHER —APPLICANTS

versus

B. RADHA MOHAN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 209, 437—Enquiry in respect of two offences—Charge framed in respect of only one offence—Further enquiry, whether can be directed in respect of other offence.

SHEO NARAYAN SINGH *v.* RADHA RAM.

Accused was placed before a Second Class Magistrate for trial on charges under sections 307 and 323 of the Penal Code. The Magistrate framed a charge under section 323 only and directed the accused to enter on his defence. The District Magistrate called for the record and, after giving notice to the accused and hearing his Counsel, directed a further enquiry in respect of the charge under section 307:

Held, that the order of the Magistrate framing a charge under section 323 amounted to a discharge of the accused under section 307 and that, therefore, the District Magistrate had power to direct further enquiry in respect of the latter offence.

Criminal revision against the order of the District Magistrate, Jaunpore, dated the 23rd July 1919.

Dr. *J. N. Misra*, for the Applicant.

Dr. *S. M. Sulaiman*, for the Opposite Party.

JUDGMENT.—This application arises under the following circumstances :—Two persons, Sheo Narain and Arjan Singh, were placed before a Magistrate of the Second Class for trial on charges under sections 307 and 323, Indian Penal Code. The learned Magistrate passed an order formally discharging Arjan Singh, but he went on to frame a charge under section 323 only against Sheo Narain Singh, who was directed to enter on his defence at the next hearing. In the course of his order the learned Magistrate recorded :—"In my opinion there is evidence of *marpit* against Sheo Narain Singh accused. A charge was, therefore, framed under section 323, Indian Penal Code, and was read over and explained to him." The District Magistrate called for the record and gave both the accused notice and considered everything that was said by Counsel engaged on their behalf, and he ordered further enquiry against both the accused. In this revision before me it is argued—

(1) That there was no ground for ordering further enquiry on the merits, and

(2) that as against Sheo Narain Singh the order was one which could not have been passed by the learned District Magistrate under the provisions of section 437, because it was said that on the plain wording of that section it can only come into operation in the case of an accused person who has been discharged.

It is argued that, far from there being an order of "discharge" against Sheo Narain Singh, the case is actually pending against him, and final orders have not yet been passed.

On the first ground I do not see any reason whatever to interfere. There was evidence on the record and the offence was a very serious one triable exclusively, so far as section 307 is concerned, by a Court of Session. On the second ground it seems to me that the objection is very technical. It is admitted that if the Magistrate had gone on with the case and convicted the accused under section 323, it would have been possible for the learned Sessions Judge to call for the record and report the matter to this Court which certainly could, if it was so advised, set aside the whole trial and order further enquiry or order commitment to the Court of Session. However, I find that there is the authority of a Full Bench of the Madras High Court, namely, *Krishna Reddi* v. *Subbamma* (1), which covers this case. In that case a Magistrate was enquiring into offences under sections 477 and 379 of the Indian Penal Code. He ultimately acquitted under section 379 and said nothing in his order about the charge under section 477. That also was an offence which was exclusively triable by a Court of Session. The High Court held:—"From the terms of the Magistrate's order it is clear that he adjudicated upon the question whether there was any evidence against the accused in respect of the major offence. The Magistrate came to the conclusion that there was not and he declined to charge him with the major offence. It seems to us that this is a 'discharge' within the meaning of section 209." Similarly in this case the Magistrate has said that there is evidence against Sheo Narain Singh of *marpit*. I take this to be equivalent to saying that there is no reliable evidence against him on the major charge. The District Magistrate is of opinion that there is. I think, therefore, that it was within the jurisdiction of the Magistrate to pass the order. But in any case, assuming that it was not, I think this is certainly a case in which there should be further enquiry. I, therefore, decline to interfere. I say this without any reference to the merits of the case.

Order accordingly.

(1) 24 M. 136; 2 Weir 544.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 282 OF 1919.
(CRIMINAL REVISION PETITION No. 236 OF 1919).

September 15, 1919.

Present:—Mr. Justice Moore.

In re PULLANNAVARA HANUMANTHA —ACCUSED No. 1—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 423—Appellate Court, power of, to alter finding, scope of.

Although an Appellate Court has power under section 423 of the Criminal Procedure Code to alter the finding of a lower Court while maintaining the sentence, it ought not to use such power if the accused would be prejudiced by the omission to prove the altered charge and if the defence might have been of a different character had the altered charge been framed in the first Court. [p. 621, cols. 1 & 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Bellary, in Criminal Appeal No. 22 of 1919, preferred against the judgment of the Court of the Sub-Divisional 1st Class Magistrate, Adoni, in C. C. No. 10 of 1918.

FACTS appear from the judgment.

Dr. *S. Swaminathan*, for the Petitioner.—The alteration of the finding by the Sessions Judge was illegal and was not warranted by the terms of sections 423, Criminal Procedure Code. The altered sections constitute more serious offences than the one for which the accused was convicted by the Magistrate.

Except under sections 237 and 238, Criminal Procedure Code, no person can be convicted by a Court of Appeal of an offence with which he was not charged in the first Court. *Padmanabha Payi Kanniah* v. *Emperor* (1), *Mongalu Aorodhone Hathi In re* (2), *Golla Hanumappa* v. *Emperor* (3), *Dasarath Mandal* v. *Emperor* (4).

The accused was distinctly prejudiced by the absence of a charge under the new sections. He was prevented from pleading the right of self-defence and that he had a right to resist the unlawful arrest.

(1) 5 Ind. Cas. 145; 33 M. 264; 7 M. L. T. 79; 11 Cr. L. J. 49; 20 M. L. J. 84.
(2) 41 Ind. Cas 828; 18 Cr. L. J. 860.
(3) 10 Ind. Cas 372; 21 M. L. J. 805; (1911) 2 M. W. N. 106; 35 M. 243; 12 Cr. L. J. 269; 10 M. L. T. 66.
(4) 34 C. 325; 5 Cr. L. J. 424.

The Public Prosecutor, for the Crown.—The Sessions Judge had power to alter the finding under section 423, Criminal Procedure Code. The absence of a charge did not prejudice the petitioner. He never pleaded the right of private defence at the trial. In fact he said that he used no violence, and the finding is that violence was used.

JUDGMENT.—The petitioner and five other persons were convicted of the offence of rioting armed with deadly weapons (sections 148, Indian Penal Code). On appeal the Sessions Judge of Bellary altered the finding in the case of the petitioner (accused No. 1) to one under sections 323, 511, Indian Penal Code, and maintained the sentence but reversed the convictions of the other accused. The facts, as found by the lower Courts, are shortly these. There had been ill feeling between accused No. 6 and prosecution witness No. 4, the Sub-Inspector of Police of Kowtalam, and there was a charge against 6th accused of having wrongfully confined P. W. No. 4 and P. W. No. 5. The Sub-Inspector of Adoni, who had been deputed to investigate the case, learning that 6th accused had sent for some bad characters from Halvy to commit offences against the Police, deputed a party of Head Constables and Constables with instructions to watch the path from Halvy, and to catch any Halvy people or strangers who might pass that way.

Soon after midnight on 7th May 1918 the Police, who were lying in ambush, saw ten or fifteen persons approaching armed with weapons and surrounded them. In the *melee* the petitioner aimed a blow with a battle axe at one of the Constables (P. W. No. 2). The latter warded off the blow with his *lathi* which was cut, but no hurt was actually caused to P. W. No. 2. Five persons including the petitioner were illegally arrested by the Police.

The Sub-Divisional Magistrate framing a charge under section 148, Indian Penal Code, against accused Nos. 1 to 5 improperly omitted to state in the charge what the common object of the unlawful assembly was. The charge as framed was in these terms "that you at Halvy armed with deadly weapons, *i. e.*, battle-axes, axes and sticks, committed rioting and attempted to strike P. Ws. Nos. 1, 2, 3 and 5 and that 1st accused

aimed a blow with his battle axe at P. W. No. 2." The Sessions Judge came to the conclusion that it was not proved that the accused were members of an unlawful assembly, that the conduct of the accused showed that it was not their intention to attack the Police, that the Police had no right to arrest the accused merely because they saw them coming along the road and that no offence had been committed by accused Nos. 2 to 6. The Sessions Judge was, however, of opinion that a clear case under sections 226, 511, Indian Penal Code, had been made out against the petitioner and that the petitioner was not justified in using violence and aiming a blow with an axe before any arrest had been effected by the Police.

Dr. Swaminathan for the petitioner contended that the Sessions Judge acted illegally in altering the conviction under section 148, Indian Penal Code, into one of more serious offences under sections 326, 511, Indian Penal Code that such an alteration of finding is not warranted by the provisions of section 423, Criminal Procedure Code, and that the facts found would not justify a conviction under section 326, Indian Penal Code, read with section 511, Indian Penal Code. Under section 423 (1) (*b*) of the Code of Criminal Procedure an Appellate Court has the power to alter the finding of the lower Court maintaining the sentence. It is urged that in cases not falling under sections 237 and 238, Criminal Procedure Code, the Appellate Court cannot convict a person of an offence with which he was not charged in the first Court, and reliance is placed on the decisions in *Padmanabha Payi Panniah* v. *Emperor* (1), Criminal Revision Case No. 83 of 1919, *Mongalu Aorodhone Hathi, In re* (2) and *Golla Hanumappa* v. *Emperor* (3). In *Mangalu Aorodhone Hathi* v. *Emperor* (2) it was held by a Bench of this Court, following *Dasarath Mandal* v. *Emperor* (4), that when persons were convicted of rioting and acquitted on appeal but were convicted by the Appellate Court of house trespass and hurt (sections 448, 323, Indian Penal Code), the convictions were illegal on the ground that the accused could not be convicted of offences with which they were never charged. It is no doubt true that although hurt is generally caused in rioting, it does not necessarily follow that hurt is so caused. In this case, however, the charge, although it was carelessly drawn up, distinctly sets out that 1st accused aimed a blow with his axe at P. W. No. 2. The true principle appears to be that laid down in *Yakub Ali* v. *Lethu Thakur* (5), namely, that if the accused have been prejudiced by the omission to prove the altered charge and if the defence might have been of a different character had the altered charge been framed in the first Court, the Appellate Court should not use the power vested in it by section 423, Criminal Procedure Code, to give such an altered finding. This was the view taken by Sadasiva Aiyar, J., in *Mannar Krishnan Chetty, In re* (6) and I respectfully adopt it. It is suggested that the petitioner was prejudiced in his defence, as he had no opportunity of pleading that he was justified in resisting the illegal arrest and that in attempting to cause hurt he acted in the exercise of the right of private defence. It was open, however, to the petitioner to put forward this plea in the lower Court. He denied having used violence and in fact the defence was that accused Nos. 1 to 5 were arrested not on the Halvy path but while they were passing the Police station at Kowtalam. The lower Court found that the petitioner commenced the assault and aimed a blow at P. W. No. 2, which struck the *lathi* he was carrying.

The conviction of the petitioner under sections 326, 511, Indian Penal Code, is not, I think, bad in law, but the sentence, one year's rigorous imprisonment, is, in my opinion, much too severe. The Police appear to have acted in a high-handed and illegal manner. I confirm the conviction but reduce the sentence to one of three months' rigorous imprisonment. The petitioner must surrender to his bail and serve the unexpired portion of the sentence. I see no reason to interfere with the order directing the petitioner to give security under section 106, Criminal Procedure Code.

K. C. P.

Conviction affirmed;
Sentence reduced.

(5) 30 C. 288.
(6) 35 Ind. Cas. 816; (1916) 2 M. W. N 267; 4 L. W. 873; 17 Cr. L. J. 384.

CALCUTTA HIGH COURT.

CRIMINAL REVISIONS NOS. 529 AND 560 OF 1919,
July 24, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Newbould.

GUNPAT RAI KHEMKA—PETITIONER

versus

W. G. GOOD—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 20, 29—Calcutta Port Act (III B. C. of 1890), ss. 84, 138, 139—Presidency Magistrate, jurisdiction of, extent of—Offence committed outside Calcutta but within limits of port, cognizance of.

The Presidency Magistrate of Calcutta is an officer authorised to exercise the powers of a Magistrate within the limits of the port of Calcutta and is competent, under section 20 of the Criminal Procedure Code, to entertain a complaint of an offence under section 84 of the Calcutta Port Act, in respect of an offence committed outside the limits of Calcutta but within the limits of the port of Calcutta. [p. 623, cols. 1 & 2.]

Per *Newbould, J.*—The provisions contained in the first part of section 138 and the whole of section 139 of the Calcutta Port Act were made through excess of caution and were based upon the provisions of section 29 of the Criminal Procedure Code. [p. 623, col. 2.]

Criminal revisions against the order of the Chief Presidency Magistrate, Calcutta, dated the 10th June 1919.

IN CR. R. No. 529.

Babus *Manmatha Nath Mukherjee* and *Satindra Nath Mukherjee*, for the Petitioner.

Babus *Dasarathi Sanyal* and *Heramba Chandra Guha*, for the Opposite Party.

IN CR. R. No. 560.

Babus *Dasarathi Sanyal* and *Heramba Chandra Guha*, for the Petitioner.

Babus *Manmatha Nath Mukherjee* and *Satindra Nath Mukherjee*, for the Opposite Party.

JUDGMENT.

SANDERSON, C. J.—Two Rules have been issued, one No. 529 and the other No. 560, and they were in connection with certain proceedings which were taken against one Ganpat Rai Khemka, who was alleged to have committed a breach of the provisions contained in section 83 of the Calcutta Port Act of 1890, and to have committed an offence under section 84. The proceedings were taken before Mr. Das Gupta, who on the 8th of May of this year was acting, as we are informed, on behalf of the Chief Presidency Magistrate; and the most important point which has been raised in respect of Rule No. 529 is whether the Presidency Magistrate had jurisdiction over the matter. The alleged offence admittedly took place outside the limits of Calcutta, but admittedly within the limits of the port of Calcutta: and, the argument of the learned Vakil, who obtained the Rule in No. 529, shortly stated, is that although the Presidency Magistrate may have jurisdiction outside the limits of Calcutta but within the limits of the port of Calcutta for certain offences, he has no jurisdiction outside the limits of Calcutta and within the limits of the port, in respect of offences against the Calcutta Port Act, and he further contended that the intention of the 1890 Port Act was that the trial of offences under that Act should take place before the tribunals especially appointed by that Act. This question depends upon the provisions contained in sections 138 and 139 of the Calcutta Port Act and in my judgment also upon section 20 of the Code of Criminal Procedure of 1898. Section 138 of the Calcutta Port Act provides: "Every charge of an offence against any provision of this Act.....alleged to have been committed within Calcutta, may be instituted before any Magistrate having jurisdiction ....."That section makes it clear that an offence committed against any provisions of this Act within the limits of Calcutta might be tried before the Presidency Magistrate. That is not disputed. Then comes section 139 which provides: "Every charge of an offence against the provisions of this Act...alleged to have been committed out of Calcutta, may be heard and determined by any officer authorized to exercise any of the powers of a Magistrate in the place in which such offence may be alleged to have been committed, according to the provisions of the Code of Criminal Procedure, 1882." The learned Vakil argued that the last words "according to the provisions of the Code of Criminal Procedure, 1882," regulate the mode of trial. As at present advised, I am inclined to agree with the interpretation which the learned Vakil puts upon those words, although that is not necessary for the decision of this case. The learned Vakil has drawn our attention to the difference in language of the two sections

in describing the tribunal; in section 138 the words are "any Magistrate having jurisdiction," and in section 139 the words are "any officer authorised to exercise any of the powers of a Magistrate in the place in which such offence may be alleged to have been committed:" and, he has drawn our attention to certain previous Acts which, he contends, show the origin of those words, inasmuch as he pointed out that there were certain persons who were authorized to exercise some of the powers of a Magistrate, although they might not be authorized to exercise all the powers of a Magistrate. But to my mind, the difference in the words used in section 138 and those used in section 139 does not conclude the point, because the words in section 139, "any officer authorized to exercise any of the powers of a Magistrate in the place" do not specify the tribunal without reference to some other Act, and we have to see what officer is authorized to exercise any of the powers of the Magistrate in the place in which the offence in this case is alleged to have been committed As I have said, admittedly the alleged offence was committed within the limits of the port of Calcutta. When we look at section 20 of the Criminal Procedure Code, we find as follows: "Every Presidency Magistrate shall exercise jurisdiction in all places within the Presidency town for which he is appointed, and within the limits of the port of such town..... as such limits are defined under the law for the time being in force for the regulation of ports and port-dues." Therefore, it seems to me that the Presidency Magistrate is an officer authorized to exercise the powers of a Magistrate within the limits of the port of Calcutta and inasmuch as the offence is alleged to have been committed within such limits, he has jurisdiction to hear the complaint which was lodged against the petitioner.

The other Rule No. 560 dealt with the acquittal of Ganpat Rai Khemka. I need not go into all the facts which led up to the acquittal of Ganpat Rai Khemka. It appears, however, that on the 8th of May 1919 the complainant and his Attorney were present in Mr. Das Gupta's Court, which Court had dealt with the case on certain previous occasions when adjournments were granted: and, without their knowledge the case was called on before the Chief Presidency Magistrate himself, and as the complainant and his Attorney were not present, the Chief Presidency Magistrate acquitted Ganpat Rai Khemka. I think that inasmuch as it was clearly owing to a misunderstanding (for which the complainant and his Attorney were not responsible) that they were not present before the Chief Presidency Magistrate, the order of acquittal ought to be set aside. The result will be that, both parties having agreed that there should not be two trials, the hearing of the first complaint will proceed, and the other complaint, which was lodged afterwards, will be set aside.

Therefore, Rule No. 560 is made absolute; and Rule No. 529 is made absolute to the extent that the second prosecution is quashed.

NEWBOULD, J.—I agree with my Lord the Chief Justice.

I only wish to add something in reply to the argument that if the Presidency Magistrate had jurisdiction under the Criminal Procedure Code to try this offence, it would not have been necessary to make the provisions contained in the first part of section 138 and the whole of section 139 of the Calcutta Port Act, III of 1890. It appears to me that these provisions were made through excess of caution, and were based upon the provisions of section 29 of the Criminal Procedure Code. That section provides that trials of offences under laws other than the Indian Penal Code, such as the Port Act, shall, when any Court is mentioned, in this behalf in such law, be tried by such Court. I think the drafters of the Act had that section in their minds, and thought it desirable to provide in the Act for the tribunal in which offences under it should be tried, and consequently introduced into section 139 words similar to those in section 20, with the intention of leaving no doubt that offences under the Act should be tried when committed out of Calcutta but in the port of Calcutta by a Presidency Magistrate who has been authorised to exercise jurisdiction by section 20 of the Code of Criminal Procedure.

Rule No. 529 made absolute in part;
Rule No. 560 made absolute.

PURNA CHANDRA DE *v.* AMBIKA CHARAN.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 1067 OF 1918.
January 2, 1919.
Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.
PURNA CHANDRA DE—COMPLAINANT—PETITIONER
versus
AMBIKA CHARAN ADHIKARI AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 203, 437—Dismissal of complaint on report of panchayat *without hearing complainant—Further enquiry, whether can be directed.*

Where a complaint charging the accused with assault and theft was dismissed by a Magistrate on receipt of the *panchayat* report without hearing the complainant and referring only to the charge on assault:

Held, that further enquiry must be made into the allegations made in the complaint.

Rule against the order of the Sub-Divisional Magistrate, Ranaghat.

Babu *Khitish Chandra Chakravarty*, for the Petitioner.

JUDGMENT.—This is a Rule to show cause why further enquiry should not be made into the complaint filed by the petitioner.

It appears that the petitioner had charged certain persons not only with assaulting some of his boatmen but also with theft of two *chalis* of bamboos. We are informed that the value of these bamboos is Rs. 1,000. The Sub-Divisional Magistrate after hearing the complainant sent the case to the local *panchayat* for investigation and report. The *panchayat* submitted a report which is among the papers before us. Apparently, on receipt of this report, the Sub Divisional Magistrate dismissed the complaint without giving the complainant an opportunity of being heard. In dismissing the complaint the Sub Divisional Magistrate refers only to the charge of assault and says nothing about the alleged theft of bamboos.

In the circumstances we are of opinion that further enquiry should be made into this complaint and we direct accordingly.

Rule made absolute.

AVADH BEHARI LAL *v.* EMPEROR.

ALLAHABAD HIGH COURT.
CRIMINAL APPEAL No. 918 OF 1919.
September 22, 1919.
Present : Mr. Justice Ryves.
AVADH BEHARI LAL—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 234—Joinder of charges—Trial joint on eight counts, legality of—Procedure

Accused was sent up for trial under sections 218, 409 and 466 of the Penal Code on eight counts and was convicted on four counts under sections 409 and 466:

Held, (1) that having regard to the provisions of section 234 of the Criminal Procedure Code, the accused could only be tried on three counts in one trial:

(2) that the procedure adopted in this case being in contravention of the provisions of section 234 of the Criminal Procedure Code, the trial was illegal and must be set aside.

Criminal appeal against the order of the Additional Sessions Judge, Mainpuri, dated the 9th of August 1919.

Mr. *J. M. Banerji*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—In this case Avadh Behari Lal was sent up for trial under sections 218, 409 and 466 of the Indian Penal Code on eight counts and was convicted on four counts under sections 409 and 466. It seems to me that this is in contravention of the plain wording of section 234 of the Criminal Procedure Code. According to the ruling of the Privy Council in the well-known case of *Subrahmania Ayyar* v. *King-Emperor* (1) the trial is illegal. I, therefore, set it aside and direct that the accused be re-tried according to law, that is to say, on three counts only. Having set aside his conviction, I direct that he be released on his giving bail to the satisfaction of the District Magistrate.

Case remanded.

(1) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 833; 2 Weir. 271; 8 Sar. P. C. J. 160 (P. C).

HARI KANTA DAS BARMAN v. BIBI NURANNESSA.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2033 OF 1917.

May 5, 1919.

Present :—Mr. Justice Newbould.

HARI KANTA DAS BARMAN AND OTHERS —DEFENDANTS NOS. 2, 3 AND 4—APPELLANTS

versus

BIBI NURANNESSA AND OTHERS— RESPONDENTS.

Bengal Tenancy Act (VIII B C. 1885), s. 106—Record of Rights, entry in, suit for correction of—Presumption—Burden of proof—Landlord and tenant—Tenant attorning to third person, effect of—Adverse possession.

In a suit for correction of the Record of Rights under section 106 of the Bengal Tenancy Act there is primarily a presumption in the defendant's favour, and the burden of proof rests on the plaintiff to show that the entry is wrong. [p. 626, col. 2.]

Where during the subsistence of a tenancy the tenant attorns to a third person, he becomes liable to eviction at the option of the landlord; but until the landlord indicates his intention to put an end to the tenancy, the mere act of attornment to a third person does not transfer possession from the landlord to the third person. [p. 626, col. 2.]

Appeal against the decree of the Special Judge, Jalpaiguri, dated the 23rd of June 1917, affirming that of the Assistant Settlement Officer, Jalpaiguri, dated the 29th of November 1915.

FACTS appear from the judgment.

Babu *Nagendranath Ghose* (with him Babu *Bankim Chandra Ghose*), for the Appellants.—Defendants Nos. 2, 3 and 4 are the appellants. The appeal arises out of a suit, under section 106 of the Bengal Tenancy Act, for correction of the Record of Rights. The *jama* of the tenant, Rup Kanta, was entered in the Record of Rights as being under defendants' tenure. The lower Court has taken a wrong view of section 106. The plaintiff's tenure—Rs. 201 *jama*—was purchased on 20th August 1883 by one *K*. In that year the then proprietors of the defendants' tenure—Rs. 188 *jama*—sued the tenants of this *jama* for rent. In that suit *K* intervened under Act X of 1859. Rent was decreed in favour of my predecessors-in-interest. That becomes conclusive unless a suit is brought within one year from decree. *K*. sold his tenure to *H*. and *E*. in 1901. Present plaintiff purchased the tenure from them in 1909. My purchase of the tenure was in 1911. In 1912 plaintiff instituted a suit for ejectment of Rup Kanta. Rup Kanta alleged that he was my tenant. In 1914 the suit was compromised and Rup Kanta attorned to the plaintiff. The record of rights then took place in the same year and I was recorded as proprietor of the land in dispute. My submission is that a tenant may pay rent to a third person but that does not amount to the dispossession of the landlord. Refers to *Bejoy Chunder Banerjee* v *Kally Prosonno Mookerjee* (1), *Srinivasa Ayyar* v. *Muthusami Pillai* (2). My title is to be traced from the time of the rent decree under Act X of 1859. I could produce other documents to show that I have all along been in possession. The present suit is really a suit for recovery of possession in the guise of a suit for rent. Mere denial of the landlord's title does not terminate the tenancy. Possession cannot be recovered in suit under section 106, Bengal Tenancy Act. Refers to *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (3). The tenancy cannot be terminated unless a notice is served. The learned Judge has fallen into an error by refusing to go into the question of title. Suits under section 106 are of the nature of declaratory suits. I cannot establish my case unless I prove that I am the landlord.

Moulvi *Wahed Hossain* (with him Babu *Nalin Chandra Kaul*), for the Respondents.—The case is wholly concluded by findings of fact. Rup Kanta, the best man who could give all information, was not called by them. The other side had got sufficient notice of disclaimer from Rup Kanta. The real question is whether the land in dispute appertains to the *jama* of the plaintiff or of the defendants. That question has been finally decided by the Civil Courts, and in second appeal the findings of fact cannot be disturbed.

Babu *Nagendranath Ghose*, in reply.—As regards the question of limitation I would refer your Lordship to S. C. Guha's Indian Limitation Act, pages 389-90; *Thanman Punde* v. *Maharaja of Vizianagram* (4), *Acharath Bappan* v. *Mathummal Chovi* (5); Lalmohan Mukerjee on Limitation, pages 209-10; *Ram*

(1) 4 C. 327; 2 Shome L. R. 106; 2 Ind. Dec. (N. S.) 207.
(2) 24 M. 246.
(3) 12 C. W. N. 8.
(4) 29 A. 593; A. W. N. (1907), 195; 4 A. L. J. 746.
(5) 3 Ind. Cas. 122; 4 M. L. T. 327; 19 M. L. J. 255; 6 M. L. T. 166.

Newoz Acharjee v. *Shashi Bushan Misser* (6), *Gangabai* v. *Kalapa Dari Mukiya* (7), *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhry* (8).

JUDGMENT.—This appeal arises out of a suit under section 106 of the Bengal Tenancy Act in which the plaintiff respondent prayed for correction of the Record of Rights. Both Courts have decided in the plaintiff's favour. In the suit three corrections were sought to be made, but I am now only concerned with the third and that is whether a certain plot of land of which one Rup Kanta Das is in actual occupation appertains to the tenure of Rs. 201 odd belonging to the plaintiff, or to the tenure of Rs. 128 odd belonging to the defendants-appellants.

The first Court decreed the suit, and on appeal to the lower Appellate Court it was contended amongst other points that the decision of the lower Court was based on inadmissible evidence; the learned Judge, however, in his judgment has not dealt with these points. He has held that as in a title suit brought by the plaintiff against Rup Kanta in 1912, Rup Kanta compromised and admitted the plaintiff's title, the plaintiff must be held to have been in possession since then through Rup Kanta and that as there was no evidence of subsequent attornment to the defendants, the plaintiff must be held to have been in possession ever since. In my opinion these findings are not sufficient for the decision of the appeal. If, as the defendants-appellants alleged, Rup Kanta was holding the land as their tenant, when the plaintiff brought the suit to eject Rup Kanta, the subsequent attornment by Rup Kanta to the plaintiff would not have the effect of ousting the defendants from possession; as was held by Markby, J., in the case of *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (1): "one who holds possession on behalf of another does not by a mere denial of that other's title make his possession adverse so as to give himself the benefit of the Statute of Limitation. By adverse possession I understand to be meant possession by a person holding the land on his own behalf other than that of the person who is the real owner who was in possession."

(6) 9 Ind. Cas. 119.
(7) 9 B. 419; 5 Ind. Dec. (N. S.) 277.
(8) 31 C. 397.

I may also refer to a decision of the Madras High Court in the case of *Srinivasa Ayyar* v *Muthusami Pillai* (2), where it was held that "A tenant repudiating the title under which he entered becomes liable to immediate eviction at the option of the landlord, but until the landlord indicates that he intends to exercise his option, the tenancy subsists."

It is not suggested in the present case that the defendants ever took any steps to put an end to the tenancy of Rup Kanta under them, assuming that such a tenancy existed. So long as such a tenancy had not terminated, Rup Kanta's possession of the land would be the possession of the defendants and his attornment to the plaintiff would not transfer possession from the defendants to the plaintiff.

It is contended that the lower Appellate Court has found as a fact that Rup Kanta was a tenant of the plaintiff; but this does not appear to be so. The most that can be found in the judgment in support of this contention is the statement that "there is no evidence at all of defendants' possession beyond their allegation that Rup Kanta was their Chokanidar." Their allegation that Rup Kanta was such a Chokanidar is evidence which should have been considered by the lower Appellate Court and an express finding should have been come to whether that evidence was credible or not. It must be remembered that the defendants were successful before the Settlement Officer in getting their names entered in the Record of Rights; so, primarily there is a presumption in the defendants' favour and the burden of proof rests on the plaintiff.

Next it is contended on behalf of the appellants that the remark in the judgment which I have just quoted has reference to the defendants' possession after the attornment of Rup Kanta, and as the learned Judge seems to think that, that was the only point on which the case turned. That may be so. The case must, therefore, be remanded for a re hearing by the lower Appellate Court for a determination of the point whether at the time of the compromise between the plaintiff and Rup Kanta and Rup Kanta's attornments to the plaintiff, Rup Kanta was holding the land under the defendants on a tenancy which

was still subsisting. If the finding on this question be in the affirmative, the plaintiff's suit will be dismissed. If otherwise, the plaintiff will be entitled to the decree which she has obtained. The point will be decided on the evidence on the record.

I accordingly set aside the decree of the lower Appellate Court and remit this case to that Court for a re-hearing according to the remarks I have made above in my judgment.

Costs of this appeal abide the result.

Decree set aside;
Case remitted.

BOMBAY HIGH COURT.
ORIGINAL CIVIL JURISDICTION SUIT NO 339 OF 1918.
July 7, 1919.
Present:—Mr. Justice Pratt.
MURADALLY SHAMJI - PLAINTIFF
versus
B. N. LANG—DEFENDANT.

Presidency Towns Insolvency Act (III of 1909), s. 38 (b)—Discharge of insolvent, suspension of, effect of—Final order, whether necessary—Practice of Bombay High Court—Practice contrary to law, whether can be upheld—Civil Procedure Code (Act V of 1908), s. 80—Injunction, suit for, against public officer—Notice, failure to give, effect of.

A was adjudicated an insolvent and an order was made vesting his estate in the Official Assignee. Thereafter he applied for his discharge and an order was made accordingly, but under section 38 (*b*) of the Presidency Towns Insolvency Act the operation of the order was suspended for one year. Three years after the date of this order *A* acquired a business and the Official Assignee, in view of the fact that no final order of discharge had been made, took possession of *A*'s stock in trade and then restored possession and allowed him to continue his business on condition of his making payments for the benefit of his scheduled creditors. The Official Assignee then threatened to take possession and *A* filed the present suit to recover the sums which he had paid, for damages for trespass and for an injunction for the threatened trespass. Upon a preliminary objection being taken that as *A* had not given notice as required by section 80 of the Civil Procedure Code, the suit was not maintainable, he dropped his claim for damages and for the money paid:

Held, (1) that the suit in respect of the injunction for the threatened trespass was maintainable, even although the required notice under section 80 of the Civil Procedure Code had not been given; [p. 628, col. 2; p. 629, col. 1.]

(2) that the order of discharge operated from the date mentioned therein, and that *A* was entitled to the injunction for which he prayed, [p. 629, col. 2; p. 630, col. 1.]

The practice of the Bombay High Court requiring an insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension is contrary to law. [p. 630, col. 1.]

Practice is a useful guide where a Statute uses a language of doubtful import, but a practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful. [p. 630, col. 1.]

Mr. *Ghaswalla* (with him Mr. *Kanga*), for the Plaintiff.

Mr. *Desai* (with him Mr. *R. D. N. Wadia*), for the Defendant.

JUDGMENT.—On the 26th of September 1911 the plaintiff in this suit was adjudicated insolvent and an order was made vesting his estate in the Official Assignee. The plaintiff thereafter applied for his discharge and on the 2nd of October 1912 an order was made in the following terms:—'It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the 2nd day of October 1913." In 1916 and 1917 the plaintiff acquired a saddlery business. On the 22nd day of January 1918 the Official Assignee, considering that no final order of discharge had been made, took possession of the plaintiff's stock in trade and then restored possession and allowed the plaintiff to continue his business on condition of his making payments for the benefit of his scheduled creditors. On the 7th of March 1918 the Official Assignee threatened to re-take possession, and on the 8th of March the plaintiff filed this suit to recover the sums which he had paid to the Official Assignee, as he says, under coercion, for damages for the alleged trespass and for an injunction to restrain the threatened trespass.

A preliminary objection has been taken that the suit is not maintainable as the plaintiff has not given notice as required by section 80 of the Code of Civil Procedure.

There is no question but that the Official Assignee is a "public officer" entitled to such a notice: *Joosub Haji* v. *N. W. Kemp* (1). It is sought, however, to take this out of the operation of the section as one of the reliefs claimed is for an injunction to restrain a future act of trespass.

(1) 26 B. 809; 4 Bom. L. R. 929.

MURADALLY SHAMJI v. B. N. LANG.

Section 80 is as follows:—

"No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing, etc."

It is said that the words "act purporting to be done by such public officer in his official capacity" refer to past and not to future acts. If the matter were *res integra*, I should have found no difficulty in deciding that they do refer to future acts. If the words were limited to past acts, it would have been easy to express that limitation by such words as "purporting to have been done", as for instance in section 167 of the Bombay District Municipalities Act, 1901. I think it quite clear that the clause "purporting to be done by such public officer in his official capacity" is merely an adjectival clause qualifying the substantive word "act." The section refers to official acts without any reference to the time when the act was or is or is expected to be performed. The act may be past, present or future; but the only qualification imposed by the section is that it is one committed or likely to be committed in the execution or intended execution of some public duty.

In *Flower* v. *Local Board of Low Leyton* (2) a similar provision in the Public Health Act (38 & 39 Vic., c. 55) was held to be inapplicable to suits for an injunction. The judgment proceeded on the ground that a Court of Chancery would not have held that its jurisdiction to grant equitable relief was limited by the section; for otherwise irreparable injury might be done before the Court could intervene. The fallacy of this argument has been exposed in *Colls* v. *Home and Colonial Stores, Ltd.* (3). The Court of Chancery in its concurrent jurisdiction enforced legal rights by equitable remedies. But by inadvertence equitable doctrines were sometimes applied to the right instead of to the remedy. This process was stopped by the House of Lords in *Colls* v. *Home and Colonial Stores, Limited* (3). The Chancery Court had granted an injunction to restrain a building which would deprive plaintiff of some of the light he had been enjoying, but yet would not interfere with his common law right to such light as was necessary to make his house habitable. The Court of Chancery had thus inadvertently enlarged the plaintiff's common law right. The House of Lords overruled a multitude of decisions of Chancery Judges and held that the equitable remedy must be limited to the legal right. Lord Macnaghten said:—

"Courts of Equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief, or where an injunction was required to prevent multiplicity of actions."

Now, in *Flower* v. *Local Board of Low Leyton* (2) an injunction was granted where plaintiff had under the Statute no right of action and thus the equitable jurisdiction of the remedy was inadvertently used to enlarge the legal right on which the remedy was claimed. This is the very abuse condemned in the judgment of the House of Lords.

Flower v. *Local Board of Low Leyton* (2) is, therefore, no longer good law; and it is perhaps unnecessary to add that the Courts in India cannot invoke the equitable jurisdiction of the Court of Chancery to override the law as enacted in the Acts of the Indian Legislature.

However, *Flower's case* (2) was followed by this Court in *Secretary of State* v. *Gajanan Krishna Mavlankar* (4) and *Naginlal* v. *Official Assignee* (5). In the former case it was stated that if the future act was so imminent that it was practically impossible for the plaintiff to give notice and serious injury was threatened, the Court would not be debarred from entertaining the suit. This was an *obiter dictum*, as the suit was held to be barred. But it was followed in the second case, where the suit was filed to restrain a threatened sale by Official Assignee and was

(2) (1877) 5 Ch. D. 347; 46 L. J. Ch. 621; 36 L. T. 760; 25 W. R. 545.

(3) (1904 A. C. 179 at p. 188; 73 L. J. Ch. 484; 53 W. R. 30; 90 L. T. 687; 20 T. L. R. 475.

(4) 10 Ind. Cas. 639; 35 B. 362; 13 Bom. L. R. 273.

(5) 17 Ind. Cas. 876; 14 Bom. L. R. 1148; 37 B. 243.

held maintainable in spite of the fact that no notice had been given. Though I respectfully differ from this case, I am bound by it.

In this suit there are two distinct causes of action ; a tort already committed and a threatened trespass on the plaintiff's property. Damages are claimed for the first, and an injunction to restrain the second. The suit under the first cause of action is not maintainable. But the injunction is a substantive relief claimed under the second cause of action. The threat of trespass was made on the 7th of March. Danger was indeed so imminent that the suit was filed on the 8th of March, and the trespass was restrained by an interim injunction granted on the same day. Mr. Ghaswalla drops his claim on the first cause of action and elects to proceed only on the injunction in respect of the second cause of action, and under *Nagindal's case* (5) I think he is entitled to do so.

The finding on the second issue will be: Plaintiff having dropped the claim for damages and for recovering the money payable under coercion, suit is maintainable in respect of the injunction to restrain the threatened trespass.

After further arguments the Court delivered on the 25th July 1909 the following

FINAL JUDGMENT.—In view of the judgment on the 2nd issue, the only issue that survives is the first as to whether the plaintiff is entitled to an injunction.

There is a suggestion in paragraph 2 of the written statement that the property which the Official Assignee claims is not the property of the insolvent acquired after his discharge. If this were so, it might be contended that this property was vested in the Official Assignee and that the effect of the order of discharge was not to re-vest this property in the insolvent: *Thomas Pereira, In the matter of* (6). The point was raised at the time the order was made suspending the insolvent's discharge but it was not clear whether the question was then decided. However, Mr. Wadia does not make this defence and rests his case solely on the ground that the order of 2nd October 1912 did not operate as a discharge from 2nd October 1913, and that, therefore, the property, even though acquired by the insolvent after that date, is divisible among the insolvent's creditors under section 52 (2) (*a*).

But I think the words of the order of discharge are too clear to admit of this construction. The order runs in the form prescribed by the rules of this Court and it is as follows :—

"It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the 2nd day of October 1913."

The order, therefore, expressly grants his discharge from the 2nd of October 1913. Again the words of section 38 (*b*), under which the order was made, imply that the discharge is granted though its operation is suspended. The word 'operation' would have no meaning unless there were an order which did operate as a discharge. It is not the making of the order that is suspended but the operation of the order made. The Act makes no further proceedings necessary after an order of suspension under section 38 has been passed.

If authority is needed, the case of *Dove, In re, Bousfield* v. *Dove* (7) is very much in point. That was under the English Bankruptcy Act, 1847. Under that Act the order of discharge was made by grant of certificate of conformity, which was not effective until confirmed. An order was made suspending the grant of certificate of conformity in the following terms :—

"The said Commissioner did adjudge. . . , that the grant of...certificate of conformity be suspended for the period of three years from the 30th day of June now last and ordered it to be adjourned to the 30th day of June which would be in the year 1851."

After this order, the new Act of 1849 abolished the necessity for the confirmation of the certificate. It was then held that the order operated as a discharge from the 30th June 1851 and that the order was a final order, although in terms it adjourned the proceedings till that date. The Court said that the order of suspension of certificate was a grant of the certificate subject

(6) 1 M. H. C. R. 217.

(7) (1884) 27 Ch. D. 687; 53 L. J. Ch. 1039, 33 W. R. 197.

to such suspension. That is exactly the case here.

It is true that the practice of the Court is to require the insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension. Practice is a useful guide where a Statute uses a language of doubtful import, but a practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful: *Balkaran Rai* v. *Gobind Nath Tiwari* (8).

The plaintiff is, therefore, entitled to the injunction he seeks and in the circumstances I direct that he do recover half his costs from the defendant.

I find on the first issue in the affirmative.

Decree for the plaintiff in terms of prayers (*a*) and (*b*) of the plaint and that plaintiff do recover half his costs from the defendant.

Suit decreed.

(8) 12 A. 129 (F. B.); A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 831.

PRIVY COUNCIL.

APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

July 29, 1919.

Present :—Lord Buckmaster, Lord Atkinson, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

RAO KISHORE SINGH—PLAINTIFF—APPELLANT

versus

Musammat GAHENABAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Custom—Inheritance—Cessat ratio cessat lex, *applicability of—Impartible estates, origin of—Acceptance of* sanad *inconsistent with family custom, whether destroys custom.*

A special family custom of inheritance inconsistent with the ordinary Hindu Law may, if observed and acted upon, survive the primitive condition of things out of which it originally sprang. [p. 635 col. 1.]

In such a case the principle embodied in the expression *cessat ratio cessat lex* does not apply. [p. 637, col. 1.]

One of the ways in which impartible estates may originate is by independent chiefs or feudatories being reduced in course of time to the position of ordinary *zemindars*, but such estates may also owe their origin to family arrangements followed up in practice for generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of the whole family by a single member at a time in a certain order of succession, the other members being entitled to maintenance only. A family may expressly or impliedly agree to continue to observe such a custom, even though the conditions which at one time made it necessary have completely altered. [p. 636, col. 2.]

The mere acceptance by the head of a family governed by such a custom of a *sanad* from the Crown containing clauses inconsistent with the custom cannot destroy the custom or affect the order of succession which it prescribes. [p. 639, col. 1.]

Appeal from a decree of the Judicial Commissioner's Court of the Central Provinces, dated June 29, 1912, reversing a decree of the District Court, Nimar.

FACTS of the case are fully set out in their Lordships' judgment. The appellant sued for possession of the Estate of Rao Himmat Singh deceased, alleging a special family custom excluding females, by which he was entitled to succeed. The defendants were the mother and step-mother of Himmat Singh, who were entitled to succeed him by ordinary Hindu Law and had obtained possession. They denied the custom alleged, and pleaded that even if it existed, there had been a partition between their branch of the family and the junior branch to which plaintiff belonged. The trial Judge found the custom proved, and alleged partition not proved: he decreed the suit. On appeal his decision was reversed by the learned Judicial Commissioners (Batten and Stanyon), who found that whatever had once been the state of things, the family property had, since a settlement effected in 1864, when Sanads were issued by Government to the ancestors of the parties, become subject to the ordinary Hindu Law They summed up their conclusions as follows:—

"We have no doubt that Rao Daolat Singh and Shere Singh accepted each a separate estate from Government, which was liable, as the Commissioner pointed out to lapse to Government without reference

to the other: and whatever may have been the rights of the two branches of the family *inter se* in respect of their property under previous custom, we are clear that the property granted by the Sanads was in each case property subject to the ordinary Hindu Law of inheritance as the severalty of the grantee or as the estate of the grantee and his joint brethren."

They accordingly dismissed the suit.

Mr. *DeGruyther*, *K. C.*, and Mr. *H. Johnston*, for the Appellant, submitted that the trial Court had rightly found that the special family custom alleged was proved and subsisting. The Appellate Court had erred in treating the Sanads as a fresh root of title: these Sanads did not in fact confer any property at all. These Sanads only referred to a small part of the property, but they were relied on as showing that part of the property was treated as not being impartible, and the argument was that it had all ceased to be impartible. It was clear that the estate was impartible up to the time of Captain Mackenzie's report. That report showed that Captain Mackenzie never considered the precise point now raised. By taking a hereditary appanage in lieu of maintenance Shere Singh, the plaintiff's ancestor, did not destroy the impartibility of the Raj: the Appellate Court had misconstrued the agreement of 1811. Captain Mackenzie in his settlement proceedings had no intention of altering the order of succession, and whatever was intended either by him or by the higher revenue authorities, no fresh grant could alter the established custom of the family, which held its properties quite independent of and long before Captain Mackenzie's settlement.

The respondents did not appear.

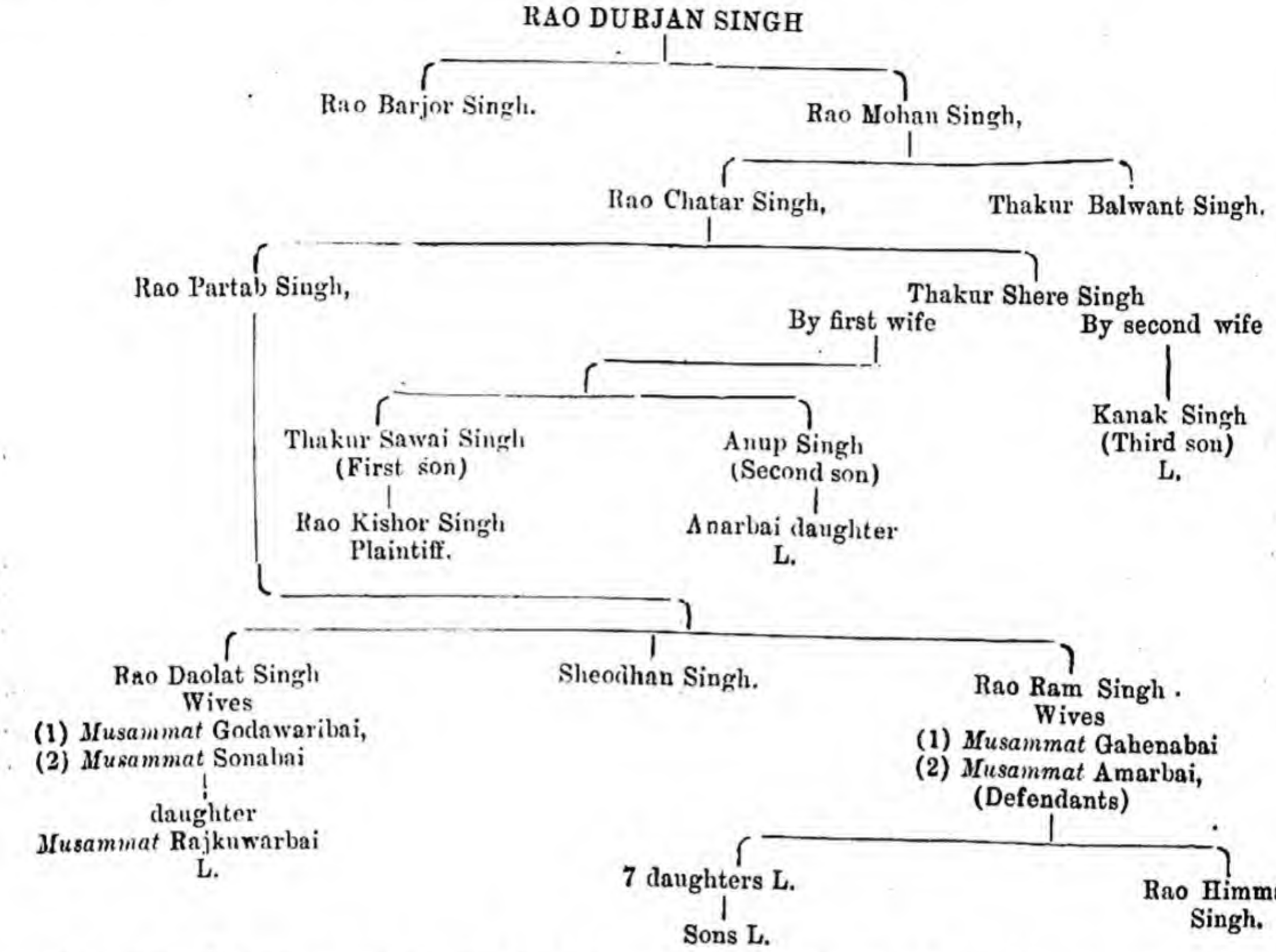
JUDGMENT.

LORD ATKINSON.--This is an appeal from the decision of the Judicial Commissioner of the Central Provinces on appeal from the District Court of Nimar, reversing a judgment of the latter Court in an action in which the present appellant was plaintiff and the present respondents were defendants. The fact that the respondents have not appeared on the hearing of the appeal before this Board, requires that the evidence, and the points raised in the case, should be examined by their Lordships in more detail than would have been necessary, had Counsel for both the appellant and the respondents appeared and presented their respective contentions to them.

The action out of which the appeal has arisen was brought by the appellant, Rao Kishore Singh, to have it declared that he, as sole heir of his second cousin, Rao Himmat Singh, who died on the 16th October 1906, was entitled to a certain estate, particulars of which are set out in detail in the schedules attached to the plaint, of which his said cousin was owner in possession at the date of his death, and also to recover possession of the same. The appellant claims this heirship by virtue of a special family custom upon which he relies, according to which, as he avers, (1) females are wholly excluded from inheritance; (2) on the death of a proprietor the whole estate passes to a single person, subject to the liability to maintain the other members of the proprietor's family; (3) on the death of a proprietor the male relative who is in the eldest line of male descent from him succeeds, and in default, the male relative in the eldest line of male descent, from his father, and next from his grandfather succeeds and so on. No restraint on alienation is imposed in other respects by this custom.

The respondents are the mother and step-mother of Himmat Singh, widows of his late father, Rao Ram Singh, claiming to be entitled as the latter's heirs to the aforesaid estate under the ordinary Hindu Law. They admittedly would be so if the alleged custom did not govern the descent

of the estate. The genealogical table of the appellant's family for the last six generations, which is set out in the plaint, is admitted to be correct, and runs thus :—



The letter " L " appears under the names of those persons still alive who are not parties to these proceedings.

It is in the plaint averred, amongst other things and subsequently found by the District Judge, that certain properties of which the appellant was then in actual possession were by a certain instrument in writing, dated the 21st January 1841, obtained by his grandfather, Shere Singh, from Rao Partab Singh, the then head of the family, in lieu of the yearly sum of Rs. 210, formerly received by him for maintenance. This document is Exhibit P. 42. From the extraordinary and, as it appears to their Lordships, misleading use made of it by the Appellate Court, it becomes necessary to examine its terms in detail. It is further averred that, with certain trifling exceptions, named by the District Judge, the whole family estate in the schedule to the plaint described descended from Rao Durjan Singh to Rao Barjor Singh, from him to Rao Mohan Singh, thence to Rao Chatar Singh, and from him to Rao Partab Singh, and thence to Rao Daolat Singh, all of whom are named in the above-mentioned genealogical table.

It is also averred and not disputed that Rao Daolat Singh died on the 23rd August 1850, possessed of the whole of the said family estates, leaving him surviving his two widows *Musammat* Godawaribai and *Musammat* Sonabai, and one daughter, *Musammat* Rajkuwarbai, who is still alive.

It is further averred that Rao Ram Singh, who was a younger brother of Rao Daolat Singh, lived separate from the latter, receiving certain sums of money for his maintenance; that on the death of Rao Daolat Singh, in the events which had happened, the family estates passed by inheritance to Rao Ram Singh, who gave by registered deed to the widows of his

brother, Daolat Singh, for their maintenance one village, some lands, a house and a cash allowance; and that after the death of these widows the property so given reverted to Rao Ram Singh, *Musammat* Rajkuwarbai receiving nothing; and that Rao Ram Singh died on the 30th May 1905, leaving him surviving two widows, the defendants in the case, one son, Himmat Singh, who died childless on the 31st May 1905, and seven daughters. In the written statement of the respondents filed the 13th November 1908, they, in addition to putting the appellant upon strict proof of the family custom relied upon, and denying that any rule of primogeniture existed in the caste and family to which the parties litigant belong, pleaded that even if the Court should find in favour of the existence of some kind of rule of primogeniture binding the family, it would be of no avail to the appellant, inasmuch as before the first Settlement in 1864 there was a partition of the family estates between the senior and junior branches of this family, by reason of which the junior branch enjoyed exclusively the property then in their possession; that Shere Singh, paternal uncle of Rao Daolat Singh, made a representation of this fact to the officer in charge of the Zamindari Settlement during its progress between the years 1858 to 1864, and that on the faith of this representation separate Jageer and pensions were allowed him to the detriment of the interest of Rao Daolat Singh, who, on the faith of the representation, did not claim a larger pension, nor the grant of the Jageer with respect to property assigned to Shere Singh; that Shere Singh, as one among numerous junior members of several Zamindari families, well knew that he would have, in future, no claim to the succession to the senior branch, but that on the extinction of heirs the property would lapse to the Government; and that the appellant was, by reason of the above representation, estopped from claiming any right to succeed to the property in suit, the above-mentioned partition having destroyed the right of the junior branch, if they had any, to succeed to it.

The respondents further plead in reference to the matters set forth in the third paragraph of the plaint that they have no personal knowledge of the grant of Rs. 210 per annum for maintenance, nor of the execution of the *ekranama* therein mentioned, but alleged that even if the Court were to find in favour of the existence of the agreement, it would be of no avail by reason of the aforesaid partition, and estoppel.

The appellant in a written statement in reply traversed all the material averments contained in the written statement of the defendants; and as to the sum of Rs. 210, said that it was at the Zamindari Settlement commuted by the Government into a hereditary annual pension of Rs. 150, and Mouza Malgaon on Jageer.

The following ten issues were settled by the learned District Judge, C. S. Finlay:—

"ISSUES.

"I. Under what circumstances are the appellations of 'Thakur' and 'Kuwar' applied to members of the Bhamgarh family?

"II. Does Government confer the title of Rao on the person succeeding to the Bhamgarh property and in particular was it conferred on plaintiff by Government on 29th January 1902?

"III. Does a law or custom of primogeniture prevail in the Bhamgarh family, and if so, what are its details and incidents?

"IV. Was there a partition between the senior and junior branches of the Bhamgarh family of the nature indicated in paragraph (2) (*c*) of defendants' written statement, dated 13th November 1908? If so, what is the effect of such partition on plaintiff's claim? Is plaintiff estopped from claiming a right to succeed to the property in suit?

"V. Did plaintiff's grandfather, Shersingh, receive a yearly grant of Rs. 210 as maintenance allowance under an 'Ikrarnamah' dated Magh Vadi 14 Sambat 1897, executed between Shersingh and Partab Singh? What is the effect of the partition and estoppel, if any, described in the last issue on this 'Ikrarnamah' and the arrangement made thereunder?

"VI. Has the British Government since its advent paid a definite sum to Shersingh in lieu of his Zamindari rights?

"VII. Is any of the property ancestral? Was all of it enjoyed by the several ancestors mentioned in paragraph (3) of the plaint? In particular are properties Nos. (30), (31),

(46) and (53) in the possession of the defendants? What is the nature of property No. (53)?

"VIII. Is plaintiff the heir of Rao Himmat Singh?

"IX. Are plaintiff's claims for a declaration and for possession redundant?

"X. To what relief is plaintiff entitled?"

The learned District Judge who tried the case, C. Sestra Rao, in a lengthy and elaborate judgment, delivered on the 19th November 1910, analyzed in minute detail all the evidence given in the case, oral and documentary. He dealt at length with the early occupation of Nimar by Rajput Chiefs as described in the Settlement Reports of Captain Forsyth and the Zemindari Settlement Reports of Captain Mackenzie, Commissioner for the Nerbudda Division, and also with those portions of the latter report relating to the history of the Zemindari property, the subject of this suit, and he found amongst other things:—

(1) That in the Bhamgar family to which the parties litigant belong the brothers of a sonless Gaddawale are styled Kuar, and should the Gaddawale have a son that son is styled Kuar and the child's paternal uncles are styled Thakur.

(2) That in this same family the Gaddawale gets the title of Rao, and that the Indian Government, on the 29th January 1908, conferred that title on the appellant on his succession to Rao Himmat Singh, deceased.

He then summarizes in the following words the historical conclusions which the above-mentioned reports of Captains Forsyth and Mackenzie appeared to him to establish:—

(1) That the Bhibala, the family to which the litigants belong, sprung originally from the intermarriage of one of the invading Rajput chieftains with a member or members of a local clan inhabiting the hills bordering on Nerbudda, and are now true Rajputs.

(2) That the ancestors of the plaintiff came from the north and occupied the Central Nimar about 20 generations ago.

(3) That they subdued the Bhils three or four centuries prior to the Muhammadan conquest of Nimar and were chiefs. (Paragraph 40 of Captain Forsyth's Settlement Report.)

(4) That they brought with them the institutions of their race, one of which is Gaddi. The succession to the Gaddi being by primogeniture and the other members being provided with maintenance.

(5) That in the time of the Muhammadan rule the chiefs were constituted hereditary Zemindars or fiscal officers of their tracts with "*hucs*," and were allowed to retain the villages actually in their possession.

(6) That in later times of the Muhammadan rule the Rajput Zemindars were deprived of all fiscal functions, though they were allowed to retain the title of Zemindar and the *hucs* and lands attaching to their offices. (Paragraphs 120 and 121 of the Settlement Report.)

(7) The Zemindars had property in the lands which were considered their private property.

(8) The Rajput Zemindars rendered nominal service to the State till the advent of the British Government and the Zemindari settlement.

These *hucs*, which took the shape of percentages of revenue collections, were of considerable value.

The learned District Judge, having thus dealt with the historical aspect of the case, proceeds to dispose of the different issues raised on the pleading, especially the third and most important issue, namely: "Does a law or custom of primogeniture prevail in the Bhamgar family, and if so what are its details and incidents?" The burden of proving this issue he rightly held lay on the appellant. The examination of the evidence bearing upon this issue covers 17½ printed pages of the Record, from page 301 to page 318. He ultimately finds that the custom of primogeniture prevails in the family of the parties litigant; that under it women were excluded from inheritance, and that the male relative who is in the eldest line of male descent from the last holder or his father or grandfather succeeds. It will be observed that the learned Judge uses the present, not the past tense, "prevails," and that he does not state that the custom involves any restraint on alienation.

It is in their Lordships' view clear that there was abundant evidence before the

learned Judge to justify him as a reasonable man in finding as he has found on this issue, and they do not find in the evidence anything to lead them to think that his conclusion was erroneous. Well, if he be right in this, this custom became the law of the family regulating the succession to the family estate. The ordinary Hindu Law did not apply to it save so far as it was not inconsistent with the custom. It is in their Lordships' view clear that such a custom may, if observed and acted upon, survive the primitive condition of things out of which it originally, from the very necessity of the case, sprung; and it is, they think, perfectly clear that the head of the family for the time being could not, by accepting from the Government of India a Sanad containing clauses inconsistent with the custom, destroy it or render it inoperative.

The learned District Judge then proceeds to deal with issues Nos. 4, 5 and 6. In reviewing the evidence bearing upon issues Nos. 4 and 5, he deals specifically with Exhibit P. 42, the agreement of the 21st January 1841, and the two Sanads dated the 18th December 1865, identical in all respects save as to the property dealt with, given to Rao Daolat Singh and Shere Singh respectively, and he finds that the evidence as a whole shows that there was no partition between Partab Singh and Shere Singh; that there was an agreement in January 1841, by which Shere Singh received Rs. 210 a year, a Jirat, and some trees as his maintenance allowance. On issue No. 6 he finds that the British Government realized the *hucs*, and that out of the *huc* due to Daolat Singh Rs. 210 were paid to Shere Singh, and the balance direct to him, and that Exhibit P. 42 lends support to the finding that Shere Singh received Rs. 210 direct from the Government. Ultimately the learned District Judge finds that the appellant is entitled to possession of the properties in suit except items Nos. 30, 31, 46 and 53.

Before dealing with the judgment of the Court of Apreal it would be well to examine this document, P. 42, considering the use which has been made of it by that tribunal. It is found at page 140 of the Record. It takes the form of a letter written by Shere Singh to Partab Singh. It runs thus :—

"I shall get Rs. 210 annually for my food and other expenses. You should, therefore, cause it to be paid to me directly from the Sarkar. (1) Chhote land of the village Rangaon. (2) Old Mango Grove at Bhampar. (3) Mowha Grove of Rampur. (4) The house situate on the road in which I live. I shall be receiving as above and I will serve the Raj and will go wherever ordered. My descendants and I will enjoy it. In case there shall be no descendant from me it will lapse to the Raj. I will not give it to anyone. I will not act against your pleasure."

It would be difficult to select words to indicate more complete loyalty and subservience to the Raj than do these words. It is simply an agreement by the head of the family to devote certain portions of the family property to the maintenance of a junior member, that is, an alienation *pro tanto* of an impartible estate which every head of such a family not restrained from alienation by a family custom is entitled to make, though the estate be impartible. [*Sartaj Kuari* v. *Deoraj Kuari* (1), *Gangadhara Rama Rao* v. *Raja of Pittapur* (2)] To treat it as it is treated by the Appellate Court at page 347 of the Record as an example of the semi-hostile assertion by the younger members of a family of a right to a provision out of the family as a permanent settlement, in the shape of a portion of the estate, is quite inaccurate.

The Appellate Court does not seem to have been of opinion that the evidence did not establish that the custom found by the District Judge to be an existing operative custom was not at some time or other before the Settlement of 1865 existing as an operative binding custom. So far they seem to concur with the learned District Court Judge. Where they differ from him apparently is that they hold that the custom, though once existing and operative, has ceased to be so, either because the primitive conditions out of which it sprung had ceased to exist, and, therefore, *cessat*

(1) 15 I. A. 51; 5 Sar. P. C. J. 139; 10 A. 272; 12 Ind. Jur. 212; 6 Ind. Dec. (N. s) 182.

(2) 47 Ind. Cas. 354; 45 I. A. 148; 35 M. L. J. 392; 24 M. L. T. 276; 16 A. L. J. 833; 41 M. 778; 28 C. L. J. 428; 5 P. L. W. 267; 20 Bom. L. R. 1056; 23 C. W. N. 172; (1918) M. W. N. 922.

ratio cessat lex, or because owing to the improvement in education and the spread of socialistic opinions consequent thereon, the custom has been so gradually but steadily and persistently encroached upon that it has, as it were, been eaten away, and has ceased to be observed or applied, or because it has been destroyed by the grant and acceptance of the Sanads above mentioned, since they contain provisions inconsistent with it. Indeed they regard these latter documents as decisive of the case.

The judgment of the Appellate Court contains many very lengthy quotations from the before-mentioned reports of Captains Forsyth and Mackenzie. The Court appears to have accepted as accurate the statements contained in these reports, though they involve, in some cases, as in the case of the agreement of the 21st January 1841 made with Shere Singh, the construction of a written document. At pages 346 and 347 of the Record, speaking of the report of Captain Forsyth, they say that it contains a reliable record of the antecedents of such families as that to which the parties litigant belong, and proceed to give a historical sketch of the conditions out of which the quality of impartibility of the estates of such families arose, as well as the circumstances under which it ceased to attach to them.

The outline of that history, they say, is "that certain families of Rajputs came into Nimar centuries ago, and settled here probably as rulers of petty domains there, then chiefly peopled by aboriginal tribes. . . . In days when the crude state of internal communications made decentralization of sovereign power indispensable, it is easy to understand that the Rajput clans, so established, even where nominally subject or in vassalage to some distant ruler, were practically independent chiefs in their own territories. Therefore, we find them with the royal title of Rao applied to the head of each clan, accompanied by such ensignia as a throne, a treasury and other attributes of sovereignty. Later, when the Muhammadan Dynasty asserted itself, and its own viceroys appeared on the scene, stripping the clans of their independence, the established Rajputs were still a power to be reckoned with, and they were reconciled and their loyalty secured by their appointment of each headman as the fiscal officer in charge of his estate. In this capacity . . . . the headman exercised considerable power. But as his unfitness for purely revenue work became more apparent, he was deprived of his powers by the substitution of a stipendiary establishment. Nevertheless for obvious political reasons his complacency was secured by a maintenance of his status and dignity. His title, his nominal authority over his tract, his property in land and the grant of perquisites, were continued, but it now ceased to be necessary that the clan should be represented by one acknowledged head. It is easy to understand that while each family possessed sovereign or *quasi* sovereign rights over any tract of country, it was indispensable that succession to the throne should be governed by a rule of primogeniture, and no doubt at that time and under those circumstances the family property as an undivided whole was under the governance of the family head, and remained attached to the Gaddi like any impartible Zemindari at the present day. Again, when the head of the family became the holder of a hereditary fiscal office it was still necessary to apply the rule of primogeniture for succession to the office."

No doubt one of the ways in which impartible estates may originate is by independent chiefs or feudatories, exercising almost autocratic powers, being gradually in the course of time reduced by a paramount power to the position of ordinary Zemindars; but these impartible estates may also owe their origin to family arrangements followed up in practice for many generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of the whole family by a single member at a time in a certain order of succession, the other members being entitled to maintenance only, without any power of interference with the management.

It is difficult to see why a family should not similarly agree expressly or impliedly to continue to observe a custom necessitated by the condition of things existing in primitive times, after that condition had completely altered. Their Lordships, therefore, are of

opinion that the principle embodied in the expression *cessat ratio cessat lex* does not apply where the custom outlives the condition of things which gave it birth.

The Appellate Court do not appear to have attached sufficient weight to the vast mass of evidence given on behalf of the appellant to the effect that the custom relied upon, whatever its origin, has been acted on and applied down to quite recent times.

This Court proceed next to show how a custom arising out of ancient conditions affecting the succession to the estates of a family such as that to which the litigants belong was superseded, and the succession to and enjoyment of those estates became subject to the ordinary Hindu Law. At pages 340 and 341 of the Record the Court set out the orders of the Indian Government prescribing the mode in which the recommendation of Captain Mackenzie should be carried out. The orders run as follows:—

"That the full value of the Zemindar's land and cash perquisites should be ascertained, and that, after deducting the amount of expenditure which would fall on Government, in lieu of their services, they should receive the balance in rent-free estates, and thereby revert to the position of *inamdars*.

"That in giving effect to this measure lands whether plots ('*zirait*') or whole estates ('Jageer') already held rent-free by the Zemindars should remain undisturbed, and new grants of rent-free estates should be made only in commutation for that portion of the cash perquisites which might remain after making the prescribed deductions.

"That the future status of the Zemindars as *inamdars* should be regulated by the principles of the Madras Inam Rules each case to be considered and decided on its own merits."

The plain object of these orders is to change the tenure by which the owners of estates such as that of the family of the litigants held their estates, and the rights and obligations attaching to that ownership of them. The Appellate Court, at page 341, state:—

"that in carrying out the object so aimed at it was discovered that besides actual heads of families there had sprung up a certain number of junior sharers who for several generations had enjoyed property and allowances independently of the heads of the families to which they respectively belonged. These were carefully distinguished from those cadets, or junior members, who received allowances from or were maintained otherwise by the head of each family. Captain Mackenzie found that the inclusion of these junior sharers raise the number of individuals requiring treatment to 78, whereof no less than 44 were junior share holders"

That statement is based entirely upon Captain Mackenzie's report. It may or may not be an accurate description of the general condition of affairs in this district. Their Lordships have not the means of determining, nor are they called upon to determine that question, but it would appear to be clear that it is not an accurate description as applied to the estate of the litigants' family, for this reason that where the Appellate Court, at page 347, line 20, apparently attempt to give instances of the three junior sharers existing for generations on the estate in suit, they are obliged to select Shere Singh claiming under Exhibit P. 42 the maintenance agreement of 1841, and (Exhibit 51) an agreement made on the 24th January 1865, in contemplation of the intended Government settlement, whereby certain provisions were made by Rao Daolat Singh for the maintenance of his brothers Sheodan Singh and Ram Singh. It is not too much to assume that if other instances of shares having been enjoyed for generations by junior sharers were available, those of cadets, whose titles began in 1841 and 1865 respectively, would not have been selected.

At page 347 the Appellate Court continue to deal with the same point. They say:—

"Again when the head of the family became the holder of a hereditary fiscal office, it was still necessary to apply a rule of primogeniture for succession to the office. But now the once *ruler* of the family had become merely the *representative* of the family for the management of such property, and the receipt of such perquisites as attached to the hereditary office. Thereupon the ordinary Hindu Law began to be reinstated and junior members asserted themselves as share-holders Still, while the ruling power recognised only the office-holder, the 'younger sons' were still to some extent under his sway, and their shares at his disposal. But the recurring demand for shares, and the advance of socialism in the family, due to education and the evanescence of all real

authority in the head, made permanent partitions of estate necessary. The subsistence which the younger brother once received as a favour from the lord of the manor now became a share claimed by him as a right, ever increasing in *quantum* towards that equality which is favoured by the ordinary Hindu Law, from which only the particular circumstances had for a time diverted enjoyment of the family property."

It is unnecessary for their Lordships to determine whether this reasoning would be sound as applied to any case. It is sufficient to say the facts which it assumes and upon which it is based do not exist in the present case. The Appellate Court have not been able to refer to a single instance other than those two already mentioned where the junior members asserted themselves as share holders in the manner described.

It only remains to deal with the Sanads. They run as follows: —

"Sir,

"Whereas you formerly held the office of Zemindar as a Pergunna Officer in the District of Nimar, and enjoyed certain allowances by way of Ziraut, Jageer, and cash percentages on public revenues, and *whereas* the services you rendered in that office will not in future be required by the Government, and *whereas* it has seemed fit to arrange for your proper maintenance in future in consideration of your previous services and present status: Therefore, the Governor General in Council has been pleased to order that your Ziraut and Jageer, as noted at foot hereof, continue in your possession in free-hold Inam, with the full power of alienation by gift, sale, adoption or otherwise, subject to good behaviour and the annual payment into the Government Treasury by half-yearly instalments of Rupees one hundred and fifteen as quit-rent.

"2. In token whereof this Sunnad is granted to you this Eighteenth day of December 1865.

'(Sd.) W. MUIR,

"Secretary to the Government of India."

Such a document as this is quite inapplicable to Shere Singh's case. He never held the office of Zemindar as a Pergunna or any other officer. He never enjoyed by virtue of such an office any percentages on public revenues. His maintenance is to be arranged in consideration of services he never was empowered to perform and never did perform. The reason why its use was resorted to is not far to seek.

At page 347 of the Record, line 29, the Appellate Court state that: —

"Captain Mackenzie found Shere Singh to be an independent sharer holding a distinct hereditable share independent of Rao Daolat Singh. It is reasonable to presume that Shere Singh himself led the Commissioner to that conclusion as a result of which he got an independent status as Zemindar and was given a separate Sanad in exactly the same terms as Rao Daolat Singh."

If Shere Singh did this he, it appears to their Lordships, grossly misrepresents his true position under the agreement of the 21st January 1841 (and he had no other title), but Captain Mackenzie, in the 38th paragraph of his report, states that: —

"38. '. . . . In very few cases is it known with any degree of certainty when the holdings enjoyed by these Zemindars were first acquired by them or in what they originated. It is, no doubt, probable that they were conferred in the first instance on some condition of service; and so it has been most convenient to assume as a general principle that they are service tenures. . . . So the service theory was maintained. It was the only theory upon which the tenures could be readily understood, written about, and generally dealt with. . . .'"

And accordingly Shere Singh's true position was misdescribed in the Sanad in order to fit the theory. As indeed was Daolat Singh's also to some extent. It occurs to their Lordships, there may have been another reason for inserting clauses expressly relieving those grantees from the further performance of their imaginary services.

The first case to be found deciding that the discontinuing of a service attached to an impartible estate did not alter the nature of that estate and render it partible is *Ramrao Trimbak* v. *Yeshvantrao Madhavrao* (3) heard and decided in 1885, twenty years after the Zemindari settlement; and it may possibly have been thought in 1865 that as the law then was supposed to stand, the release from these fictitious services would render the estate partible. But whether that be so or not, their Lordships are clearly of opinion that if this family custom

(3) 10 B. 327; 5 Ind. Dec. (N. S.) 606.

relied upon and found applied to and bound the estate the subject matter of this suit, the head of the family for the time being could not destroy that custom or release his estate from it by becoming grantee from the Crown under such a document as these Sanads. For these reasons they think the Appellate Court dealt with the case on mistaken principles, that their decision was wrong and should be reversed, that the decision of the District Judge was right and should be restored, and this appeal be allowed with costs in the Appellate Court and before this Board, and they will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the Appellant.—Messrs. *Adams and Adams.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos 1883 AND 1933 OF 1917.

May 2, 1919.

Present:—Mr. Justice Newbould.

BATA KRISTA PRAMANICK—DEFENDANT No. 1—APPELLANT

versus

SHEBAITS OF SRI SRI SRIDHAR JEW THAKUR JOGENDRA NATH MAITY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pleadings—Adverse possession, title by, not set up in plaint—Plaintiff, whether can succeed on plea of adverse possession.

The question whether a plaintiff can succeed on a title by adverse possession not set up in the plaint depends mainly on the facts of each particular case, and more particularly on whether the defendant has or has not been taken by surprise and whether he has had an opportunity of meeting the case so set up [p. 641, col 2.]

Appeals against the decrees of the Subordinate Judge, 2nd Court, Midnapur, dated the 26th of July 1917, reversing that of the Munsif, 2nd Court at Tamluk, dated the 21st of June 1915.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babus *Narendra Chandra Bose* and *Satyendra Nath Mitter*), for the Appellants.—These appeals arise out of two suits for recovery of possession on a declaration of title thereto. The first Court dismissed the suits. The Court of Appeal below decreed them on the ground that the plaintiffs had acquired title by adverse possession. My points are:—The learned Judge was not justified in granting a decree to plaintiffs on that ground, as it was not put forward in the plaint and no issue was joined on it. Secondly, if the plaintiffs can be permitted to succeed on such ground, there could have been no adverse possession for evidently their possession commenced since 1909. Adverse possession of an independent trespasser cannot be tacked to oust the possession of a third person. Refers to *Ram Lakhan Rai* v. *Gajadhar Rai* (1), *Lakshman* v. *Moru* (2), *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna* (3), *Secretary of State for India* v. *Vira Rayan* (4), *Guroo Churn* v. *Krishna Moni Gupta* (5). Assuming that such possession could be adverse, the possession must be adequate in continuity, publicity and content. Refers to *Secretary of State for India* v. *Krishnamoni Gupta* (6). Here merely because earth was thrown, that cannot be taken to be adverse possession. Their title must have been perfected before their possession was interrupted. Until the finding on the question of limitation is set aside, the lower Appellate Court cannot decide the question of adverse possession. See also *Ram Chandra Sil* v. *Ramanmani Dasi* (7).

Babu *Bipin Behari Ghose* (with him Babu *Sarada Charan Maity*), for the Respondent.—The first point raised by the other side was placed before both the Courts and they arrived at different findings thereon. The case in *Ram Chandra Sil* v. *Ramanmani Dasi* (7) is not in point. It merely follows *Sundari Dassee* v. *Mudhoo Ohunder Sircar* (8), which is the leading case on the point. I submit the present case is stronger than *Sundari Dassee's case* (8) for this reason, that in the present case in my plaint I state that my predecessor was in possession, whereas in the case cited the plaintiff merely claimed *lakheraj* title in the plaint and claimed to have been in possession in Court when the case was gone into. Defendant never proved his possession to the satisfaction of the Courts. The mort-

(1) 8 Ind. Cas. 1095; 33 A. 224 at p. 228; 7 A.L.J. 1184.
(2) 16 B. 722; 8 Ind. Dec. (N. S.) 960.
(3) 8 Ind. Cas. 639; 36 B. 79; 12 Bom. L. R. 956.
(4) 9 M. 175; 6 Ind. Dec. (N. S.) 519.
(5) 2 C. W. N. 315.
(6) 29 C. 518; 29 I. A. 104; 6 C. W. N. 617; 4 Bom. L. R. 547; 8 Sar. P. C. J. 269.
(7) 30 Ind. Cas. 890; 20 C. W. N. 773.
(8) 14 C. 592; 7 Ind. Dec. (N. S.) 392.

gagor had mortgaged all the rights he had in the properties, so the mortgagee would be entitled to everything that the mortgagor acquired. Hence the mortgagee by his purchase stands in the shoes of the mortgagor.

As regards the second point I do not claim my right independently of the mortgagor. I acquired and have continued the rights of my predecessors. Therefore, there is no question of tacking adverse possession by an independent trespasser, as I claim to have actually acquired my right by adverse possession through my predecessors in-interest. It is not a case of dispossessing a true owner. The question is not one of independent trespassers. Reads Rustomjee's ndian Limitation Act at page 504 on the point of taking of possession. Refers to *Lachho* v. *Har Sahai* (9). In neither of the Courts below was it raised that the land in dispute was not mortgaged. There is no room for doubt that we were the purchasers in execution of the mortgage-decree in 909. The case ought to be dismissed, as all the points now raised were discussed and decided by the Courts below. Refers to *Lilabati Misrain* v *Bishun Chobey* (10).

Dr. *Dwarkanath Mitter*, in reply.—The case in *Sundari Dassee* v. *Mudhoo Chunder Sircar* (8) is obviously distinguishable. Refers to *Ananda Hari Basak* v. *Secretary of State* (11). There is a clear distinction between a suit for declaration of title and a suit for possession on proof of plaintiff's title. Refers to *Joytara Dassee* v. *Mahomed Mobaruck* (12). If by the pleadings I was not called upon to meet the case I have been seriously prejudiced thereby. The plaintiff must produce the best available evidence. It is no use saying that the Court used certain expressions on the question of possession. The Sub-Judge has proceeded on the footing that plaintiff's predecessors were in possession. What was mortgaged was the *pattai* land. These lands could not have passed by the mortgage. There is nothing in the deed to show that there were other lands than the 15 plots which have been found to have been mortgaged.

(9) 12 A. 46 at p. 51; A. W. N. (1888) 43; 6 Ind. Dec. (N. S.) 778.

(10) 6 C. L. J. 621 at p. 635.

(11) 3 C. L. J. 316 at p. 330.

(12) 8 C. 976 at p. 980; 11 C. L. R. 393; 5 Shome L. R. 13; 4 Ind. Dec. (N. S.) 629.

The document distinctly says that. The other side apparently now want to set up a new case.

JUDGMENT.—These appeals arise out of two suits for recovery of possession of two plots of land on a declaration of the plaintiff's title thereto. The plaintiff's case is that these two pieces of land formed part of Jalpai Chak Purba and Paschim Gumai *alias* Kalagachee, which was permanently settled with the Raja of Mohisadal. On the 10th Assar 1281 corresponding to 7th June 1874, the Raja of Mahisadal granted a permanent lease of over 1,000 *bighas* of land to one Mohesh Chandra Kotal. These lands were held by Mohesh and his successors in-interest who are referred to as the Kotals and were mortgaged on the 14th August 1905 to one Pitambar Maiti. Pitambar brought a suit on his mortgage, obtained a decree and purchased the mortgaged properties in execution of the decree and was put in possession by the Court on the 12th August 1909. After Pitambar's death, in 1911, the plaintiffs in these suits succeeded to Pitambar's interest and subsequently made an endowment of these lands in favour of a deity, and the present suits were brought by the plaintiffs as Shebaits to that deity. The defendants claimed the lands as appertaining to the Jalpai Chak Gholl Andaria.

The first Court found that the plaintiffs had failed to establish any titles to the lands in suit and dismissed the suit.

The lower Appellate Court has found that the lands in suit were not specifically leased to the Kotals and has left open the question as to whether they appertain to the Chak claimed by the plaintiffs or to that claimed by the defendants, and has granted the plaintiffs a decree on the finding that they acquired a title by adverse possession.

Against this decree defendant No. 1 has appealed.

The main points urged in this appeal are, first, that the lower Appellate Court was not justified in granting a decree on a case not made in the plaint and on which no issue was framed, and secondly, that, if the plaintiffs could succeed on such a ground, they are not entitled to rely on the addition of the period of

adverse possession of the Kotals to the period of adverse possession by Pitambar and the plaintiffs.

As regards the first point it is true that in the plaint no claim is made to a title by adverse possession.

On behalf of the respondents reference has been made to paragraph No. 2 of the plaint. At most, the facts there stated amount to a suggestion that a title by adverse possession might be made out, but certainly that paragraph does not amount to a definite claim to a title on that account, also no issue as to the title by adverse possession was framed in the Court of first instance. It, therefore, appears at first sight that the case falls within the general rule laid down in the case of *Joytara Dassee* v. *Mahomed Mobaruck* (12).

But on behalf of the respondents it has been pointed out that exceptions have been made to this rule and reliance is placed on the decision in the case of *Sundari Dassee* v. *Mudhoo Chunder Sircar* (8). The question, therefore, is whether the facts of this case bring it within the exception laid down in that decision. The latest case to which my attention has been drawn is the case of *Ram Chandra Sil* v. *Ramanmani Dasi* (7) and I may quote the remarks of my learned brother, Mr. Justice Mookerjee, from page 785,* in that decision: "The question next arises, whether the plaintiff has established a title to the disputed land by proof of adverse possession for the statutory period. Here we cannot overlook the fact that title by adverse possession was not explicitly pleaded in the plaint. As ruled by this Court in *Sundari Dassee* v. *Mudhoo Chunder Sircar* (8), the plaintiff may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of Appeal, provided such a case arises on the facts stated in the plaint and the defendant is not taken by surprise." Also in the case of *Ananda Hari Basak* v. *Secretary of State* (11) the same learned Judge makes the following remarks: "The Subordinate Judge, however, not very consistently went to the question in his judgment and found that the plaintiff had acquired a good title by adverse possession. The appellants take exception to this course and contend that the plaintiff ought not to be allowed to succeed upon a case which was not made in the plaint. We think this argument is well founded and the case falls within the rule laid down in *Joytara Dassee* v. *Mahomed Mobaruck* (12) rather than within the rule in *Sundari Dassee* v. *Mudhoo Chunder Sircar* (8)."

I quote these remarks, as they show that the question whether a plaintiff can succeed on a title by adverse possession not set up in the plaint depends mainly on the facts of each particular case and more particularly on whether the defendant has or has not been taken by surprise, and whether he has had an opportunity of meeting the case so set up. In my opinion this case comes within the exception, and the facts and essential points resemble those in the case of *Sundari Dassee* v. *Mudhoo Chunder Sircar* (8).

It is contended that in that case one of the grounds of distinction was that that suit was not one for a declaratory decree. Personally I find some difficulty in appreciating the distinction between a suit to recover possession on a declaration of title and a suit to establish one's right to property and to recover possession. But it is clear from the judgment of Norris, J., in *Sundari Dassee's case* (8) that the case of *Joytara Dassee* v. *Mahomed Mobaruck* (12) was distinguished not on that ground but on the ground that the defendant was aware of the case which he had to meet. In that case it is stated that the plaintiff's suit was dismissed in the first Court. He appealed and in the grounds of appeal to the lower Appellate Court he distinctly gave notice to the other side, namely, that he was entitled to the land by adverse possession. Here, although no issue was framed on this title, evidence was adduced and the Munsif in his judgment dealt at considerable length with the question whether the plaintiffs have by adverse possession acquired any title to the lands." And also in the grounds of appeal to the lower Appellate Court the claim of a title by adverse possession was distinctly raised. I would, therefore, hold that although it is not claimed in the plaint, the plaintiffs are entitled to succeed on the proof of this title.

As regards the second point, Pitambar's possession commenced on the 4th August

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1909. So obviously as the suit was brought in March 1914, the title by adverse possession could not have accrued after the commencement of Pitambar's possession. The general proposition that independent trespassers are not entitled to add to the periods of their different possessions is not disputed, but it is contended on behalf of the respondents, and in my opinion rightly contended, that this is not a case of independent trespassers. The Kotals held these lands in dispute claiming them as lessees under the Raja, and Pitambar and his successors also held them on the strength of their purchase of the lessees' rights. There appears to have been no interval between the possession by the original lessees and the possession by the purchasers at the mortgage sale. Also on the facts found the respondents can uphold this decree on the ground that at the time of their purchase their predecessors, Kotals, had already been in adverse possession of this land for a sufficient period which extinguished any interest which the defendant might have had. Though, as is pointed out on behalf of the appellant, the learned Subordinate Judge has not distinctly stated in his judgment when the adverse possession commenced, he has recorded his belief in the evidence on this point as given by the plaintiff's witnesses and from the judgment of the first Court, it appears that their evidence shows that the adverse possession commenced not later than 1289. This amounts to a finding of fact that the Kotals were in adverse possession for over 12 years before the plaintiffs purchased from Pitambar, and consequently as Pitambar by his purchase obtained all the rights of the lessees not only under the lease but also acquired by them by adverse possession under a claim of right set up by virtue of the lease, this point must be decided against the appellant. The findings of the lower Court, which are findings of fact, are sufficient to support the decree which the plaintiffs have obtained.

It is contended on behalf of the appellants that the lands in suit were not covered either by the lease or by the mortgage of the leasehold interest and, therefore, the plaintiffs by their purchase at the sale in execution of the mortgage decree obtained no title to these lands. I hold, however, that as the lessees when holding by adverse possession claimed the lands by right of their lease, that interest also passed by sale of the leasehold interest.

On behalf of the respondents it is contended that these lands were covered by the lease, but on the view I take it is unnecessary to consider whether the effect of the lease was to grant the entire Chak with the exception of certain specified lands or only to grant the 15 plots of lands described in the schedule in the document.

The result is that these appeals fail and are dismissed with costs.

Appeals dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 321 OF 1918.

April 25, 1919.

Present—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

BAPPU REDDIAR—RESPONDENT No. 3—APPELLANT

versus

THE OFFICIAL ASSIGNEE, TINNEVELLY—PETITIONER—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 37—Fraudulent preference, proof of, requisites of—Burden of proof.

Where a transaction is impugned as amounting to fraudulent preference within the meaning of section 37 of the Provincial Insolvency Act, the burden lies on the Receiver, or the creditors who impugn the transfer, to make out that the transfer was made with a view to give preference. It is not sufficient to prove that the transaction took place within three months of the insolvency, and that in fact it had the effect of giving preference to the transferee it must be shown positively that the transfer was made with a view to prefer the creditor to whom the transfer was made, and unless such an intention is made out, the mere fact that the transfer would have such an effect is not sufficient to bring the case within the scope of the law. [p. 643, col. 2.]

Appeal against the order, dated the 31st August 1918, of the District Court, Tinnevelly in Civil Suit No. 27 of 1917.

FACTS.—Appeal under the Provincial Insolvency Act against an order annulling a sale made in the appellant's favour. The money realised by the sale was found to have been utilised to pay off two other debts in part, besides the appellant's debt.

Mr. *T. V. Muthukrishna Aiyar* (with him Mr. *Subbarama Aiyar*), for the Appellant.—Section 37, Provincial Insolvency

Act, applies to a sale made within three months of the adjudication in favour of a creditor. But a distinction has been drawn that the section applies only to voluntary transfers by the insolvent, and not to transfers made under "pressure." Legal process need not have been resorted to to constitute "pressure." See *Nripendra Nath Sahu* v. *Ashutosh Ghose* (1), see also *Karsandas* v. *Maganlal* (2), *Official Assignee of Madras* v. *Mehta & Sons* (3). The motive for transfer must be "preference of one creditor against another," and so necessarily relates to a voluntary preference. See also *Nalam Viswanatham* v. *Official Assignee of Madras* (4). And there is no suggestion that the price is inadequate.

Mr. *V. Purushothama Aiyar* (with him Mr. *T. R. Venkatarama Sastri*), for the Respondent. —The Court shall presume a transfer within three months of the adjudication to be a fraud on creditors. The present transfer does not wipe off any debt, other than that of the appellant. And none of these debts have been proved before the Receiver.

JUDGMENT.—After the order of remand was made by this Court on 26th March 1918 giving an opportunity to the transferee, the transfer in whose favour is impeached in this case under section 37 of the Provincial Insolvency Act, both the parties adduced evidence relevant to the matter and we have now got to decide on that evidence whether there is a case under section 37. A ruling of this Court in *Official Assignee of Madras* v. *Mehta & Sons* (3) and another of the Calcutta High Court in *Nripendra Nath Sahu* v. *Ashutosh Ghose* (1) lay down clearly after a full discussion of the authorities that it is for the Receiver, who is impugning a transaction as amounting to fraudulent preference within the meaning of section 37 of the Provincial Insolvency Act, to prove the allegation. No doubt in the order of remand, the learned Judges seem to have taken the opposite view. This is a question of law and we agree with the decisions already mentioned. The facts of this case are that Nagalingam Pillai's creditors' petition to declare him insolvent was filed on the 27th January 1914 and the transfer, which is a deed of sale in favour of the appellant, one of the creditors, was made on the 11th December 19.3, that is, within 3 months of the insolvency. The consideration for the sale was Rs. 1,000, out of which Rs. 500 was paid towards the debt due to the vendee himself and out of the balance, Rs. 400 was paid to a relation of the respondent's witness No. 2 who had a mortgage on another property of the insolvent and Rs. 100 to another creditor who had a mortgage. These are practically all the facts we have before us, to find whether the case comes under section 37.

The law lays down that it is not sufficient to prove that the transaction which is impugned took place within three months of the insolvency and that in fact it had the effect of giving preference to the transferee, but it has to be shown positively that the transfer was made with a view to prefer the creditor to whom the transfer was made. The burden lies, as pointed out in the decisions, on the Receiver or the creditors who impugn the transfer to make out that the transfer was made with a view to give preference. Unless such intention is made out, the mere fact that the transfer would have such an effect is not sufficient to bring the case within the scope of the law. As we have suggested, beyond the fact that the transfer was made within three months prior to the insolvency and that it had the effect of paying the transferee in full, while the other creditors would probably receive much less than their debt, there is nothing on which we can hold that the transfer was made with the intention contemplated by law. It is not suggested that the consideration for the transfer was not the proper value of the property. The transferee, it may be mentioned, is not a relation of the insolvent, in which case the Court might be inclined to view the transfer with suspicion. And there is some evidence, though it cannot be said to be of a very cogent character, that the transferee had been pressing for payment of his debts and that it was in pursuance of that demand

(1) 33 Ind. Cas. 543; 43 C. 640 at p. 643; 20 C. W. N. 420.

(2) 26 B. 476; 4 Bom. L. R. 94.

(3) 49 Ind. Cas. 963; 33 M. L. J. 190; 25 M. L. T. 265; 42 M. 510; (1919) M. W. N. 293.

(4) 32 Ind. Cas. 795.

the sale was effected. Under the circumstances, we cannot uphold the view taken by the learned District Judge that the case fell within the purview of section 37 of the Insolvency Act.

The learned Pleader for the respondent before us suggested that his client was misled by the observation in the previous order of the High Court as to the burden of proof. But there is nothing to show that the respondent was in any way prevented from adducing any evidence either at the original trial or after remand. In fact after the order of remand, he did adduce some evidence and we do not think that we can entertain the suggestion that he would have adduced better evidence if he did not think that the burden lay on the other side. It was his duty to have adduced the best evidence he had, either to prove that the transaction amounted to fraudulent preference or to rebut the proof of the other side that the transfer was *bona fide* and made for valuable consideration.

In the result, we set aside the order of the District Judge and dismiss the petition with costs here and in the Court below.

M. C. P.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No 3112 OF 1918.

May 17, 1919.

Present:—Mr. Justice Bevan Petman.

SHAH JAHAN—PLAINTIFF—APPELLANT

versus

INAYAT SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105—Interlocutory order, right to attack, in appeal against final decree, nature of—Compliance with order, whether debars appellant from contesting it.

The right conferred by section 105 of the Civil Procedure Code is unqualified and by complying with the directions or findings of an intermediate order a plaintiff is not deprived of the right to raise in appeal the question of the propriety of such order and to attack its correctness. [p. 645, col. 1.]

Plaintiff sued for possession by partition of definitely marked portions of certain premises, but was ordered to amend his plaint so as to include the whole of the premises under the penalty of having his suit dismissed. He amended his plaint accordingly. The first Court held that certain parts were not liable to be partitioned. In appeal the plaintiff attacked the order directing amendment of the plaint. The District Judge held that by complying with the order the plaintiff had divested himself of the right to dispute any part of the premises being included in the property to be partitioned. The plaintiff thereupon filed a second appeal to the High Court:

Held, that the plaintiff's compliance not being a voluntary one, he could go behind the order directing amendment of the plaint and that the lower Appellate Court erred in not considering and deciding whether this order was correct. [p 645, col 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 14th August 1918, affirming that of the Munsif, 2nd class, Jullundur, dated the 6th December 1917, passing a decree for 1/5th of the house.

Lala *Fakir Chand*, for the Appellant.

Diwan *Ram Lal*, for Mr. *Dalip Singh*, for Respondent No. 1.

ORDER.—The plaintiff-appellant instituted a suit for a $\frac{1}{4}$th share by partition of certain portions of premises. In his original plaint his claim related to the parts marked A and B on the plan on the record. In an amended plaint his claim related to the parts marked A, B, C, D and E. Thereafter, on the ground that other parts of the premises were joint and that a claim could not be made in respect of a portion only, the plaintiff was ordered, by an order dated the 30th April 1917, to amend his plaint so as to include the whole of the premises under the penalty, in the case of default, of having his suit dismissed. The proper order would have been one of rejection and not dismissal. The plaintiff amended his plaint accordingly. It was, no doubt, open to the plaintiff to elect not to amend further and to appeal from the rejection of his plaint.

One of the defendants, Inayat Shah, claimed the parts marked A and C as his exclusive property by virtue of his being the *mutwalli* of the *khankah* adjoining A. The first Court held, *inter alia*, that the parts marked A and C were *wakf* and not liable to be partitioned. The plaintiff appealed and in his third ground of appeal attacked the order of the first Court dated the 30th April 1917. The lower Appellate Court held that, by complying with the order of the first Court instead of letting his suit be dismissed and then appealing from the dismissal (which it held the proper course to be adopted) and by presenting the plaint in its

final form, the plaintiff had divested himself of the right to dispute any part of the premises being included in the property to be partitioned.

No authority is given for this decision, which appears to be incorrect. Under section 588 of the Code of Civil Procedure of 1882 an appeal was given from an order directing the amendment of a plaint, but this right was not maintained by the present Code which by section 105 merely gives the right to attack such an order in the appeal from the decree in suit The right conferred is unqualified and there is nothing to support the contention that by complying with the directions or findings of an intermediate order a plaintiff is deprived of the right to raise the question in appeal and to attack the correctness of the order. It appears to me that a plaintiff is not compelled to run the risk of losing the whole suit by allowing his plaint to be rejected, as he well might under the law of limitation. The result of failure on appeal might be disastrous. A compliance under the circumstances of this case cannot be regarded as a purely voluntary one. No authority has been quoted to me, nor apparently does any exist, that, under such circumstances, a plaintiff cannot go behind an order for amendment, whilst section 105 of the Code apparently gives him the right to do so. I hold, therefore, that the lower Appellate Court erred in not considering and deciding whether the order of the first Court dated the 30th April 1917 was correct. The plaintiff appellant was entitled to have a decision of the lower Appellate Court on the question whether the parts of the premises alleged by him to be his exclusive property were of that description and whether the order of the first Court directing an amendment of the plaint was correct.

Apart from section 105 of the Code it would certainly be anomalous that, whereas a party has the right to appeal from a decree based on a finding of fact, he should have no such right, except by allowing the Court to reject his plaint, and possibly run considerable risk where the finding of fact results not in a decree but merely in an intermediate or interlocutory order.

In addition to the above I find that the lower Appellate Court has fallen into substantial errors. In dealing with grounds 2 and 3 of the appeal together, it was under the erroneous idea that the plaintiff was contending that the parts of the premises marked A and C ought not to have been included in the property to be partitioned, and that the appellant was precluded from this contention by the order of the first Court dated the 30th April 1917. As explained above, the plaintiff's claim prior to that order had been for the partition of these parts. He objected to the inclusion of entirely different parts which defendant No. 2 desired to include. Grounds 2 and 3 of the appeal related to distinct matters. Ground 2 challenged the finding of the first Court with regard to the parts of the premises held to be *wakf*. As to this the lower Appellate Court remarks: "Counsel for both sides addressed to me some eloquent arguments on the question whether part of the property is a *khankah* and *wakf*. I regret that I overlooked at the time the fact that this point was not mentioned in the grounds of appeal and so does not arise. However, the contention that parts of the disputed area are *wakf* was only brought forward on the assumption that the decision of 30th April 1917 could now be set aside. As I hold that it cannot, it is unnecessary for me to deal with the point."

The above remarks shew an entire misconception of the case of the appellant. It is clear that ground 2 of the appeal did raise the question whether the parts marked A and C were *wakf* and the order of the first Court of the 30th April 1917 was not in respect of these parts but in respect of parts which the plaintiff had not included in his plaint. The plaintiff prayed for the partition of parts A and C, and this prayer had been refused by the first Court on the ground that those parts were *wakf*. The plaintiff-appellant was entitled to contest the finding of the first Court on this point.

For the reasons stated above I remand the case to the lower Appellate Court and direct it to re-hear the appeal in respect of grounds 2 and 3 of the appeal instituted by the appellant in that Court in the light of the above remarks and to decide the matters raised thereby and to return its findings to this Court by an early date.

Case remanded.

KASTURI PILLAI v. MUNICIPAL COUNCIL, ERODE.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 67 OF 1919.

August 7, 1919.

Present:—Mr Justice Bakewell and Mr. Justice Odgers.

KASTURI PILLAI—DEFENDANT—APPELLANT

versus

MUNICIPAL COUNCIL, ERODE REPRESENTED BY THE CHAIRMAN, T. SRINIVASA MUDALIAR—PLAINTIFF—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 9, 12, 16, 18, 45—Award—Possession taken by Government—Property, whether vests in Government—Notice under s. 9, failure to give, effect of—Person aggrieved by award, remedy of—Reference to Court.

Under section 16 of the Land Acquisition Act the making of an award and taking possession of land thereunder vest the property absolutely in the Government and the mere fact that notice has not been served on the occupier of the land in accordance with sections 9 (3) and 45 of the Act does not render the award or subsequent proceedings void, nor does it prevent the vesting of property in the Government. [p. 646, col. 2]

The remedy of a complainant who has had notice of an award under section 12 of the Land Acquisition Act is to apply for a reference under section 18 of the Act. No other remedy is provided by the Act. [p. 646, col. 2.]

Ganga Ram Marwari v. *Secretary of State for India*, 30 C. 576, followed.

Mysore Balakrishna Rao v. *Secretary of State for India*, 20 Ind. Cas. 255; 39 M. 494; 2 L. W. 695; 29 M. L. J. 276; 18 M. L. T. 151, *Rameswar Singh* v. *Secretary of State for India*, 34 C. 470; 11 C. W. N. 356; 5 C. L. J. 669, distinguished.

Second appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 69 of 1918, preferred against the decree of the Principal District Munsif, Erode, in Original Suit No. 2250 of 1916.

FACTS appear from the judgment.

Mr. *T. M. Krishnaswami Aiyar*, for the Appellant.—The award in this case is void, as also all proceedings subsequent thereto. Section 9 (3) of the Land Acquisition Act makes it imperative that the occupier of the land should have notice of the intended acquisition by the Government. Any proceedings taken under the Act without complying with that condition are null and void. See *Rameswar Singh* v. *Secretary of State for India* (1), *Mysore Balakrishna Rao* v. *Secretary of State for India* (2) as to the effect of failure to issue notice required by Statute.

Mr. *S. Duraiswami Ayyar*, for the Respondent.—The defendant had notice of the award and he had no other course open to him, if he felt himself aggrieved, than to ask for a reference under section 18. Section 12 states that the award is final and conclusive subject to the result of the reference under section 18. The fact that notice did not issue to any party interested or that the latter was *ex parte* in the enquiry by the Collector, will not nullify the award.

The cases cited by the appellant's Vakil do not apply. Neither of them bears on the acquisition of land.

The decision in *Ganga Ram Marwari* v. *Secretary of State for India* (3) is exactly on all fours.

JUDGMENT.—Under section 16 of the Land Acquisition Act (I of 1894) the making of an award and taking possession of the land vest the property absolutely in the Government. It has been argued that, if notice on the occupier has not been served in accordance with section 9 (3) and section 45, the subsequent proceedings and the award are void.

Assuming that such service has not been sufficiently proved in the present case, section 12 provides that the award shall be final and conclusive, whether the persons interested have appeared or not, as to the question which can be dealt with by the Collector under section 11, subject to the right of the party to require a reference to the Court under section 18. The declaration made by the Government under section 6 is conclusive evidence that the land is needed for the purposes sanctioned by the Act. All that the parties interested can urge before the Collector is that the area of the land is not properly stated, the compensation proposed is insufficient and the amount has been wrongly divided amongst them. The defendant had notice of the award under section 12 and his remedy was, therefore, to apply for a reference under section 18, and no other remedy is provided by the Act.

(1) 34 C. 470; 11 C. W. N. 356; 5 C. L. J. 669.
(2) 20 Ind. Cas. 355; 39 M. 494; 2 L. W. 695; 29 M. L. J. 276; 18 M. L. T. 151.

(3) 30 C. 576.

CHIRANJU v. MOHAN LAL.

We think that the decisions cited by the learned Vakil for appellant have no bearing on the point. That reported in *Rameswar Singh* v. *Secretary of State for India* (1) does not relate to the acquisition of land, but merely decides that the owner of a franchise can sue for damages when land necessary for the exercise of his rights has been acquired without notice to him; it does not deal with the validity of the award and the vesting of the land thereunder. That reported in *Mysore Balakrishna Rao* v. *Secretary of State for India* (2) decides that a Forest Officer exercising judicial functions does not acquire jurisdiction until notice of his proceeding has been given to the party interested. The Collector in making his award is not acting judicially. In any case the award must be regarded as passing title to the property under section 16 until it has been set aside, and we think that cannot be treated as void in a suit in ejectment.

The case in *Ganga Ram Marwari* v. *Secretary of State for India* (3) is precisely in point and we respectfully agree with that decision.

The second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 22 OF 1918.

June 23, 1919.

Present :—Mr. Lyle, A. J. C., and Mr. Ashworth, A. J. C.

CHIRANJU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Babu MOHAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 10—Pre-emption—Notice, issue of, time of—Contract of sale entered into prior to issue of notice, effect of—Fraud, absence of—Period during which notice should remain affixed—Co-sharers aware of notice, effect of.

In order to comply with the provisions of section 10 of the Oudh Laws Act, it is not necessary that the notice must be issued before any contract to sell has been entered into: the notice is quite good if it is issued after the contract has been entered into but before the actual sale has been completed: nor is it, in the absence of any fraud on the part of the vendor or the vendee in the publication of the notice, necessary that the notice should remain affixed on the *chaupal* or other public place of the village in which the property is situate for the whole period of three months, especially in a case where it is found that the notice did remain so affixed for a sufficiently long period, that the co-sharers were aware of the issue of the notice and that along with the affixation of the notice the proposal of sale was notified throughout the village by beat of drum. [p. 648, cols. 1 & 2.]

Appeal from the decree of the Additional Subordinate Judge, Hardoi, dated the 5th December 1917.

Mr. *A. P. Sen*, for the Appellants.

Babu *Basudeo Lal*, the Hon'ble Pandit *Gokaran Nath Misra* and Babu *Puttu Lal*, for the Respondents.

JUDGMENT.—The plaintiffs brought this suit for pre-emption of the village of Sailapur, which the Deputy Commissioner of Hardoi as manager of the Court of Wards of the Kakrali estate had sold to the defendants for Rs. 52,500. The plaintiffs claimed that as under-proprietors in the village they were entitled to pre-emption as against the defendants and that no notice as required by Act XVIII of 1876 had been duly published. The plaintiffs also alleged that they had duly made a tender of the price asked for the villaga but their tender had been refused.

The defendants denied the plaintiffs' right to pre-empt, and they also pleaded that the notice required by Act XVIII of 1876 had been duly issued and that no tender had been made by the plaintiffs.

The learned Subordinate Judge has found that the Deputy Commissioner as manager of the Court of Wards gave due notice of the intended sale as required by section 10 of Act XVIII of 1876 and that no tender was made by the plaintiffs. On these findings he has dismissed the plaintiffs' suit and the plaintiffs appeal.

There is no force whatsoever in the appeal. The learned Counsel for the appellants admits that he cannot dispute the actual service of the notice, that is, the fact that a notice of the sale was affixed to the *chaupal* of the village; but he argues that for two reasons that notice

was not in accordance with the provisions of section 10 of Act XVIII of 1876. He points out that while section 10 requires that when any person proposes to sell any property in respect of which any persons have a right of pre-emption notice shall be given to the persons concerned, in the present case the notice itself (Exhibit A2) shows that the Court of Wards had *already agreed to sell* this property to Babu Mohan Lal and others before the notice was issued. He urges that in order to comply with the provisions of section 10 the notice must be issued before any contract to sell has been entered into, and that a notice issued after the contract has been entered into but before the actual sale has been completed is not a notice which complies with the provisions of section 10 of the Oudh Laws Act. In our opinion there is no force in this argument. A contract for the sale of immoveable property does not of itself create any interest in or charge on such property (section 54, Transfer of Property Act), and so long as the sale has not been completed, the mere fact that a contract for the sale has been entered into prior to the issue of the notice clearly would not render the notice invalid. He further urges that in order to be a valid notice under section 10 of the Oudh Laws Act a notice stuck up on a *chaupal* of the village in which the property is stituate must remain affixed there for the period of three months, during which the price may be tendered by any person entitled to pre-empt. This argument also has no force. Section 10 of the Act provides that a notice given through a Court shall be deemed sufficiently given if it be stuck on the *chaupal* or other public place of the village in which the property is situate. It does not require that the notice shall remain affixed for the whole period of three months, and such a provision would be utterly unreasonable, as it would be tantamount to requiring the vendee to make provision for assuring that the notice should remain affixed for the long period of three months lest a claim might subsequently be made for pre-emption. Had any fraud either on the part of the vendor or the vendee in the matter of publication of the notice been proved, if for example it had been shown that although the notice had been duly stuck up at the *chaupal* it had been immediately afterwards removed by or at the instigation of the vendor or the vendee, it might reasonably have been argued that no valid notice had been given; but in the present case no such fraud is even alleged. There is evidence on the record that the notice remained affixed to the *chaupal* for at least fifteen or twenty days and there is further the admitted fact that the plaintiffs were aware of the issue of the notice; and two of them filed an application in the Court of the Subordinate Judge shortly after the notice had been affixed at the *chaupal*, in which they stated that a notice under section 10 of Act XVIII of 1876 had been issued. And there is further evidence that not only was the notice affixed at the *chaupal* but the fact that it was proposed to sell the property was notified throughout the village by beat of drum.

It is further urged that the appellants tendered the price but the tender was refused by the vendor. We agree with the learned Subordinate Judge in holding that in fact the appellants never brought the sum of Rs. 52,500, the sale-price, to Hardoi; but even if it were held that they had brought this money to Hardoi, there is no evidence whatsoever on the record to show that any tender of it was made to the vendor. All we have is that the appellants filed an application before the Subordinate Judge stating their readiness to purchase and when they were properly referred to the vendor, they spoke about the matter to the *mukhtar* of the Court of Wards. The *mukhtar* of the Court of Wards has indeed denied that he was ever approached by the plaintiffs-appellants but even if we were to accept the evidence of the plaintiffs-appellants, there is nothing to show that any tender was ever made to the Deputy Commissioner, and indeed it is admitted by them that the money was left at the *sarai* and was never taken even to the *mukhtar* of the Court of Wards.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1205 OF 1918.

July 8, 1918.

Present:—Mr. Justice LeRossignol and Mr. Justice Wilberforce.

E. D. DIGNASSE, OFFICIAL LIQUIDATOR OF THE PEOPLE'S BANK OF INDIA LIMITED IN LIQUIDATION—

APPELLANT

versus

CHAJJU RAM, REPRESENTING CREDITORS, AND FAQ'IR CHAND, REPRESENTING CONTRIBUTORIES OF THE SAID BANK—

RESPONDENTS.

Companies Act (VI of 1882), s. 142—Official Liquidator, resignation of—Sanction of Court, whether necessary.

An Official Liquidator is not at liberty to resign without the sanction of the Court which appointed him. [p. 649, col. 2.]

Miscellaneous first appeal from the order of the Hon'ble Mr. Justice Broadway in charge of liquidation, dated the 5th April 1918, accepting the resignation of the appellant on certain conditions.

Messrs. *B. R. Suri*, *Herbert* and *L. James*, for the Appellant.

Mr. *Santanam* for Mr. *Petman* and Lala *Bulwant Rai*, for Chajju Ram, Respondent.

JUDGMENT.—On the 14th January 1918 the appellants, who are the Official Liquidators of the Amritsar and People's Banks, tendered their resignation of their office, and this is an appeal from the order of a Single Bench of this Court disposing of that application and accepting the resignation subject to certain conditions. At the opening of the case, Mr. Puri, on behalf of the appellants, requested the Court to sanction the appearance on behalf of the appellants of Mr Langford James, an Advocate of the Calcutta High Court who is not, however, enrolled in this Court; and after some discussion regarding the treatment meted out in a recent case in the Bombay High Court to an Advocate of this Court, we decided as a special case to hear Mr. James, on the strict understanding that our action should not be regarded as establishing a precedent and should not work prejudice to any action which this Court may see fit to take in the matter, and more particularly upon the assurance given to us by Mr. James himself that, so far as he was aware, no rule existed in the Calcutta High Court whereby an Advocate of this Court would be restrained from appearing before that Court.

Before us three main points have been urged on behalf of the appellants:—

(1) that an Official Liquidator is competent to resign at will and that the Liquidating Court has no say in the matter;

(2) that in this case, at any rate, even if the resignation of the Official Liquidators was subject to acceptance by the Liquidating Court, the Liquidators had shown good cause why their resignation should be accepted;

(3) even if the appellants failed on the two preceding arguments, it was contended that the *quantum meruit* fixed by the learned Judge in Chambers was altogether an inadequate remuneration for the efforts of the Liquidators.

Our findings in brief on these three points are that an Official Liquidator is not at liberty to resign without the sanction of the Court which appointed him and that in the present case the Official Liquidators have made out no good case why their resignation should be accepted. With regard to the third point, it is impossible for us to say, inasmuch as there is no evidence upon the record, whether the rate of remuneration proposed by the learned Judge in Chambers is adequate or not; but inasmuch as the appellants have expressed before us no desire to resign except unconditionally, we see no need to go into this question at the present juncture. Should, however, the appellants on some later date desire to retire from their post on terms, the adequacy of the rates proposed by the learned Judge could be reconsidered.

According to the rules made under the English Law, resignation of the Official Liquidator may be accepted by the contributories and the creditors but if those bodies do not accept the resignation, it is the Court which decides finally whether the resignation is to be accepted or rejected. The law in England is to this effect:—

A Liquidator appointed by the Court may resign or, on cause shown, be removed by the Court.

Here the words "on cause shown" obviously refer only to the removal by the Court. The Indian Law is contained in section 142 of the Companies Act which runs:—

Any Official Liquidator may resign or be removed by the Court on due cause shown.

It will be observed that in the Indian Act the construction of the section differs very considerably from that of the English Act, and we must hold that such a marked deviation was made of set purpose in order to leave no doubt that the words "on due cause shown" govern not only the removal by the Court but also the resignation. On these grounds we hold there is nothing in the law justifying the proposition that an Official Liquidator can resign at will without securing the concurrence of the Liquidating Court. The real question indeed is one of contract: at the time of his appointment, what did the Official Liquidator undertake to do? and to answer this question reference must be had to the order of appointment. Now, the appellants were appointed to liquidate the insolvent banks, and it is quite clear that the appointment contemplated the complete liquidation by the appellants of the insolvent concerns. Their remuneration, as has been found by another Bench of this Court, was fixed on an excessively generous scale but a sliding one, and it would be contrary to the principles of common sense, of business, and of equity that they should be permitted to resign at any moment on no better ground than caprice or resentment at enquiries regarding the nature of their past operations. A person who has entered into a contract may refuse to carry out that contract, but if he does so he is liable to pay forfeit, and the order of the learned Judge in Chambers amounts to an acceptance of the breach of the appellants' contract on their paying forfeit in the shape of a reduction of their remuneration. In the course of liquidation proceedings extending over four years, the appellants have acquired a wide and peculiar knowledge of the affairs of the insolvent banks. For the acquisition of this knowledge they had been liberally remunerated and if they are now permitted to resign, as it would be impossible for them to transfer their entire knowledge to their successor, it is obvious that the liquidation would be delayed and rendered more costly. On these grounds we hold that the appellants are not entitled to resign unconditionally.

We are not at all impressed by the argument that if the Official Liquidators have to give an account of their doings, the work of the liquidation will be hampered, but before us a fresh argument was adduced that Mr. Dignasse was in a bad state of health induced by the arduousness of his labours as Liquidator. Inasmuch, however, as there is no evidence on this point on the record, as it was not mentioned by the appellants in their application to resign and finds no place in the grounds of appeal to this Court, we can pay no attention to it. Other minor matters are mentioned in the grounds of appeal but none of them have been mentioned before us, and we hold them to be of no force. For these reasons, we dismiss the appeal with costs which must be paid by the appellants personally.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUITS NOS. 180 AND 178 OF 1919.

February 22, 1919.

Present:—Mr. Justice Pratt.

VITHALDAS CURSONDAS—PLAINTIFF

versus

DULSUKHBHAI VADILAL AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 129—Bombay High Court Rules (Original Side), r. 223—Originating summons, procedure by way of, when can be adopted—Suit for partnership accounts and damages, whether can be instituted by originating summons—Procedure.

An originating summons is not the proper procedure where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. The action should be confined to matters which are capable of decision in a summary way. [p. 651, col. 2.]

An action was instituted by an originating summons in which the plaintiff sought a declaration that a partnership between himself and the defend-

ants had been dissolved, and asked for an account of the partnership, damages for breach of the partnership agreement and an indemnity for certain liabilities incurred:

Held, that as considerable evidence would have to be taken in order to determine the matters in dispute, the procedure by way of originating summons was not the appropriate procedure for the action. [p. 651, col. 2.]

Mr. *Kania*, for the Plaintiff.

Mr. *Inverarity*, for the Defendants.

JUDGMENT.—This is an action instituted by an originating summons in which the plaintiff seeks a declaration that a partnership between himself and the four defendants was dissolved in October 1918, an account of the said partnership, damages for breach of the partnership agreement from defendants Nos. 1 and 2 and an indemnity for liabilities incurred in dealings with one Lallubhai.

The defendants object that the summons should be dismissed under rule 223, as this form of action is not appropriate to the matters in dispute.

Provision was made for this form of action by the addition of appropriate words in section 26 of the Civil Procedure Code. But as Order IV, rule 1, requires every suit to be instituted by a plaint, a suit cannot be instituted by originating summons under the Civil Procedure Code.

The procedure rests solely on rules made by this Court under the Letters Patent and section 129 of the Civil Procedure Code.

These rules generally follow the English procedure which is enacted in the Rules and Orders of the Supreme Court. These limit the procedure to the determination of questions of construction of deeds and Wills, of questions arising in the administration of an estate or trust and of questions arising out of requisitions and objections made between vendor and vendee of land.

As to the English procedure it seems clear that it does not apply where questions of fact are in dispute. Lord Lindley in the case of *Powers, In re, Lindsell* v. *Phillips* (1) said:—"A summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact;" and again in *Giles In re, Real and Personal Advance Company* v. *Michell* (2) Cotton, L. J., said that this form of action "was intended...to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to enable the Court to determine matters which involve a serious question."

It is contended that these authorities do not apply as the Bombay rules are wider. There is some force in this contention, for our rules go further than the English rules and allow a partner to take out an originating summons and the procedure approximates more nearly to that of a regular suit, for the rules contemplate pleadings. A plaint is required by rule 218 and a written statement is permitted by rule 221.

The rules do not forbid questions of fact being determined on an originating summons, and I am not prepared to hold that this form of action is always inappropriate whenever there is a question of fact in dispute.

But I think it clear that an originating summons is not the proper procedure where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. There is no machinery for discovery and inspection, and rule 223 indicates that the action should be confined to matters which are capable of decision in a summary way.

In the present case considerable evidence will have to be taken both as to the breach of contract alleged against the first and second defendants and the *quantum* of damages for which they are liable.

I, therefore, dismiss this summons with costs and refer the parties to a regular suit.

Summons dismissed

(1) (1885) 30 Ch. D. 291 at p. 296; 53 L. T. 647

(2) (1890) 43 Ch. D. 391 at p. 397; 59 L. J. Ch. 226; 62 L. T. 875; 38 W. R. 278.

JHAMMAN LAL *v.* BHAGWAN DAS.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 278 OF 1918.

April 11, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

JHAMMAN LAL—PLAINTIFF—APPELLANT

versus

BHAGWAN DAS—DEFENDANT—RESPONDENT.

Negotiable instruments—Hundi—*Maker of* hundi, *liability of, extent of.*

The maker of a *hundi* is responsible for the money payable thereon, and his liability is not discharged by the holder in due course getting payment of what is due, and the ultimate drawee is entitled to recover from the maker what he paid on it. [p. 652, col. 2.]

Appeal from the decree of the District Judge, Lucknow, dated the 27th May 1918, reversing that of the Additional Subordinate Judge, Lucknow, dated the 10th December 1917.

Pandit *Harkaran Nath Misra*, for the Appellant.

Babu *Gokal Prasad*, for the Respondent.

JUDGMENT.—This was a suit for the recovery of money due in connection with certain Hundi transactions to which the plaintiff and the defendant were parties. Bhagwan Das wanted some money to pay to his creditors and approached Jhamman Lal, who agreed to lend as much as he required. On the 22nd May 1916 Jhamman Lal drew a Hundi for Rs. 2,500 in favour of Baldeo Prasad on Bhagwan Das, which was payable in 61 days. In lieu thereof Bhagwan Das executed on the 27th May 1916 four Hundis, one for Rs. 1,000 in favour of Ishri Prasad-Ram Sahai, another for Rs. 350 in favour of Sadhu Ram-Ram Gopal, another for Rs. 400 in favour of Jathmal-Sadashuk'a and the last for Rs. 700 in favour of Hira Lal-Chunni Lal. All these Hundis were drawn on Baldeo Prasad who is now stated to have been the agent of Jhamman Lal, and they contained a note stating that Jhamman Lal was to be ultimately liable for the same. This note was described as Sri Nishani and indicates according to the evidence adduced in the case that the *prima facie* liability rested on Baldeo Prasad but the ultimate liability was enforceable against Jhamman Lal. The liability of Jhamman Lal under those Hundis was, therefore, something like that of a drawee in case of need.

The holders of those four Hundis recovered the moneys due on them and have no claim left as against Baldeo Prasad and Jhamman Lal, the drawees. Bhagwan Das accepted the Hundi for Rs. 2,500 drawn by Jhamman Lal but when it was presented for payment by Parbhu Dayal Manna Lal in whose favour Baldeo Prasad had endorsed it, he dishonoured it and refused to pay its amount. Parbhu Dayal-Manna Lal intimated the fact of dishonour to Baldeo Prasad who informed Jhamman Lal. Jhamman Lal thereupon paid the money due on the Hundi to Baldeo Prasad, from whom Parbhu Dayal-Manna Lal recovered what was due to them.

In the present suit Jhamman Lal claims the money due on the four Hundis executed by Bhagwan Das, of which he was the Sri Nishani drawee or roughly speaking a drawee in case of need. He also relies on the Hundi which he had himself drawn on Bhagwan Das in consideration of the same. The Court of first instance decreed the claim but the lower Appellate Court dismissed it

It is not possible, however, to understand the reasoning on which the decision of the lower Appellate Court proceeds. In regard to the four Hundis for Rs. 2,450 drawn by Bhagwan Das, the lower Appellate Court observes that they were duly honoured at the appointed time and the money due on them paid in the ordinary course. The liability of the maker is not, however, discharged by the holder in due course getting payment of what is due. Baldeo Prasad admits that he got what he had paid from Jhamman Lal. As the ultimate drawee of these Hundis Jhamman Lal is, therefore, entitled to recover what he paid on account of them from the maker.

In regard to the Hundi for Rs. 2,500 the lower Appellate Court observes that the only person who could complain that the Hundi had not been dealt with in accordance with law, that is who could complain that he had not been paid, was the holder of the Hundi. But that statement leaves out of account the liability of the acceptor as against the maker. Section 32 of the Negotiable Instrument Act (XXVI of 1881) lays down that, in the absence of a contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of

the note or acceptance respectively, and the acceptor of the bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand. In default of such payment as aforesaid such maker or acceptor is bound to compensate any party to the note or holder for any loss or damage sustained by him and caused by such default. Bhagwan Das as the maker of the four Hundis for Rs. 2,450 is, therefore, responsible to Jhamman Lal for the money payable on them. He is equally responsible as the acceptor of the Hundi for Rs. 2,500 to pay the money due on that Hundi to Jhamman Lal or, in other words, to compensate the drawer for any loss or damage sustained by him and caused by his default in making the payment. Sections 78 and 90 of the said Act, to which the learned Counsel for the defendant-respondent has referred, have no application, because the holders of these Hundis have already received payment from Jhamman Lal. The acceptor never held the Hundi for Rs. 2,500 at or after maturity in his own right.

The appeal is, therefore, allowed and the claim of the plaintiff-appellant decreed with costs here and hitherto and future interest at 6 per cent. per annum from the date of the suit till payment. The defendant-appellant will bear his own costs throughout.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2532 OF 1917.

May 30, 1919.

Present :—Mr. Justice Shadi Lal and Mr. Justice Martineau.

THE OFFICIAL LIQUIDATOR, INDUSTRIAL BANK OF INDIA, LIMITED, IN LIQUIDATION—PLAINTIFF—APPELLANT

versus

KESHO DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Companies Act (VII of 913), ss. 184, 186—Company in liquidation—Suit by Official Liquidator to recover money due on promissory note—Defendant, whether entitled to set off sum due to him—Liquidation Court, jurisdiction of—Summary process, whether justified Prior order of Liquidation Judge aisallowing plea of set-off, whether bar—Civil Procedure Code (Act V of 1908), O. VIII, r. 6.

The Official Liquidator of a Bank in Liquidation sued to recover a sum of money due on a promissory note executed by the defendants, who claimed to set off against the plaintiff's demand the money received by the Bank by way of security for the due performance of his duties by *K.*, one of the two defendants, on his appointment as cashier of the Bank. It appeared that the defendants were members of a joint Hindu family and that the money deposited with the Bank belonged to the family. Moreover, the Bank in its dealings had treated the money as belonging to both the brothers:

Held, (1) that the defendants who were debtors on the promissory note were creditors in respect of the money deposited as security and were, therefore, entitled to raise the plea of set-off. [p. 654, col. 1.]

(2) that as the defendants were not contributories of the Bank, the Court conducting the liquidation had no jurisdiction to recover by a summary process the money due from them on the promissory note; [p. 654, col. 1.]

(3) that an opinion expressed by the Liquidation Judge with regard to the plea of set-off did not operate as *res judicata*. [p. 654, col. 1.]

Second appeal from the decree of the District Judge, Lyallpur, dated the 23rd May 1917, varying that of the Senior Subordinate Judge, Jhang, dated the 12th March 1917, decreeing the claim in part.

Diwan *Niranjan Parshad*, for the Appellant.

Mehta *Bahadur Chand* and Lala *Fakir Chand*, for the Respondents.

JUDGMENT.—This appeal and the cross-Appeal No. 2723 of 1917 arise out of an action brought by the Official Liquidator of the Industrial Bank for the recovery of a sum of money due on a promissory note executed by the defendants, Kesho Das and Wazir Chand, on the 16th of March 1912. The defendants, who are brothers, claimed to set off against the plaintiff's demand the money received by the Bank by way of security for the due performance of his duties by Kesho Das, who was appointed a cashier of the Bank. The Courts below have accepted this defence, and the main question for determination is whether the defendants are entitled to the set-off claimed by them.

It appears that Kesho Das was appointed a cashier in November 1910, and that on the 30th November 1910 a sum of Rs. 2,500 was deposited as security. The District

Judge, concurring with the Court of first instance, finds that the defendants are members of a joint Hindu family, and that the money deposited with the Bank belonged to the family. This finding, which proceeds upon the evidence adduced by the parties, is a finding of fact and cannot be assailed in second appeal. Indeed, all the circumstances go to shew that the deposit was treated by the Bank as made by both the brothers, and it is beyond dispute that, when Kesho Das retired from the office of cashier, he was succeeded by Wazir Chand on the 1st February 1912 on the same security deposit. The Bank in its dealings regarded the money as belonging to both the brothers, and upon that finding it is clear that the defendants, who were debtors on the promissory note, were creditors in respect of the money deposited as security. The lower Courts were, therefore, right in giving effect to the plea of set-off, *vide Mehr Chand* v. *Amritsar Bank* (1).

As to the contention that this plea could not be entertained, because the Liquidation Judge has already disallowed it by his order of the 9th October 1915, it is sufficient to say that, as the defendants were not contributories of the Bank, the Court conducting the liquidation had no jurisdiction to recover by a summary process the money due from them on the promissory note. Mr. Niranjan Parshad admits that the liability on the promissory note could be enforced only by a regular suit, and it is obvious that the question of set-off could arise only with respect to the Liquidator's claim for the recovery of that money. Any opinion expressed by the Liquidation Judge cannot, therefore, preclude the defendants from putting forward their claim by way of set-off in answer to the plaintiff's demand; and we accordingly endorse the conclusion of the lower Courts that the bar of *res judicata* has not been established.

It appears that Wazir Chand was removed from his office on the 1st of December 1913, and there is nothing to shew that the money deposited by way of security could not be claimed by the defendants immediately after that date. The Courts below have held that on the 3rd of December 1913 the defendants gave notice to the Bank to set off the amount due to it on the promissory note against their security deposit, and to pay them the balance. In these circumstances we must hold that the Bank, whose claim was legally discharged, is not entitled to recover any interest after the 1st of December 1913.

For these reasons we dismiss the appeal preferred by the Liquidator, but accepting that of the defendants and reversing the decree of the lower Appellate Court restore that of the Court of first instance with costs throughout.

This appeal is dismissed with costs.

Appeal dismissed.

(1) 28 Ind. Cas. 975; 63 P. R. 1915; 89 P. L. R. 1915; 69 P. W. R. 1915.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 164 OF 1918.

June 10, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

RAMES CHANDRA CHAKRABARTI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SASI BHUSAN UPADHAY—DEFENDANT—RESPONDENT.

Hindu Law—Widow, alienation by—Reversioner joining in alienation, effect of—Necessity, proof of—Presumption—Burden of proof—Reversioner, right of, nature of—Estoppel.

The circumstance that a conveyance of a portion of her husband's estate is executed jointly by a Hindu widow and the then next reversioner, does not by itself create an indefeasible title in favour of the vendee, who can successfully resist a claim by the reversioners only on proof of legal necessity or such *bona fide* inquiry as entitles him to protection from a Court of Equity. A mere recital in the deed as to the existence of such necessity, by itself, is insufficient. Where, however, the alienation is made with the concurrence of, or jointly with, the then next reversioner, there is a presumption in favour of the validity of the transaction. [p. 655, cols 1 & 2; p. 656, col. 1.]

In order to discharge the burden of proving the existence of legal necessity, the true rule is that the creditor, to protect himself, where he is not shown to have made a *bona fide* inquiry, must prove that there was an actual pressure on the estate or danger to be averted, such as a threatened suit on a genuine debt, an outstanding decree or an impending sale, which the widow had no funds to meet. [p. 657, col. 1.]

RAMES CHANDRA CHAKRABARTI v. SASI BHUSAN UPADHAY.

Where persons contesting an alienation by a Hindu widow claim not through their father but directly as reversioners to the estate of the last male owner, they are not precluded by any rule of estoppel from disputing the validity of the alienation, nor are they affected by the circumstance that they had, after the death of their father and before the death of the widow, taken by inheritance land transferred by the widow by way of gift to their father. [p. 658, col. 2.]

Appeal against the decree of the Subordinate Judge, 24-Perganas, dated the 13th March 1918.

Babus *Brajalal Chakrabarti*, *Biraj Mohan Mojumdar* and *Hiralal Chakrabarti*, for the Appellants.

Babus *Surendra Nath Guha* and *Rishindra Nath Sarkar*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of possession of land with mesne profits upon declaration of title. The disputed property admittedly belonged to one Mahim Chandra Chakrabarti, and upon his death, which took place on the 27th June 1892, passed to his widow Monmohini, who died on the 28th October 1915. The plaintiffs are the four sons of Umesh Chandra Chakrabarti, the brother of Mahim Chandra Chakrabarti, who died in 1908, and they claim the estate of their uncle as reversionary heirs after the death of their aunt The defendant is the son of Annapurna, a sister of Mahim and Umesh, and claims title to the property by purchase under a conveyance executed on the 16th June 1895 by Monmohini and Umesh. The Subordinate Judge has held that the plaintiffs have failed to prove that the conveyance does not operate against them and has dismissed the suit. On the present appeal, the substantial point for investigation is, whether the conveyance in favour of the defendant has passed to him a title operative against the plaintiffs as the reversionary heirs to the estate of their paternal uncle.

We may observe at the outset that the circumstance that the conveyance in favour of the defendant was executed jointly by the widow and the then next reversioner did not by itself create in his favour an indefeasible title. This is conclusively settled by the decision of the Full Bench in *Debi Prosad Chowdhury* v. *Golap Bhagat* (1), where it was ruled that the transferee acquires a good title as against the actual reversionary heirs, if the widow has alienated her entire interest in the estate inherited by her from her husband, with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs: *Gopeswar Misra* v. *Gopini Baishnabi* (2) and *Shyomadas Roy* v. *Radhika Prosad* (3). This view has now received the approval of the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (4). In the case before us, the conveyance covers a portion of the estate of Mahim Chandra inherited by his widow; consequently, the defendant can successfully resist the claim, only on proof of legal necessity or such *bona fide* enquiry as entitles him to protection from a Court of Equity.

It is well settled that in a suit of this description, instituted for recovery of property alienated by a Hindu widow in possession of her husband's estate, the burden of proving that there was legal necessity or *bona fide* enquiry rests in the first instance on the person who claims title from the widow: *Amar Nath Sah* v. *Achan Kuar* (5), *Maheshar Baksh Singh* v. *Ratan Singh* (6), *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (7), *Nanda Lal* v. *Jagat Kishore Acharjya* (8) and *Brij Lal* v. *Inda Kunwar* (9). Recitals in deeds as to the existence of such necessity cannot by themselves be relied upon for the purpose of proving the assertion of fact which they contain; the existence of neces-

(1) 19 Ind. Cas. 278; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499 (F. B.).

(2) 21 Ind. Cas. 200; 17 C. W. N. 1062; 19 C. L. J. 18.

(3) 47 Ind. Cas. 853; 22 C. W. N. 846; 29 C. L. J. 24.

(4) 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105 (P. C.).

(5) 19 I. A. 196; 14 A. 420 (P. C.); 6 Sar. P. C. J. 197; 7 Ind. Dec. (N. S.) 637.

(6) 23 I. A. 57; 23 C. 766 (P. C.); 7 Sar. P. C. J. 19; 6 M. L. J. 127; 12 Ind. Dec. (N. S.) 508.

(7) 35 I. A. 48; 35 C. 420; 7 C. L. J. 335; 12 C. W. N. 393 (P. C.); 10 Bom. L. R. 230; 5 A. L. J. 184; 18 M. L. J. 100; 3 M. L. T. 344; 14 Bur. L. R. 49.

(8) 36 Ind. Cas. 420; 44 C. 186; 24 C. L. J. 487; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

(9) 23 Ind. Cas. 715 (P. C.); 36 A. 187; 18 C. W. N. 649; 26 M. L. J. 442; (1914) M. W. N. 405; 15 M. L. T. 395; 19 C. L. J. 469; 12 A. L. J. 495; 16 Bom. L. R. 352; 1 L. W. 794.

sity must be substantiated by evidence *aliunde*: *Brij Lal* v. *Inda Kunwar* (9), *Nanda Lal* v. *Jagat Kishore Acharjya* (8) and *Ranga sami Gonnden* v. *Nachiappa Gounden* (4). Where, however, the alienation is made with the concurrence of or jointly with the then next reversioner, a presumption arises in favour of the validity of the transaction. The exact nature of this presumption was described in the case of *Debi Prosad Choudhry* v. *Golap Bhagat* (1). The consent of persons who are the guardians of the widow and are, as the next possible takers of the estate, most deeply interested in its preservation, indicates the propriety of the transaction; but the presumption is not conclusive and is rebuttable. This follows from a long series of decisions of the Judicial Committee which were reviewed by the Full Bench and also from the later decisions in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* (10) and *Rangasami Gounden* v. *Nachiappa Gounden* (4). As the consent of the reversioners, who, in the words of Lord Dunedin in the case last mentioned, might fairly be expected to be interested to quarrel over the transaction, thus affords a presumptive proof of the propriety of the transaction, the circumstances under which the consent was given must be carefully scrutinised, and if it transpires that the transaction was in essence a device to divide the estate with the reversioner, his consent must manifestly lose its probative force. Let us now test the evidence in the light of these principles.

Mahim Chandra Chakrabarti, as the evidence unmistakably shows, was a man of means. The application for Letters of Administration presented by his widow on the 22nd July 1892, within a month of the date of his death, states that he left 1,584 *bighas* of land valued at Rs. 8,700, and a sum of Rs. 629 due from creditors against most of whom decrees had been obtained. There is no indication that the extent of the assets was overvalued; it is certainly not customary for people to overestimate the value of an estate where succession duty has to be paid. Besides, the statement in the case before us was verified by the defendant as also by the brother of the widow, who later on became a transferee of a portion of the estate. Different witnesses give varying figures for the income of the immoveable property; in our opinion, an estimate of Rs. 2,000 a year does not err on the side of excess. The widow obtained the Letters of Administration and entered upon the management of the estate. In less than three years, we find that she proceeds to execute almost simultaneously a number of documents whereby she alienates a considerable portion of the estate left by her husband These transactions may be conveniently enumerated as follows :—

(*i*) 15th June 1895—Conveyance of 261 *bighas* of land in favour of her brother Syama Charan Bhattacharyya for an alleged consideration of Rs. 3,499.

(*ii*) 15th June 1895—Conveyance of 285 *bighas* of land in favour of the defendant (her husband's sister's son) for an alleged consideration of Rs. 2,499.

(*iii*) 18th June 1895—Deed of endowment of 13 *bighas* 15 *cottahs* of land in favour of Trailokya Nath Chakrabarti for the worship of the family deities.

(*iv*) 18th June 1895—Deed of gift of 252 *bighas* of land, valued at Rs. 1,500, in favour of Umes Chandra (her husband's brother), the then next reversioner.

(*v*) 18th June 1895—*Ekrarnama* in favour of Umes Chandra undertaking not to act to the prejudice of the reversion in respect of the properties still left in her hands (area estimated at 705 *bighas*, *i.e.*, less than a half of the entire estate).

There can be no doubt that each of these transactions formed part of a carefully organised and matured plan for distribution of the estate; we have the significant fact that stamps for the documents were purchased simultaneously from the same stamp vendor on the 12th March 1895. It may be added that there were intermediate alienations, namely, a permanent lease in favour of one Bangsi Mandal on the 14th April 1895, for a premium of Rs. 400; on the same date there was another lease in favour of Ainuddin for a premium of Rs. 740 and a conveyance in favour of Satish Chandra Chakrabarti for Rs. 300. There was also a mortgage of some land executed on the 15th June to Bangsi Mandal for a loan of Rs. 500, which is said to have

(10) 23 Ind. Cas. 162; 41 C. 793; 18 C. W. N. 673; 19 C. L. J. 620; 27 M. L. J. 123; 16 M. L. T. 68; (1914) M. W. N. 430; 1 L. W. 533; 16 Bom. L. R. 425; 12 A. L. J. 711 (P. C.).

been repaid the very next day, out of the alleged consideration for the sale to the defendant. The various alienations we have mentioned took place with the concurrence of the then next reversioner, and as the parties are proved to have acted under legal advice, the policy pursued is not difficult to appreciate. As the law was generally understood at that time, *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (11), an alienation by a widow, even of a portion of the estate of her husband, was taken to convey an absolute title to the purchaser, provided it was made with the concurrence of the then next reversioner. No doubt, a general recital of necessity was also inserted in the deeds, but evidently the real foundation of the transactions was the consent of the immediate reversioner. The defendant now finds himself in a state of unexpected embarrassment by reason of subsequent judicial pronouncements; he is consequently driven to support the transfer in his favour, solely on grounds of legal necessity and *bona fide* enquiry. In our opinion, this attempt has ended in a complete failure

As regards legal necessity, we must bear in mind that it is not sufficient for the transferee to prove that there were some debts payable by the deceased full owner or his widow. A person who claims title under an alienation from her must prove that there was legal necessity for it, that is, such pressure on the estate at the time the alienation was made as justified the act of the widow. The creditor is not protected merely by proof that the money raised has been applied for the benefit of the estate. The true rule is that the creditor, to protect himself—where he is not shown to have made a *bona fide* enquiry—must prove that there was an actual pressure on the estate or danger to be averted, such as a threatened suit on a genuine debt, an outstanding decree or an impending sale, which the widow had no funds to meet: *Rameswar Mandal* v. *Provabati Debi* (12). Tested from this point of view, there is no solid foundation laid here for proof of legal necessity for the sale to the defendant. There is a general recital in the conveyance that Mahim had contracted debts which could not be repaid out of the income. There is no specification of debtors or of the amount of their dues. The only debt specified, namely, the mortgage executed in favour of Bangsi Mandal on the previous day, was manifestly illusory. The transaction, as we have seen, had been arranged at least three months earlier when the stamps were purchased on the 12th March 1895. The fact that a mortgage was executed on the 15th June and is said to have been repaid on the 16th June out of the alleged consideration for the conveyance, is not calculated to inspire confidence in the genuineness of the transaction. Evidence was brought forward at the trial to show that decrees had been obtained against the widow for small sums of money due for arrears of rent, but most of these appear to have been satisfied. Some rough account books of Mahim have been produced to show that from time to time he used to take loans from others; the aggregate of the entries selected comes to about Rs. 1,000. But the account books are obviously incomplete; in some places, entries have been cut out in an inexplicable manner; in other places, there is no credit side. It is impossible to draw any inference from these account books as to the financial position of Mahim at the time of his death. On the other hand, it is a matter for legitimate comment that the account books of 1895, that is, the year in which these transactions took place, are not forthcoming. They would have shown, if properly kept, the exact state of the family funds and the mode in which the alleged considerations for the sales and leases, if really received by the widow, were applied by her. No reliance can be placed upon the assertions made by the defendant in his oral testimony to show that Mahim at the time of his death was in debt to the extent of nearly Rs. 2,700. These allegations are not corroborated by contemporaneous documentary evidence and are not strengthened by testimony that Mahim sometime before his death had been sued by Sarat Kumari, one of his sisters-in-law, for a share of the ancestral properties of her husband. As already stated the evidence, if accepted, tends to show that Mahim sometimes used to take loans and at the time of his death probably left some debts. Beyond this the evidence does not carry us, and we have really no information

(11) 22 C. 354; 11 Ind. Dec. (N. S.) 228.

(12) 25 Ind. Cas. 84; 20 C. L. J. 23 at p. 28; 19 C. W. N. 313.

as to the state of family affairs at or about the time when the series of transactions mentioned took place. We must not also overlook the fact that the defendant knows all about the transactions, while the plaintiffs have no personal knowledge of them; indeed, the first plaintiff was a child two years old when the sale took place, and his brothers, the other plaintiffs, had not been born then. In our opinion, the claim of the defendant cannot possibly be supported on the ground of justifying legal necessity.

As regards *bona fide* enquiry, the position of the defendant is, if possible, weaker still. He is by no means a stranger to the family. After the death of his father, he was brought up in the family of Mahim who was his maternal uncle. It is not necessary to determine what was the precise extent of the influence exercised on Monmohini by her brother and her nephew respectively. It is clear that the defendant was intimately acquainted with, even if he did not actually look after, the affairs of Monmohini. In these circumstances, no question of *bona fide* enquiry really arises.

We have further evidence to show that the consent of Umesh to the alienation was obtained under circumstances which makes it valueless as an indication of the propriety of the transaction. Umesh was a needy man and was in receipt of a small allowance from the estate of his father. This was withheld for a time, much to his inconvenience. In addition to this, we find that he received by way of gift land valued at Rs. 1,500, which was substantial enough, in his straitened circumstances, to induce him to assent to the transactions in favour of the defendant and the brother of the widow. In this view, we need not examine whether the alleged consideration for the sale to the defendant was actually paid by him to his maternal aunt. It has been suggested that he had no funds at his disposal to enable him to make the purchase. The circumstances are certainly suspicious, but we need not go into the point further, as the sale could not be supported even if it was for consideration.

On a review of all the circumstances of the case, we feel no doubt that the sale to the defendant was only one element in a scheme for the division of the estate, during the lifetime of the widow, among persons nearly related to her and well-acquainted with the state of the family. The end was intended to be achieved by a series of transfers effected with the concurrence of the then next reversioner, who was paid a substantial consideration as the price of his consent. There was no justifying necessity for these alienations and no occasion for such enquiry as affords protection to a *bona fide* purchaser for value.

We may add finally that whatever the position of Umesh might have been, the plaintiffs, though his sons, are not affected by any rule of estoppel. The plaintiffs do not claim through their father, but directly as reversioners to the estate of their uncle. The contrary view indicated in *Rangappa Naik* v. *Kamti Naik* (13), *Muthuveeru Mudaliar* v. *Vythilinga Mudaliar* (14) and *Vinayak* v. *Govind* (15) possibly received some colour of support from dicta in *Rup Narain* v. *Gopal Devi* (16) and *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (17), but was contrary to the principle enunciated in *Bahadur Singh* v. *Mohar Singh* (18) and has now been definitely negatived by the Judicial Committee in *Rangasami Gounden* v. *Nachiappa Gounden* (4). The plaintiffs are consequently not precluded by any rule of estoppel from disputing the validity of the alienation nor are they affected by the circumstance that they had, after the death of their father and before the death of their aunt, taken by inheritance the land transferred by way of gift to their father; this clearly does not operate as acquiescence or ratification.

The result is that the appeal is allowed, the decree of the Subordinate Judge set aside and the suit decreed with costs in both Courts. The case will be remitted to the Subordinate Judge for determination of the mesne profits.

Appeal allowed.

(13) 31 M. 366; 18 M. L. J. 309; 3 M. L. T. 355 (F. B.).
(14) 3 Ind. Cas. 473; 32 M. 206; 5 M. L. T. 122; 19 M. L. J. 88.
(15) 25 B. 129; 2 Bom. L. R. 820.
(16) 3 Ind. Cas. 382; 36 I. A. 103; 36 C. 780; 6 A. L. J. 537 (P. C.); 10 C. L. J. 58; 13 C. W. N. 920; 5 M. L. T. 423; 11 Bom. L. R. 833; 93 P. R. 1909; 68 P. L. R. 1910; 146 P. W. R. 1909; 19 M. L. J. 548.
(17) 35 I. A. 1 (P. C.); 30 A. 1; 6 C. L. J. 763; 5 A. L. J. 1; 12 C. W. N. 74; 17 M. L. J. 605; 9 Bom. L. R. 1348; 11 O. C. 78; 3 M. L. T. 1.
(18) 29 I. A. 1; 24 A. 91 (P. C.); 6 C. W. N. 169; 4 Bom. L. R. 238 12 M. L. J. 56; 8 Sar. P. C. J. 152.

SAIYID MUHAMMAD *v.* JAWAD HUSAIN.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 460 OF 1917.

March 19, 1919.

Present :—Pandit Kanhaiya Lal, A. J. C.

Kazi SAIYID MUHAMMAD AND OTHERS —DEFENDANTS—APPELLANTS

versus

Mirza JAWAD HUSAIN, MINOR, UNDER THE GUARDIANSHIP OF HIS FATHER MUMTAZ HUSAIN, AND OTHERS— PLAINTIFFS—RESPONDENTS

Mortgage of undivided share—Partition—Mortgaged property, allotment of, to co-sharer—Mortgagee, remedy of—Civil Procedure Code (Act V of 1908), O. XLI, rr. 22, 33—Cross-objections against co-respondent, whether permissible—Appellate Court, power of, to modify decree.

A mortgage of an undivided share in property which under a partition is allotted to another co-sharer cannot, in the absence of fraud, be enforced by the mortgagee except against the share allotted to the mortgagor in lieu of the share mortgaged. The remedy of the mortgagee is to proceed against the substituted property. [p. 660, col. 1.]

The filing of cross-objections by a respondent against a co-respondent is not illegal, and where an Appellate Court cannot do complete justice between the parties without opening the whole case, it can take into consideration the objections filed by one of the respondents, not only against the appellant, but against the co-respondent also, and to modify the decree, if necessary. [p 660, cols. 1 & 2.]

Appeal from the decree of the District Judge, Sitapur, dated the 24th May 1917, modifying that of the Subordinate Judge, Sitapur, dated the 8th February 1917.

Mr. *M. A. Khan*, for the Appellants.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for Respondent No. 1.

Syed *Ali Muhammad*, for Respondent No. 6.

JUDGMENT.—This appeal arises out of a mortgage which was effected by *Musammat* Wazir Begam, the widow of Amir Haidar, and Muhammad Sajjad and Muhammad Asghar, sons of Amir Haidar, in favour of the plaintiff-respondent, on the 15th October 1909. The amount secured by the mortgage was Rs. 250, out of which Rs. 175 were left for payment to *Musammat* Imam Bandi, a prior mortgagee. It has been found that out of Rs. 175, Rs. 150 were paid to *Musammat* Imam Bandi in satisfaction of the prior mortgage and that no other money was due to her. It was asserted on behalf of the plaintiff-respondent that the remaining Rs. 25 were paid back by him to the mortgagors, but he was unable to prove that allegation. The Court, therefore, awarded the plaintiff-respondent a decree for the recovery of Rs. 225 with interest against the mortgaged property.

The dispute in this appeal relates to two matters. The first matter is concerned with the liability of the property mortgaged. The property mortgaged was a *phulwari* in the town of Sitapur. The alleged owner of the *phulwari* was Amir Haidar, but it is not clear whether he inherited it from his father or had acquired it himself. It is not disputed, however, that there was a 4 annas in share in the village Angrasi which was partitioned between the heirs of *Musammat* Ahmadi Begam, the daughter of Ashiq Ali, and the heirs of Amir Haidar, the son of Ashiq Ali.

On the 8th September 1904, *Musammat* Wazir Begam executed a deed of partition wherein she acknowledged that the heirs of *Musammat* Ahmadi Begam were entitled to a one-third share in the 4 annas of the village Angrasi held by her and her sons. In 1911 Nazir Haidar, Muhammad Sajjad and Muhammad Asghar, sons of Amir Haidar filed a suit for a declaration that the said deed of partition was fictitious. The sons of *Musammat* Ahmadi Begam, namely, Syed Muhammad, Muhammad Said and Muhammad Askari, were defendants to that suit On a reference to arbitration made through the Court, the arbitrator decided on the 9th February 1912 that inasmuch as Syed Muhammad disclaimed any share in the Angrasi property, his $\frac{1}{3}$ pies share should go to the sons of Amir Haidar and inasmuch as Muhammad Said and Muhammad Askari were willing to dedicate half of their share, namely, $5\frac{1}{3}$ pies, to religious purposes, that dedication should be upheld. In regard to the remaining $5\frac{1}{3}$ pies share held by Muhammad Said and Muhammed Askari, he held that it should be given to the sons of Amir Haidar in exchange for some land in Mohalla Kot and a grove and *phulwari* now in question. This award was accepted by the Court before which the suit was pending, and a decree was passed in accordance with it on the 9th March 1912. The effect of that decree was to substitute for the security held by the plaintiff respondent the property which the mortgagors obtained by virtue

of the above award. There are no materials on the record to determine the exact value of the *phulwari* mortgaged or the aggregate value of the grove or the Angrasi property. All that can be said is that the Angrasi property given to the sons of Amir Haidar was of greater value than the land, grove and the *phulwari* awarded to the defendants-appellants. The award says so.

The Courts below refused to give effect to the award, holding that the mortgage was antecedent in point of time and must, therefore, have precedence over the distribution of property made by the award. But as held in *Mahadin* v. *Sheo Prasad* (1), a mortgage of an undivided share in property which under a partition has been allotted to another co sharer cannot, in the absence of fraud, be enforced by the mortgagee except against the share which has been allotted to the mortgagor in lieu of the share mortgaged. The remedy of the mortgagee, where there is no fraud, is to proceed against the substituted security. There is nothing to show that any fraud was intended to be perpetrated in the proceedings which terminated in the decree of the 9th March 1912. The proper course, therefore, for the mortgagee is to proceed against the substituted security, which, in the absence of better materials for identifying it, must be treated as included in the 10/16ths share of the mortgagors in the $5\frac{1}{3}$ pies share of the village Angrasi, which was allotted to the sons of Amir Haidar in exchange for the land in Sitapur, and the grove and *phulwari* referred to.

The next point relates to the omission of the lower Appellate Court to enter in the decree a direction that the prior charge claimed by *Musammat* Imam Bandi will be treated as satisfied. The Court of first instance directed the sale of the *phulwari* subject to that prior charge, but as the lower Appellate Court found that the prior charge was satisfied and that finding has not been challenged here, the direction contained in the decree of the first Court ought to have been expunged.

On behalf of *Musammat* Imam Bandi, it is urged that no respondent can be permitted to file a cross-objection against a co-respondent and in support of that contention reliance is placed on *Sajjad Husain* v. *Bakar Ali* (2). The powers conferred by Order XLI, rule 33, of the Code of Civil Procedure are, however, more extensive than those conferred by the old Code of Civil Procedure, upon which the decision above referred to proceeded. In *Munisami Mudaly* v. *Abbu Reddy* (3) the cross-objection filed by a respondent against a co-respondent was admitted and in *Abdul Ghani* v. *Muhammad Fasih* (4) it was recognised that if the Appellate Court could not do complete justice between the parties without opening the whole case, it could take into consideration objections filed by one of the respondents not only against the appellant but, it may be, against the co-respondent also and to modify the decree against them, if necessary.

The appeal and the cross-objections are, therefore, allowed and the decree passed by the lower Appellate Court will be modified in so far that the decree will be enforceable against nothing more than the 10/16ths share of the mortgagors in the $5\frac{1}{3}$ pies share of the village Angrasi, which was given by the defendants-appellants in lieu of the *phulwari* and some other property given to them in exchange. The condition laid down in the decree of the first Court, namely, that the sale shall be made subject to the rights of defendant No. 2 under her decree of conditional sale, dated the 5th November 1906, will be treated as cancelled. The parties will, in the circumstances, bear their own costs of this appeal.

Appeal allowed.

(1) 20 Ind. Cas. 577; 16 O. C. 161.

(2) 11 O. C. 93.

(3) 27 Ind. Cas. 323; 33 M. 705; 27 M. L. J. 740; (1915) M. W. N. 45.

(4) 28 A. 95; 2 A. L. J. 667; A. W. N. (1905) 200.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 47 OF 1918.

July 30, 1919.

Present: - Sir Abdur Rahim, KT., Offg. Chief Justice, and Mr. Justice Moore.

LODD GOVINDA DOSS KRISHNA DOSS —APPELLANT

versus

Diwan Bahadur GOVINDA DOSS CHATHURBUJA DOSS AND OTHERS— RESPONDENTS.

Trust, charitable—Dedication of building for use by particular sect or class—Cy-pres, *doctrine of, application of—Re-construction of building after death of founder, whether justifies application of* cy-pres—*Occasional use by objects of trust, whether justifies use by others at other times—Construction of document.*

The trustees of a charitable endowment cannot convert its funds to purposes other than those marked out by the instrument of trust or the scheme regulating the charity. [p 663, col. 1.]

The trustees cannot make a *cy-pres* application on their own authority merely because they consider it desirable to do so. [p. 663, col. 1.]

Where a building is dedicated expressly for use by a particular sect or class or denomination of persons whenever they halt there, its occupation by other persons at other times, when it is not used by the class for whom it was founded, cannot be permitted. [p 663, cols. 1 & 2.]

The fact that a building founded for use by a particular class was afterwards re-constructed by members of another class or by the public, will not justify the application of the *cy-pres* doctrine, unless the sect for whom the building was intended has become extinct. [p. 663, cols. 1 & 2.]

A follower of Vallabachari, founder of a sect, dedicated a building for use by 'Samastha Vallabha Kul':

Held, that the intention of the dedicator was to restrict the use of the building only to the descendants of the founder who were priests of that sect, and not to all Vallabha Vaishnavas. [p. 663, col. 2.]

Appeal from the decree of the Hon'ble Mr. Justice Coutts-Trotter, dated the 22nd April 1918, made in the Ordinary Civil Jurisdiction of the High Court, in Original Suit No. 414 of 1916.

Messrs. *T. Rangachariar* **and** *T. Ethiraja Mudaliar*, **for the Appellants.**

Mr. *K. Srinivasa Aiyangar*, **for the Respondents.**

JUDGMENT.—The parties to this suit, which was instituted under section 92, Civil Procedure Code, are Vallabha Vaishnavas belonging to a sect founded by one Vallabha Chariar. Among his followers are included Gujarathi Vaishnavas, Marwadis and Bhatias. The appellant (4th defendant in the suit) and the plaintiff are Gujarathi Vaisyas, the 3rd defendant, who is a respondent in the appeal, is Bhatia and the 5th defendant, another respondent, is a Marwadi. The only question in the appeal is as to the terms of the trust founded by one Shamdoss Balakrishnadoss in 1827. He dedicated a building for the purposes mentioned in his Will. The original Will is not forthcoming, but a document purporting to be a true copy has been produced which is Exhibit A in the case. It is contended by Mr. Rangachari who appears for the appellant that the genuineness and accuracy of this copy have not been satisfactorily proved. But that apparently either the original Will or a copy of it was forthcoming in 1876 cannot be doubted, for we find that Exhibit B, a document which is not impugned, recites the contents of the Will of Balakrishnadoss and those recitals, so far as the question in issue is concerned, are in substantially the same terms as those of Exhibit A.

The contention of the appellant is that the building was intended primarily for the use of the Maharajis or descendants of Vallabhachari, who held the position of priests of this sect when they came to Madras, and that when it was not required for such purposes it might be used by the Gujarathi Vaisyas, followers of their sect, on the occasion of marriages. The contention of the respondents is that although the pilgrim, priests, that is, the descendants of the founder of the sect, are preferentially entitled to the use of the building whenever any of them visits Madras, it may be used, when it is not so occupied, by all the followers of the Vallabha sect including Bhatias, Marwadis and Gujarathi Vaisyas as for purposes of marriage and the like.

The learned Judge, as we read his judgment, seemed to be disinclined to adopt the view that the original purpose of the dedication was that the building should be used only by the priests when they were on a visit to Madras; he thought that having regard to the dictionary meaning of the word Kula, coupled with the word Samastha, it could be inferred that the entire Vallabha sect or, as the learned Judge says, the whole body of the disciples were intended to be the beneficiaries of this trust. Then the learned Judge goes on to say that if that were not the proper construction of the clause

in the Will, he would be inclined to hold that this was a fit case for applying the doctrine of *cy-pres* and, that so applying it, he would hold that all the followers of the Vallabha sect should be allowed to use the building on ceremonial occasions.

Having heard the question fully argued we have come to the conclusion that the founder of the charity intended the building to be used by the descendants of Vallabhachari, that the words in Exhibit A "Samastha," "Vallabha Kul" should be read with what follows in the next sentence, namely, that Sri Maharaj when he may come to Madras may halt therein, and that whenever the house was not occupied by the Maharajis, *i. e.*, priests and descendants of Vallabhachari, it should be let on rent so that the taxes and the repairs might be met out of the income. It seems to us to be clear that "Vallabha Kul" was not meant to include all Vallabha Vaishnavas and that it was only intended to mean the descend ants of Vallabhachari, who are priests of this sect. The recital in Exhibit B is almost identical. That document came into existence in 1876; at that time the building had to be entirely re-built. The leading men of the Gujarathi Vaisya community put their heads together and with the consent of the Maharaj who happened to be present in Madras decided to put up a new building on the same foundation, and they did so at considerable cost. Two persons, the father of the present plaintiffs and the uncle of the 4th defendant who found the money, were made trustees with the consent of the caste people and the priest. The document, Exhibit B, was then drawn up. It begins with a recital of the contents of the Will of Balakrishna Doss which, as already stated, are to the same effect as the paragraph which we have discussed, namely, that Balakrishnadoss left a Will by which he made a gift of the house "with a view that all Balakas (children) of Vallabha Kul who may come may halt therein." There can be no doubt that by "all Balakas of Vallabha" only the descendants of Vallabhachari were intended. But then Exhibit B goes on to say that without interfering with the accommodation of the Vallabha Kul Balakas and Bhatias, *i.e.*, their messengers or agents, and Virakta Vaishnavas (devotees among Vaishnavas) who might come to Madras, if the "caste people" were to ask for the use of the building for marriage, they should be allowed accommodation without charging them any rent. This provision for the "caste people" is clearly an addition to the original uses to which the building was dedicated as recited in Exhibit B and in Exhibit A. We may incidentally mention here that a question was raised as to the meaning of 'caste people' and we have no doubt that by 'caste people' were intended only Gujarathi Vaisyas. All the signatories are Vaisyas and they had contributed the funds for re-building the house. It cannot be said that they belong to the same caste, as for instance, Bhatias and Marwadis. We may also refer to Exhibit G, the stone inscription on the building, where also the beneficiaries are stated to be the "Sri Vallabha Kool's (family's) Balakas (children) and Sri Bhathiajis (which admittedly means their agents) to halt therein." Then if we look at the extract from the certificate register Exhibit D, that also leaves no room for doubt as to who are the objects of the trust. For it says that "the property in question was bequeathed by a Will as charitable endowment for the halting and lodging of the Gujarathi pilgrim priests, etc., by the said Shyama Doss. We may refer to the case of *Mohan Lalji* v. *Gordhan Lalji* (1), when the phrase Ballava Kul was held by the Privy Council to mean the descendants of Ballavachari. Mr. Rangachari argued that although that might have been so originally, yet as the building was re-erected in 187[illegible] with the money contributed by two of the leading men of the Gujarathi Vaisya community and as it has been frequently used since then by members of that community on occasions of marriage, we must presume that the original grant was for the benefit primarily of the priests and secondarily of the members of the Gujarathi Vaisya community. We cannot accept this contention for, as already stated, we have got the words of the grant which admit of no ambiguity.

(1) 19 Ind. Cas. 337; 35 A. 283; 17 C. W. N. 741; 11 A. L. J. 548; 17 C. L J. 612; 15 Bom. L R. 606; (1913) M. W. N. 536; 14 M. L. T. 27; 40 I. A. 97 (P. C.).

It was further contended that even granting that the original objects of the dedication were the Vallabha priests, having regard to the fact that the building was entirely reconstructed in 1876 and also having regard to the subsequent user, there was a valid and binding change in the objects of the trust, that it is to say, we must hold that the objects now include the use of the building by the Gujarathi Vaisya community on occasions of marriage and for like purposes. But we have no hesitation in holding that this argument is unsound. As stated in Tudor on Charities, page 224, "nor can trustees convert the funds to other purposes than those marked out by the instrument of foundation or the scheme regulating the charity." And although a *cy pres* application may be desirable, it is not for the trustees to make that application on their own authority. The same proposition is laid down in Halsbury's Laws of England, Volume IV, on page 191: "However desirable it may be, in no circumstances can trustees of a charity apply the trust funds *cy pres* on their own authority, without the direction of the Court or the Charity Commissioners." Their Lordships of the Privy Council in *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood* (2) have also laid down a similar proposition with respect to a Muhammadan endowment.

Then it was suggested on behalf of the respondents that the Court ought to apply the doctrine of *cy pres* in this case. We do not, however, think that there is any room for such application. It is not suggested that the descendants of Vallabhachari are extinct. There is evidence that at least 40 or 50 such priests are living at the present time and also that they occasionally come to Madras to visit their disciples and followers. It may be that they only come to Madras occasionally, perhaps only once in a few years though their agents or Bhatias come here more frequently. Nonetheless, if the founders intended that the building should be used solely by the Maharajis (priests) whenever they chose to come here, it is not for us to say that the building should be used for other purposes whenever the priests do not occupy it. The founder apparently did not desire that the building should be used by any persons other than the descendants of Vallabhachari. It was on that account that he laid down that when the building was not in their occupation, it should be let out on rent for purposes of meeting the expenses of repairs and other outgoings. It has not been suggested that the income derived from rent has left any surplus. In fact the repairs since 1876 have been made by the followers of Vallabha sect by contribution. We do not, therefore, see that there is any room for the application of the doctrine of *cy pres* in this case.

The result is that the decree of the learned Judge will be modified by declaring that the Haveli mentioned in the Will of Kambi Shamdoss Balakrishna Doss, deceased, made in or about the year 1827 is for the benefit of the descendants of Vallabhachari, so that they or their agents may stay there during their visits to Madras, instead of the declaration contained in paragraph 4 of the decree, and the case will be remitted to the Court of first instance for disposal on the other questions. The plaintiffs, who have been discharging the duties of trustees and who came to Court in order to get declaration as to the objects of the trust and to have a proper scheme settled, are entitled to have their costs (both here and on the Original Side) paid out of the estate. As regards the other parties, they will bear their own costs throughout. We may mention that they did not want to take their costs out of the trust estate and even if they had, we do not think we would have been justified in allowing the parties except the plaintiffs to take their costs out of the estate. The memorandum of objection follows the order on the appeal.

M. C. P.

Appeal allowed; Case remanded.

(2) 35 Ind. Cas. 30; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 8 L. B. R. 517; 43 I. A. 127 (P. C.),

RAM NARAIN *v.* LALTA PRASAD.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 178 OF 1918.

June 10, 1919.

Present:—Mr. Ashworth, A. J. C.

RAM NARAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LALTA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father to pay off debt incurred for purchase of new property, validity of—Antecedent debt, what is—Legal necessity—Sons, failure of, to object at time of alienation, effect of—Delay in objecting, effect of.

In the absence of evidence to the contrary, the consent of the sons of a Hindu to an alienation by their father may be inferred from their failure to object at the time to the alienation. [p. 665, col. 1.]

Where there is delay in impeaching an alienation by a Hindu father of the family property, the burden of proving that the alienation was not for a legally necessary purpose is upon those who seek to have the alienation set aside. [p. 665, col. 1.]

A sale of a small portion of a joint Hindu family property to pay off a portion of a debt incurred for the purchase of new property may be justified. [p. 665, col. 1.]

A debt, which is only precedent to but not entirely disconnected with the subsequent debt, is not an antecedent debt. [p. 665, col. 1.]

Where a sale is effected by a Hindu father and the bulk of the consideration is found to have been taken for legal necessity, the sons cannot question that sale [p. 665, cols. 1 & 2.]

Appeal from the decree of the District Judge, Gonda, dated the 2nd February 1918, reversing that of the Munsif, Gonda, dated the 18th December 1917.

Babu *Bisheshwar Nath Srivastava*, for the Appellants.

Pandit *Harkaran Nath Misra*, for the Hon'ble Pandit *Gokaran Nath Misra*, for Respondents Nos. 1 and 2.

JUDGMENT.—The facts of this case are as follows. On the 3rd of June 1904 a sale deed was executed by four persons, namely, Ram Sukh and his widowed sister-in-law *Musammat* Jaibasi and Ramdas and his widowed sister-in-law *Musammat* Balwanta, in favour of the defendants-respondents for the sum of Rs. 800. In this case we are only concerned with the half share belonging to Ramdas and *Musammat* Balwanta. The suit was brought by the sons of Ramdas, who were alive and adults at the date of the sale, to recover possession of the half share sold by the deed on the ground that the family was joint, the property ancestral, and that there was no legal necessity for the sale. Ramdas is alive and joined as a defendant, but he has taken no part in the case. The Court of first instance decreed the claim on the finding that out of the total consideration of Rs. 800 only Rs. 283 were for necessity, that is to say, that out of the consideration of Rs. 400 paid for the half portion of the property now in suit only Rs. 141-8-0 were for necessity and Rs 258 8-0 were not for necessity. On appeal the District Judge found that the Munsif was not justified in disbelieving the defendants' witnesses as to the consideration for the deed and the objects on which it was expended, and held that legal necessity was established with regard to Rs. 583 of the Rs. 800. He also would by implication appear to have held that the rest of the consideration except Rs. 17 (which might be disregarded) was in payment of antecedent debts. He further held that the fact that the alienation impugned was not called in question by the plaintiffs for just on twelve years raised a presumption, in the absence of some evidence to the contrary, that the alienation was made with their consent. In this appeal it is urged that the facts found by the learned District Judge to constitute legal necessity in respect of Rs. 583 would not constitute such necessity on the proper view of the law and further that as there was no distinct finding of the District Judge that the remaining Rs. 217 were for legal necessity, the decree giving the defendants possession of the half village should have been made subject to the payment by them of one half of Rs. 217.

The defendants' case was that Rs. 250 were paid to one Deo Kali and Rs. 283 to one Basant, due to them in respect of a purchase of other Zemindari property effected by Ramdas and Ram Sukh a short time before the deed now in question, and that Rs. 50 were paid for the purchase of a pair of bullocks. It is contended by the appellants that a debt incurred for purchase of Zemindari property on behalf of the family is not a debt for legally necessary purposes. From the evidence of the defendants' witness, Taqakul Husain, it appears that the vendors represented to the defendants that this purchase was for the benefit of

the family. I am of the opinion that, considering that the plaintiffs have waited so long to impeach the alienation, the burden of proof that these representations were not true was on them. There is no evidence to show that the purchase of this property was not for the benefit of the family. It could scarcely be urged that the manager of the family can never run into debt on behalf of the family. In *Krishnaswami Doss, In re* (1) it was held that a sale of ancestral immoveable property for the purpose of buying new property was not *per se* an improper alienation and that each such sale would have to be judged on its merits. It would follow that a sale of a small portion of the family property to pay off a portion of a debt incurred for the purchase of new property may be justified. It was for the plaintiffs to prove that the purchase was not justified and they have failed to do so. I also concur in the finding of the learned District Judge that the consent of the sons of Ramdas to the alienation may, in the absence of evidence to the contrary, be inferred from their failure to object at the time to the alienation. They were all grown up at the time. It has been suggested by the respondents that in any case the Rs. 583 raised by the sale in suit, in order to pay off the money due for the new purchase, would be an antecedent debt. This I cannot concede. It would appear from the evidence that when the purchase of the new property was effected, there was an intention to sell off this family property to raise part of the purchase money. The debt then, therefore, although precedent, could not be said to be entirely disconnected in fact with the sale of the family property. As to the second plea the evidence of the first three witnesses produced by the defendants, if believed, would show that Rs. 200 out of the balance of Rs. 217 were advanced for the payment of antecedent debts. The District Judge has stated that he believes these witnesses. Impliedly, therefore, he must have believed the evidence that the Rs. 200 were for the payment of antecedent debts. This is a finding of fact which cannot now be impugned. There remains only Rs. 17 of the consideration to account for and this sum may obviously be disregarded, it being impossible to sell property for the exact sum required at the moment by the necessities of the Hindu family. See *Buniyad Husain* v. *Mata Din Singh* (2).

On the above grounds, therefore, I dismiss this appeal with costs.

Appeal dismissed.

(1) 13 Ind. Cas. 648; 11 M. L. T. 182; (1912) M. W. N. 167.

(2) 36 Ind. Cas. 57; 3 O. L. J. 313; 19 O. C. 122.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 519 OF 1918.

March 13, 1919.

Present :—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

SESHAPPA HEGGADE—PLAINTIFF—PETITIONER

versus

CHANDAYYA HEGGADE—DEFENDANT—RESPONDENT

Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, Art 28—Maintenance, arrears of, assignment of—Suit to recover arrears—Jurisdiction of Small Cause Court—Assignment of maintenance due to member of tarwad *or* Aliyasanthana *family, validity of—Transfer of Property Act (IV of 1882), s 6, scope and applicability of.*

A suit by an assignee of arrears of maintenance which had accrued due to the assignor for the recovery of such arrears is not cognizable by a Small Cause Court. [p 666, col. 1; p. 667, col. 2.]

Saminatha Ayyan v. *Mangalathammal*, 20 M. 19; 7 Ind. Dec. (N. S.) 21, followed.

Per *Seshagiri Aiyar, J.*—A right to maintenance which falls due to a member of a Malabar *tarwad* or an Aliyasanthana family is capable of assignment and is "property" within the meaning of section 6 (*a* of the Transfer of Property Act, its assignment being not opposed either to the principles of sub-clauses (*d*, and (*h*) of the section or to the general law. [p 667, col 1.]

Annapurni Nachiar v. *Swaminatha Chettiar*, 6 Ind. Cas. 439; 34 M. 7; 20 M. L. J. 725; 8 M. L. T. 108; (1910) M. W. N. 505, explained.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Udipi, dated the 4th March 1918, in Small Cause Suit No. 68 of 1918.

SESHAPPA HEGGADE v. CHANDAYYA HEGGADE.

FACTS appear from the judgment.

Mr. *B. Sitarama Rao*, for the Petitioner.—The right to maintenance of a member of an Aliyasanthana family is property. What was assigned was the arrears that had already fallen due to plaintiff's assignor. The assignment is not opposed to section 6 of the Transfer of Property Act. The right is based on the ownership of property. *Maradevi* v. *Pammaka* (1), *Manikkath Ammini Ammal* v. *Nanikkath Padmanabha Menon* (2) Clauses (*d*) and (*h*) of section 6 do not militate against the rule. Clause (*d*) refers to a right personal to the owner. Clause (*h*) relates to transfers of property. A right to future maintenance may not be assigned or attached but the right to past maintenance may.

Mr. *K. Y. Adiga*, for the Respondent.—The right to maintenance can neither be attached nor assigned. Plaintiff's claim is unsustainable under the general law. *Bhyrub Chunder Ghose* v. *Nobo Chunder Gooho* (3), *Narbudabai* v. *Mahadeo Narayan* (4). The assignment is also opposed to clauses (*d*) and (*h*) of section 6 of the Transfer of Property Act. See *Palikandy Mammad* v. *Chingoran Keloth Valia Arpa* (5).

In any event, if the right to maintenance is property, the suit is not cognizable by the Small Cause Court. *Saminatha Ayyan* v. *Mangalathammal* (6).

JUDGMENT.

OLDFIELD, J.—I do not propose to express any opinion on the question which my learned brother has dealt with—whether the plaintiff's claim is sustainable. My reason is that there is no decree before us, which we are entitled to test with reference to the considerations arising in connection with that question. The decree was passed by a Small Cause Court without jurisdiction, inasmuch as the claim is a claim for maintenance. See *Saminatha Ayyan* v. *Mangalathammal* (6). The only order we can pass, in my opinion, is that the decree be set aside and that the lower Court do return the plaint for presentation to the proper Court. Each party will bear his own costs throughout up to date.

SESHAGIRI AIYAR, J.—This is a suit for arrears of maintenance by an assignee. The assignor is a member of an Aliyasanthana family. The suit was brought in the Small Cause Court for arrears which had already fallen due. The lower Court dismissed the suit on the ground that the assignment is opposed to the Transfer of Property Act. In my opinion, this conclusion is wrong. I do not think that section 6 of the Transfer of Property Act is opposed to the assignability of the right which the plaintiff seeks to enforce. It is undoubtedly property, because it is now well settled that the right of a member of a Malabar Tarwad or of an Aliyasanthana family to maintenance is based on ownership of property, and not because he is entitled to be paid a fixed allowance by the Karnavan who must be regarded as the true owner of the property. In *Maradevi* v. *Pammaka* (1) this principle was laid down and this is followed in a case to which I was a party, *viz.*, *Manikath Ammini Ammal* v. *Nanikkath Padmanabha Menon* (2). In an earlier case *Chandu* v. *Raman* (7), this Court held that the right to maintenance by a junior member of a Tarwad can be made a charge upon a specific portion of the Tarwad property. Therefore, it seems to me to be clear that the right to maintenance which a member of an Aliyasanthana family or a junior member of a Tarwad possesses is property, and, therefore, the first portion of section 6 of the Transfer of Property Act is complied with. Mr. Adiga for the respondent contended that the assignability is opposed to clauses (*d*) and (*h*) of the same section. Some support is given to this argument by the observations of Sadasiva Aiyar, J., in *Palikandy Mammad* v. *Chingoran Keloth Valia Appa* (5). The question before Sadasiva Aiyar and Moore, JJ., in that case related to the attachability of the right to maintenance under a money decree obtained against a widow. Therefore, the present question did not arise for decision directly in that case, but Sadasiva Aiyar, J., in coming to the conclusion that the right to maintenance was not attachable, refers to clauses (*d*) and (*h*) of section 6 of the Transfer of Property Act. I will take clause (*d*) to

(1) 14 Ind. Cas. 383; 36 M. 203; 11 M. L. T. 112; (1912) M. W. N. 109; 22 M. L. J. 309.
(2) 48 Ind. Cas. 104; 41 M. 1075; 35 M. L. J. 509; 24 M. L. T. 498.
(3) 5 W. R. 111.
(4) 5 B. 99; 3 Ind. Dec. (N. S.) 68.
(5) 34 Ind. Cas. 381; 40 M. 302; 30 M. L. J. 361.
(6) 20 M. 29; 7 Ind. Dec. (N. S.) 21.
(7) 11 M. 378; 4 Ind. Dec. (N. S.) 264.

which the learned Judge refers. That refers to an interest in property restricted in its enjoyment to the owner personally. I do not think it can be said that the right to maintenance is a right of that kind. That clause contemplates cases like service-tenures or the office of an Archaka in a temple, which is restricted in its enjoyment and cannot be transferred by the office holder. Then as regards clause (*h*), the transfer must not be opposed to the nature of the interest affected thereby. This again relates to cases of property which are known as *extra commercium*, for example, transfer to a non Hindu of a right in a religious office : that would be opposed to the nature of the interest affected thereby. I do not think that a right to maintenance is covered by either clause (*d*) or clause (*h*) of section 6. I am supported to some extent by the observations of the learned Judges who decided *Annapurni Nachiar* v. *Swaminatha Chettiar* (8), wherein they say that at any rate where, as here, the amount payable is subsequently fixed by agreement or by decree, a transfer of a widow's right to maintenance from her late husband's estate would be good. I understand the distinction to be this, that you cannot attach maintenance which is to fall due at some future time but where the maintenance has become payable, it is attachable. That is well settled. Therefore, so long as a decree-holder does not attempt to anticipate an income which is to fall due, there can be no objection to his obtaining decree and subsequently attaching the allowance when it becomes payable. Subject to this limitation, I fail to see why a right to maintenance should not be assigned. I am, therefore, of opinion that the Transfer of Property Act is not opposed to the assignability of the maintenance of a member of a Malabar Tarwad or of a member of an Aliyasanthana family.

Mr. Adiga next attempted to argue that under the general law a right to maintenance should not be assigned and he quoted two cases, one in *Bhyrub Chunder Ghose* v. *Nubo Chunder Gooho* (3) and another in *Narbadabai* v. *Mahadeo Narayan* (4), in support of this proposition. So far as my experience goes in Madras, it has always been regarded that a right to maintenance which has already fallen due can be assigned and can be attached and, as I said before, there is nothing either in the Transfer of Property Act or in the Civil Procedure Code which prohibits such a transfer or such an attachment. I am, therefore, not prepared to hold that under the general law a right to *maintenance* is not assignable.

This conclusion lands Mr. Sitarama Rao's client in another difficulty. If it is in the nature of a right in property and a right to maintenance that he has purchased, then the suit will not lie in a Small Cause Court. The decision in *Saminatha Ayyan* v. *Mangaluthammal* (6) is in point. Even the decision quoted by the learned Vakil, *Achutan Nair* v. *Kunjunni Nair* (9), shows that such a suit is taken away from the cognizance of a Small Cause Court. I would, therefore, direct that the decree be set aside and that the lower Court do return the plaint for presentation to the proper Court. I agree with my learned brother as to the order as to costs which he proposes to make.

M. C. P.

Petition allowed.

(8) 6 Ind Cas. 439; 34 M. 71; 10 M. L. J. 785; 8 M. L. T. 108; (1910) M. W. N. 505.

(9) 13 M. L. J. 499.

OUDH] JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 274 OF 1918.

July 24, 1919.

Present:—Mr. Ashworth, A. J. C.

RATIPAL SINGH, AND ON HIS DEATH RAM NARESH SINGH, AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Babu UDAI BHAN PARTAP SINGH—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 63—Secondary evidence—Document referred to in previous statement—Statement made by party or authorised agent—Oudh Rent Act (XXII of 1886), Chap. VII A—Lands held rent-free—Grant, lands not held under—Assessment of rent, whether permissible.

RATIPAL SINGH *v.* UDAI BHAN PARTAB SINGH.

A statement made by a party or his authorised agent in a previous suit, in which he refers to a document which is against his interest, is secondary evidence of that document. [p. 669, col. 2.]

Chapter VII A of the Oudh Rent Act does not apply to lands held rent-free merely by reason of their being so held, if it is found that they are not held under any grant. [p. 670, col. 2.]

Appeal from the decree of the District Judge, Fyzabad, dated 2nd April 1918, reversing that of the Subordinate Judge, Fyzabad, dated 30th May 1916.

Mr. *Mohammad Wasim* holding brief of Mr. *Haidar Husain*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit by the plaintiffs-appellants for a declaration that in respect of certain plots of total area of 15 *bighas* 8 *biswas* in the village of Jitpur they own the subordinate right known as *didari*. This means that they were once the superior proprietors of the village in which the lands are situated and on transfer to the predecessors-in interest of the present proprietors of the village they received these lands by way of consolation for the loss of their superior proprietary rights. When these lands were given, the new superior proprietors became liable for the revenue payable in respect of them and consequently the old proprietors, who retained these lands occupied the position of under proprietors in respect of them. The cause of action as stated in the plaint consists of the following alleged facts:—

(*a*) that the plaintiffs and their ancestors have been in proprietary and adverse possession of the said lands from before the former settlement,

(*b*) that the defendant Zamindar denied the plaintiffs' right by suing them for assessment of rent as if they were mere rent free holders,

(*c*) that the Board of Revenue, when hearing a third appeal against two decisions in favour of the assessment of rent suit, directed the present plaintiffs to sue in the Civil Court for a declaration of their alleged right.

Now the fact (*a*) is stated in a very equivocal manner. It is not clear whether the plaintiffs rely on a title based on grant or whether they rely on a title based on adverse possession. In the two lower Courts they were allowed to take up both pleas alternatively. The learned Subordinate Judge of Fyzabad, without coming to a clear finding as to whether the title of the plaintiffs was based on a grant, found that this title had at any rate accrued by adverse possession. In appeal the learned District Judge of Fyzabad found that there was no evidence to prove a grant and also that adverse possession to this particular land was not proved. Both these findings are impugned in appeal before me.

The following facts have been proved by the evidence. The village in which these lands are situated was originally owned by the descendants of one Basawan in four branches to be seen in the genealogical tree on page 3 of Exhibit 6 which refers to the family as it existed in 1877. They sold the village in portions to Jaidat, the predecessor-in-interest of the present defendant. Their last share of the village was sold in 1856 and in 1864 the defendant's predecessor-in-interest got a decree for proprietary right. See Exhibit A2. In 1870 Nageshar, representative of one of the four branches of Basawan's family, applied in the Settlement Court for a declaration that he and his family possessed the *didari* right in respect of 46 *bighas* 6 *biswas*. He arrived at a compromise with the superior proprietor, whereby he was recorded as having the right in respect of 20 *bighas* 19 *biswas*. As regards the other 22 *bighas* 7 *biswas* it was agreed that the ex-proprietors should be entered as mere tenants of these. It is common ground that the lands in suit in this case were not comprised in the 20 *bighas* and 19 *biswas*, but it is strenuously maintained by the appellants that they must be deemed to be comprised in the 22 *bighas* 7 *biswas*. The compromise is Exhibit A6, dated the 17th February 1870, and in this compromise it is stated that Nageshar had been claiming the *didari* rights on behalf of the entire body of the ex proprietors. The compromise states that if any member of the family was subsequently to claim any *didari* right, he must get it out of the 20 *bighas* 19 *biswas*. Exhibit A5 is the order of the Court accepting the compromise. Subsequently to this two other members of the family, Huba Singh and Ganga Prasad Singh claimed, lands as their *sir* in separate cases. Their names do not appear in the genealogical tree mentioned, as they

must have died before 1877. Their claims were all dismissed on the ground that they were entitled to nothing outside the 22 *bighas* 7 *biswas*. Exhibits A7 and A10 are the claims, Exhibits A8 and A11 are the plots and Exhibits A9 and A12 are the judgments of the Court. In the Record of Rights of the Regular Settlement of 1870 Gajraj and his cousin, Sukhnandan, appear as ordinary tenants of 15 *bighas* 10 *biswas*. It is maintained by the appellants that this area was part of the 22 *bighas* 7 *biswas*. In 1871 the Taluqdar issued a notice of ejectment against Gajraj in respect of the 14 *bighas* 17½ *biswas* in his name. The notice of ejectment was cancelled because the Mukhtar of the Taluqdar made the following statement:—

"My client, *i. e.*, the Taluqdar, wrote a Sanad for one *bigha* out of every eight *bighas*. Mr. Clark told us to pay Rs. 523 due by Gajraj and Nageshar. We did so. He then told us to confiscate the *didari* until they repaid. Plaintiff (*i. e.*, Gajraj) has not as yet paid rent, so I issued notice of ejectment. They (meaning Gajraj) never sued at settlement. Gajraj owed Rs. 261-8-0. Nageshar the same. We compromised with the latter. We never sued Gajraj for the money but thought Mr. Clark's order which was verbal sufficient. We did not sue for confiscation of the *didari* nor the adjustment of rent."

Again in 1887 the Taluqdar issued a notice of ejectment against one Chet in respect of 7 *bighas* 9½ *biswas*. It is stated in the judgment in that case, Exhibit 6, that Chet got his title from Gaya Prasad, who is a distant cousin of Gajraj as shown in the genealogical tree referred to. It would appear, however, that Chet got the difference between the whole 22 *bighas* 7 *biswas* referred to in Nageshar's compromise and 14 *bighas* 17½ *biswas* in respect of which the notice of ejectment referred to above was issued against Gajraj. 22 *bighas* 7 *biswas* less 14 *bighas* 17½ *biswas* leave 7 *bighas* 9½ *biswas*. This notice of ejectment was also cancelled on the ground of the Taluqdar's admission in the previous case against Gajraj.

We now come to the present litigation. This litigation commences with a suit for assessment of rent on the present appellants in respect of 15 *bighas* 8 *biswas*. The Assistant Collector and the Collector in appeal held that the appellants could not prove that they were *didaris*, chiefly because they failed to prove their relationship with the original proprietors. In third appeal to the Board of Revenue the appellants were told to establish their claim to *didari* right in respect of the 15 *bighas* 8 *biswas* in the Civil Court.

Two questions arise for decision by me in appeal:—

1. Was the District Judge right in holding that the appellants had failed to prove their title by grant?

2. Was the District Judge right in holding that they had failed to prove their title by adverse possession?

As regards question 1, the District Judge has held that the *sanad* to which Ramjas, agent of the Taluqdar, referred in his admission (made in Gajraj's case), quoted at length above, is not forthcoming and that no secondary evidence of its contents has been given. It appears to me that this statement of the agent was itself secondary evidence of the *sanad*. Again he has held that no decree for *didari* rights was obtained in the Settlement Court in respect of the land in suit. This must be admitted. But it is admitted by Counsel on both sides that there is no limitation to a time within which an under-proprietor, basing his claim on the fact that his title was existing previous to the proclamation of the 15th March 1856, can get a decree affirming his title provided that no event has occurred to impose on him the liability to sue within a special period. In this case, however, such an event has occurred. As a result of the litigation in the Settlement Court between Nageshar and the Taluqdar an entry in the Settlement Khewat was made that the under-proprietary rights existed only in respect of 20 *bighas* 19 *biswas*. It is the plaintiffs' own case that the 15 *bighas* 8 *biswas* now in question fell within the 22 *bighas* 7 *biswas* in respect of which the occupiers were entered as mere tenants, that is to say, as persons having something less than an under-proprietary right. When that entry was made, the plaintiffs' predecessor-in-interest should have brought a suit for declaration of his under-proprietary right. The period of limitation for bringing such a suit would be six years. Not having done so, he has lost his right to a declaratory decree on the basis of a *sanad*. It makes no difference that before the six years were up, the plaintiffs' predecessor-in-interest may

have, in contesting an ejectment notice by the Taluqdar, raised the claim to be an under-proprietor in respect of these 15 *bighas* 8 *biswas*. So far as they are claiming a title by a grant, they are time-barred.

As to the claim based on adverse possession, it is urged by the appellants that on the date when the Taluqdar's notice of ejectment against them as ordinary tenants was cancelled owing to the Taluqdar's agent having admitted the giving of a *sanad*, they must be admitted to have held the *didari* right by adverse possession. The learned District Judge would have allowed this contention apparently if he had found it proved that the 15 *bighas* 8 *biswas* now in suit were identical with the 14 *bighas* 17½ *biswas* in respect of which the notice of ejectment was issued in 1871. He has pointed out that the area is different and that even if the area had been the same, there is nothing to show that the lands are identical. In view of the facts shown above, I am of the opinion that the *prima facie* case was made out that the lands were identical It was never suggested how the appellants could be holding the 15 *bighas* 8 *biswas* in suit unless they were the 14 *bighas* 17½ *biswas* which they held in 1871. The slight difference in area may well be explained by presuming either difference in measurement or some encroachment.

The respondent's Counsel has put in a comparative statement showing the plots in the cultivation of Gajraj and Sangram Singh, the predecessors-in-title of the plaintiffs, at the time of the regular settlement, the plots in the cultivation of Nihal Singh, a brother of Huba Singh, whose suit for *sir* rights was dismissed and the plots in possession of absolute strangers. He contends that this statement shows only 6¼ *bighas* as in the possession of Gajraj and Sangram Singh. He, therefore, maintains that only 6¼ *bighas* out of the 15 *bighas* 8 *biswas* can be deemed to be included in the 14 *bighas* 17½ *biswas* in respect of which the notice of ejectment was cancelled in 1871. This reasoning is not valid in my opinion. In the settlement papers plots were only shown in the names of actual occupiers. Nihal and the other "strangers" may have been in possession of the plots shown in their names as holding from Gajraj and Sangram Singh. The fact that Huba Singh's suit for *sir* rights was dismissed in respect of two plots which fall within the 15 *bighas* 8 *biswas* now in suit would not prevent Gajraj or Sangram Singh having possession of those plots at the date of the notice of ejectment. Indeed this comparative statement at least proves for certain that a part of the 15 *bighas* 8 *biswas* now in dispute was held by the predecessors-in-interest of the plaintiffs at the date of the notice of ejectment in 1871. It, therefore, strengthens the plaintiffs' case.

For our knowledge of what happened in the ejectment case brought by the Taluqdar against Gajraj in 1871, we are dependent upon Exhibit 6, which is a judgment of Mr. Dyson, District Judge, dated the 19th April 1887, in a similar ejectment case against Chet referred to above. It does not, however, appear to be denied that Gajraj set up the *didari* right in 14 *bighas* 17½ *biswas* in that case and that his claim to such right was upheld From that time on he must be deemed to have been holding the land under a claim to the *didari* right. In 1877 the Limitation Act of 1877 contained a provision (not existing in Act XIV of 1859) similar to section 28 of the present Limitation Act, IX of 1908. This provision is that at the determination of the period limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished. The question then is whether the Taluqdar could have sued to eject Gajraj and what was the period of limitation for assessment of rent under Chapter VIIA of the Rent Act, but that Chapter was not enacted until 1901. In any case it does not appear to me that Chapter VIIA has any application to the present case. The grant by the Taluqdar under the *sanad* has never been revived and the appellants' title does not rest on any grant. It is urged by the respondent's Counsel that the Board of Revenue has interpreted the words in section 107A of the Oudh Rent Act that the proprietor may sue to resume possession of or to have rent assessed on any land purporting to be held rent free, whether by grant in writing or otherwise, to mean that the Taluqdar can sue under this section merely on the ground that a person is holding rent-free*. The Board of Revenue may

*See *Rana Sheoraj Singh* v. *Nathu Singh*, Sel. Dec. No. 3 of 1911.—*Ed.*

have held that when land is held rent free, in the absence of evidence to the contrary it is to be presumed to be held under a grant. But I cannot believe that it has held that notwithstanding evidence that a land is not held under a grant, the section will apply merely by reason of the land being occupied rent-free. In this case it has been held proved on the respondent's own contention that the land cannot be deemed to be held under a grant. From the date of the litigation between Nageshar and the Taluqdar in 1870 the land was held by the plaintiffs in adverse possession. The correct view of the case appears to me to be this. The Taluqdar could have sued any time after 1870 for the ejectment of Gajraj as a person who had no title whatever. The suit should have been brought in the ordinary Civil Court and not in a Rent Court. As the Taluqdar failed to bring such a suit, the appellants must be deemed to have acquired *didari* right in the land by adverse possession. It has also been suggested that the admission of Ramjas on behalf of the Taluqdar amounted to an acknowledgment of Gajraj's rights. This, in my opinion, is not so. Reading the statement quoted above of Ramjas' agent in the light of the proceedings between Nageshar and the Taluqdar in the Settlement Court and in the light of the fact that under proprietary rights were confiscated until revived by the order of the Court, it cannot be said that the agent admitted any subsisting right of Gajraj at the date of the ejectment case.

I have omitted to allude to the fact that in the Jamabandi of the current settlement the plaintiffs are recorded in the remark column of the Jamabandi as holding as *didars* of the 15 *bighas* 8 *biswas*. The respondent's Counsel has objected that the Jamabandi is not a register which the Settlement Officer had to prepare and that, therefore, section 57 of the Land Revenue Act will raise no presumption as to the correctness of this entry. He is not correct in this plea. Section 55 of the Land Revenue Act prescribes as one of the registers to be prepared by a Settlement Officer a register of persons cultivating or otherwise occupying lands. It also requires the nature and class of their tenures to be entered. Rule 103 of the Patwari Rules in the Board's Circulars, Department VII, states that the Khatauni-Jamabandi is a register of persons cultivating or otherwise occupying land and that the record shall be prepared in a given form. The form given shows that the Khatauni-Jamabandi is a single sheet with sixteen columns, of which columns one to nine together with any remarks regarding them in column sixteen constitute the Khatauni and the remaining columns constitute the Jamabandi. It is, therefore, clear that this entry in what the Counsel calls the remarks column of the Jamabandi is really a portion of the Khatauni or register of cultivators. The entry was, therefore, *prima facie* evidence. As to the learned District Judge's remark that this entry is discounted by the fact that the plaintiffs are not described as *didars* in the Khasras, the Khasras are no presumptive evidence and so the absence of the entry in the Khasras is immaterial. Indeed the absence of the mention in the Khasra and the presence of it in the Khatauni shows that the entry in the latter was made under the direction of the Settlement Officer. As to the remark that the Settlement Officer had no power to determine titles at the last settlement it must be presumed that the Settlement Officer acted regularly. Under section 54 of the Land Revenue Act he had power to enter undisputed entries. We must presume that this entry was not disputed at the time. The entry is, therefore, in favour of the plaintiff both as to the identity of the 15 *bighas* 8 *biswas* with the land in respect of which the notice of ejectment was issued in 1871 and also in favour of their allegation of having acquired the *didari* rights in the 15 *bighas* 8 *biswas* somehow or other.

My finding then is that Gajraj, the predecessor in interest of the plaintiffs, acquired the right he claimed by adverse possession for 12 years subsequent to 1871. The Taluqdar's suit for assessment of rent against the present appellants could have been dismissed on this ground and also because the facts show that there was never any grant so that Chapter VII A was inapplicable.

I allow the appeal with costs in all Courts.

Appeal allowed.

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

CALCUTTA HIGH COURT.
CIVIL RULE No. 551 OF 1917.
February 7, 1919.
Present :—Mr. Justice Teunon and
Mr. Justice Walmsley.
MOHINI LAL PAKRASI AND OTHERS—
PETITIONERS
versus
NOGENDA NATH PAKRASI AND OTHERS
—OPPOSITE PARTY.

Bengal Tenancy Act (VIII B. C. of 1885), *s.* 95—*Common manager, whether can be appointed to share of estate.*

Under section 95 of the Bengal Tenancy Act the appointment of a common manager to a share of an estate, and not to the whole estate, is illegal.

Rule against an order of the District Judge, Pabna and Bogra, dated the 29th May 1917.

Babus *Gunada Charan Sen* and *Prakas Chandra Pakrasi*, for the Petitioners.

Babus *Biraj Mohan Majumdar*, *Prakas Chandra Mojumdar* and *Satish Chandra Munshi*, for the Opposite Party.

JUDGMENT.

TEUNON, J.—In this case it appears that on an application made on the 3rd September 1907 one Amulya Chandra Banerjee was appointed common manager under the provisions of section 95 of the Bengal Tenancy Act of two estates, namely, Estate Dihi Adgola bearing No. 76 or 79 of the Bogra Collectorate and Dihi Suratoil or a 13-annas 15 gandas 2-karas share therein spoken of as a Subam and apparently representing a separate estate created by partition. Amulya Chandra Banerjee died sometime in the month of April 1916 and thereupon, after directing the issue of and endeavouring to serve notices upon all the proprietors of these estates, the District Judge proceeded to appoint a successor of the said Amulya Chandra Banerjee. Subsequently on the 20th September 1916 the District Judge did appoint one Nogendra Chandra Ganguli to be the common manager on the conditions and in the terms and with the powers under which Amulya Chandra Banerjee had held the office. Meanwhile it appears that of the Dihi Suratoil of which Amulya Chandra Banerjee had been appointed common manager, a certain number of shares had been excluded from the common management. It is, therefore, urged here that the appointment of Nogendra Chandra Ganguli, being an appointment to a share of an estate and not to the whole estate, is not in accordance with law. Another objection urged, which is common to both these estates, is that notices have not in fact been served upon all the co-sharer proprietors. The parties who appear here, however, did receive notice and did in fact appear before the District Judge. If it be the case that any of the other co sharer proprietors did not receive notice, they have made no complaint either before the District Judge or here, and we need not further consider this objection. The objection, however, taken in the case of Dihi Suratoil appears to be well-founded. It has been laid down in a number of cases in this Court that the appointment of a common manager must be to the entire estate and not to a portion thereof.

In so far, therefore, as the appointment of Nogendra Chandra Ganguli to be the common manager in respect of Dihi Suratoil or a portion thereof is concerned, we direct that the said appointment be set aside and that the learned District Judge do in respect of that estate commence proceedings anew. In so far as he has been appointed common manager to the Dihi Adgola No. 76 or 79 of the Bogra Collectorate, the appointment will not be interfered with.

This Rule is accordingly made absolute to the extent indicated above. We make no order as to costs.

WALMSLEY, J.—I agree.

Rule made absolute in part.

NANJUNDA ROW v. MARWADI DHAMMAJI.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 282 OF 1918.

February 26, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Sesbagiri Aiyar.

R. NANJUNDA ROW—PETITIONER No. 1—APPELLANT

versus

MARWADI DHAMMAJI SAMMIJI—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 58, 145—Execution of decree—Arrest of judgment-debtor—Surety bond for release of judgment-debtor, whether can be enforced in execution proceedings.

A security bond executed in favour of a decree-holder to obtain the release of a judgment-debtor from imprisonment in execution, and filed in Court, whereupon the release of the judgment-debtor is ordered under the proviso to section 58 of the Civil Procedure Code, must be regarded as a matter of record in the Court as much as if it had been executed to the Court itself, and is consequently enforceable against the surety in proceedings in execution. [p. 672, col 2.]

Appeal against the order of the District Court, Bellary, in Execution Petition No. 18 of 1918 (I. A. No. 258 of 1918).

FACTS appear from the judgment.

Messrs. *T. Narasimha Aiyangar* and *D Srinivasa Row*, for the Appellant:—The lower Court should not have issued the warrant against the surety. The contract was entered into out of Court and the decree-holder could only enforce the terms of the bond by suit. The fact that the bond was executed in connection with the execution proceedings against the judgment debtor will not affect the decree-holder's remedy. See *Subbaraya Pillai* v. *Sathanatha Pandaram* (1) and *Nadanaligi Kurugodappa* v. *Angadi Soogamma* (2).

The mere filing of the bond in Court, which was not expressly asked to take action, will not entitle the decree-holder to enforce it in execution.

No doubt there is a stipulation in the bond itself for its enforcement in execution. But the Court cannot acquire jurisdiction, which it has not, by the consent of parties.

Mr. *V. S. Narasimhachari*, for the Respondent:—It is not correct to say that the agreement between the parties was out of Court. The bond was filed in Court impliedly with appellant's consent. It had become a matter of record. Secondly, the appellant has expressly submitted to execution proceedings in the bond. He is estopped from questioning the proceedings which the decree-holder had a right to take.

JUDGMENT.—In this case appellant and another person executed a security bond to the respondent, who held a decree against one Narayana Row, to obtain the release of the last mentioned from his imprisonment in execution. The bond was filed in the lower Court with respondent's application for the release of Narayana Row; and his release was ordered under the proviso to section 58 of the Code of Civil Procedure. The respondent subsequently applied for a warrant of arrest against appellant, as he failed to pay the decree amount in accordance with the provisions of the bond. This appeal is against the order of the lower Court issuing warrant.

The appeal is argued here on a ground not apparently relied on in the lower Court, that the bond having been given out of Court can be enforced only by suit, not by proceedings in execution of the decree in connection with which it was given; and no doubt, if the facts were as this statement of the argument assumes them, the decision in *Subbaraya Pillai* v. *Sathanatha Pandaram* (1) and the observations of Spencer, J., in *Nadanaligi Kurugodappa* v. *Angadi Soogamma* (2) would justify it. But the facts actually before us differ from those assumed in material respects.

Firstly, as already stated, the security-bond was filed in Court and was left there. The Court no doubt was not asked to consider its terms or their propriety. But it was certainly asked to take action, statedly on the ground that the bond had been given; and, as the bond itself refers to the request which preceded its execution, it must be taken to have been presented to the Court with the concurrence of the surety and judgment-debtor.

It must accordingly be regarded as matter of record in the Court as much as if it had been executed to the Court itself.

Secondly, the bond provides that in case of the judgment-debtor's default, execution

(1) 48 Ind. Cas. 940; (1918) M. W. N. 734; 8 L. W. 507; 24 M. L. T. 416.

(2) 39 Ind. Cas 928; 41 M. 40; (1917) M. W. N. 490; 22 M. L. T. 320.

can be taken against him. It is argued that the parties cannot give the Court jurisdiction by their consent. But the facts of the present case resemble those in *Sadasiva Pillai* v. *Ramalinga Pillai* (3) the circumstances that the bonds in question therein were executed to the Court not affecting the general ground on which the decision proceeded, that "the respondent had, by the proceedings in question, come under an obligation, which was capable of being enforced by proceedings in execution" and that "upon the ordinary principles of estoppel he could not be heard to say" that the relief claimed was not obtainable under the decree.

For these reasons the lower Court's decision must be confirmed, the appeal against order being dismissed with costs.

M. C. P.

Appeal dismissed.

(3) 2 I. A. 219; 15 B. L. R. 383 (P. C.); 24 W. R. 193; 3 Sar. P. C. J. 519; 3 Suth. P. C. J. 190.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 219 OF 1918.

July 9, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

Musammat BHAGWANA AND OTHERS —DEFENDANTS—APPELLANTS

versus

RAMESHWAR—PLAINTIFF,

CHHEDI LAL AND OTHERS—DEFENDANTS —RESPONDENTS.

Hindu Law—Widow, mortgage executed by, jointly with reversioners—Legal necessity—Presumption—Reversioner, whether can impugn mortgage.

A joint mortgage by a widow and the reversionary heirs of her husband, detailing the property mortgaged by each, shows that the reversioners assented to the mortgage by the widow, and such assent is presumptive evidence of the existence of legal necessity. Until that presumption is rebutted, it is not open to one of the reversioners, who eventually succeeds to the reversionary rights, to impugn the mortgage made by the widow. [p. 675, col. 1.]

Appeal from the decree of the District Judge, Lucknow, dated the 2nd March 1918, reversing that of the Subordinate Judge, Unao, dated the 24th August 1917.

Babu *Bisheshwar Nath Srivastava*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for Respondent No. 1.

JUDGMENT.—The dispute in this case relates to a two-pies share of the village Rustampur, which belonged to Bakhtauri, who died in 1878, leaving a widow, *Musammat* Maharani. Bakhtauri had two brothers, Bhawani and Jhaulal Bhawani died leaving three sons, Chhedi, Sukhnandan and Matadin. On the 13th August 1881 *Musammat* Maharani, Chhedi and Jhaulal executed a mortgage of a 4-pies share of the said village in favour of Hazari Lal in lieu of Rs. 225. The mortgage deed recited that each of the mortgagors had separately mortgaged her or his respective share and had taken a specific amount of the mortgage money for her or his own use. In regard to *Musammat* Maharani it was stated that she had mortgaged her 2-pies share in lieu of Rs. 112-8-0. The deed of mortgage provided that the mortgagee should get possession over the mortgaged property; but it is stated by Hazari Lal that he never got possession. Chhedi and Jhaulal paid their portion of the mortgage money and redeemed the 2-pies share which they had mortgaged.

On the 14th June 1883 *Musammat* Maharani mortgaged her 2-pies share with Kunji Lal in lieu of Rs. 200, out of which Rs. 150 were left by her with the mortgagee for payment to Hazari Lal on account of his prior mortgage of the 13th August 1881. This mortgage was simple and was attested by Sukhnandan. It provided for payment of the mortgage money with interest at 1 per cent. per mensem and authorised the mortgagee to sue for foreclosure, if the mortgage money was not paid within a specified period.

In 1893 Kunji Lal sued for foreclosure on foot of that mortgage and got a decree which was subsequently made absolute. In pursuance of the decree absolute for foreclosure, Kunji Lal got possession over the mortgaged property on the 18th November 1895. The defendants Nos. 1 to 15 are the legal representatives of Kunji Lal.

Musammat Maharani died in 1914. Jhaulal was then alive and was the nearest reversionary heir of her husband. On the 7th

September 1916 the legal representatives of Jhaulal joined Chhedi, Sukhnandan and Matadin in making a gift of the 2-annas share left by *Musammat* Maharani in favour of the plaintiff. The plaintiff filed the present suit for possession of that share, alleging that the mortgage effected by *Musammat* Maharani in favour of Kunji Lal was made without legal necessity. The Court of first instance dismissed the claim. Its finding was that the mortgage was made for legal necessity with the consent of Jhaulal and Sukhnandan. The lower Appellate Court, however, came to the conclusion that no such legal necessity or consent was established.

Its finding would have been fatal to this appeal but for the fact that out of the consideration money advanced under the mortgage of the 14th June 1883, Rs. 150 were applied to the discharge of a prior mortgage made by *Musammat* Maharani in favour of Hazari Lal, to which Jhaulal and Chhedi had consented by joining in the mortgage. It is true that Jhaulal and Chhedi had, by virtue of that mortgage, borrowed some money for their own purposes and mortgaged their property too; but the fact that a joint mortgage was executed by *Musammat* Maharani, Jhaulal and Chhedi, detailing the property mortgaged by each, shows that Jhaulal and Chhedi had assented to the mortgage of a 2 annas share by *Musammat* Maharani. Such assent is, as pointed out in *Rangasami Gounden* v. *Nachiarpa Gounden* (1), presumptive evidence of the existence of a legal necessity. That presumption not having been rebutted, it is not open to Jhaulal, who eventually succeeded to the reversionary rights, to impugn the mortgage, made by *Musammat* Maharani in favour of Hazari Lal. The money due to Hazari Lal was paid by Kunji Lal out of the consideration left with him by *Musammat* Maharani under her subsequent mortgage of the 14th June 1883. It does not appear how the sum of Rs. 150 was arrived at. Hazari Lal states that Kunji Lal paid him that amount; but inasmuch as the mortgage of the 13th August 1881 did not provide for the payment of any interest, no damages recoverable for the failure of the mortgagor to deliver possession could be added to the mortgage money. The plaintiff cannot, therefore, be made liable to pay anything more than Rs. 112-8-0 secured by the mortgage of the 17th August 1881, with interest at 1 per cent. per mensem as stipulated in the subsequent deed. The amount which the plaintiff is thus liable to pay is Rs. 301-8-0.

The appeal is accordingly allowed and the claim of the plaintiff decreed for possession of the disputed property subject to the payment of Rs. 301-8-0 to the defendants Nos. 1 to 15. The parties will, in the circumstances, bear their own costs throughout. In case of non-payment the suit shall stand dismissed.

Appeal allowed.

(1) 50 Ind. Cas. 403; 17 A. L. J. 536; 36 M. L. J. 498; 24 C. L. J. 539; 21 Bom. L. R. 640; 33 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 25 M. L. T. 5; 10 L. W. 105; 46 I. A. 72.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2924 OF 1916.

May 30, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Panton.

BHABATARINI DEBI CHOWDHURANI —PLAINTIFF—APPELLANT

versus

SHEIKH BAHADUR SARKAR— DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 89, 115—Accounts, suit for, by principal against agent—Failure of agent to render account, whether amounts to refusal within meaning of Art. 89—Limitation.

Article 89 of Schedule I to the Limitation Act is applicable to a suit for accounts by a principal against his agent, although there is an agreement by the agent to render accounts every year. Article 115 of the same Schedule does not apply to such a suit. [p. 677, col. 2.]

The mere failure of the agent to render accounts on demand does not amount to refusal to render accounts within the meaning of Article 89 of Schedule I to the Limitation Act. The question whether the failure of the agent to render accounts amounts to refusal within the meaning of Article 89, depends upon the circumstances of each case. [p. 676, col. 2.]

Appeal against the decision of the Subordinate Judge, Mymensingh, dated the 31st August 1916, modifying that of the Munsif, Iswarganj, dated the 9th December 1914.

BHABATARINI DEBI v. SHEIKH BAHADUR SARKAR.

Babu *Shama Charan Maitra*, for the Appellant.

Babu *Surja Kant Guha*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for accounts by a Zemindar against his Tahsildar. It is found that the defendant acted as plaintiff's Tahsildar from 1309 to 1317 B. S., when he left service. He did not render accounts nor did he submit the account papers. The suit was instituted in April 1913.

The Court of first instance passed a preliminary decree directing the defendant to render accounts for the entire period. On appeal the learned Subordinate Judge held that the claim for the period 1309 to 1316 B. S. was barred by limitation and the defendant was liable to render accounts for Baisakh 1317 only.

A suit for accounts against an agent is governed by Article 89 of the Limitation Act. That Article provides that the period of limitation for a suit by "a principal against his agent for movable property received by the latter and not accounted for" is 3 years from the date when the account is during the continuance of the agency demanded and refused, or where no such demand is made when the agency terminates. It has been held by the Judicial Committee that "movable property" in Article 89 includes money: see *Asghar Ali* v. *Khurshed Ali Khan* (1).

The plaintiff, therefore, was entitled to bring the suit within 3 years of the termination of the agency, unless there was demand and refusal during the continuance of the agency.

The learned Subordinate Judge found that the contract was to submit accounts on the expiry of each year, and as accounts were demanded every year and the defendant neglected to render the accounts, such neglect is tantamount to refusal. So limitation of 3 years runs from every breach and as such plaintiff's claim for accounts from 1309 to the end of 1316 is time-barred.

The question for consideration, therefore, is whether a mere failure to render accounts amounts to a refusal within the meaning of Article 89. The question has been considered in several cases in this Court. In *Hari Narain Ghose* v. *Administrator General of Bengal* (2) the agent, on account being demanded from him, at first promised to render it in Assin 1279 but never fulfilled the promise, and the learned Judges were of opinion that he "virtually refused to render the account at that time". The suit, however, was brought in Assar 1282 and was, therefore, not barred, and the learned Judges in holding that the suit was not barred made that observation. The observation was relied upon in the case of *Ersin Sarkar* v. *Biradi Kishore Acharyya Chowdhury* (3). In the case of *Madhusudan Sen* v. *Akhil Chandra Das* (4) it was held that if there has been a demand, failure to respond to the demand is refusal within the meaning of Article 89 The learned Judge (Mookerjee, J.), however, observed, "there may, however, be cases where omission to render accounts may not be a refusal within the meaning of Article 89." On the other hand in the case of *Jhapijhanessa Bibee* v. *Rama Sundari* (5) Coxe J., observed: "I must confess, speaking with the greatest respect, that I feel some difficulty in holding that the mere neglect to render accounts which the defendant has agreed to render can be deemed to be a refusal within the meaning of Article 89."

Although an express refusal may not be necessary to bring a case under Article 89 (although Dr. Whitley Stokes is of opinion that "refusal" in the Article means an "express refusal:" see Anglo-Indian Codes, Volume II page 987) because the agent may never expressly refuse to render accounts, we are of opinion that the question whether the failure of the agent to render accounts amounts to a refusal within the meaning of Article 89 depends upon the circumstances of each case. The failure to render accounts every year may be due to a variety of reasons, such as illness of the agent or the account papers not being ready. Sometimes the accounts cannot be prepared within a short time after the expiry of the year, and once they fall into arrears there is sometimes considerable delay in rendering accounts. Cases of Gomastas not being ready with accounts every year are very common.

(1) 24 A. 27; 28 I.A. 227; 3 Bom. L. R. 576; 8 Sar. P. C. J. 142.

(2) 3 C. L. R. 446.

(3) 5 Ind. Cas. 183; 11 C. L. J. 43.

(4) 30 Ind. Cas. 697; 22 C. L. J. 552; 43 C. 248; 19 C. W. N. 1070.

(5) 16 Ind. Cas. 414; 16 C. L. J. 288; 16 C. W. N. 1042 at p. 1048.

Sometimes it is due to mere procrastinations. It cannot be affirmed in such a case that the failure to render accounts necessarily amounts to a refusal. In the present case the plaintiff's Naib stated (as pointed out by the lower Appellate Court), "every year we made demand of accounts and he (the defendant) was all along saying that he would render accounts." The defendant was retained in service and evidently so long as the Gomasta was in service, his promise was relied upon. In the absence of any other circumstances, the mere failure to render accounts in the present case did not constitute a "refusal" within the meaning of Article 89, when the defendant all along said that he would render accounts and this distinguishes the present case from the cases mentioned above.

The defendant agreed to submit account papers yearly. It is contended that Article 115 applied to the case and as there was a breach of obligation on the part of the defendant at the end of each year, the claim for more than 3 years is barred. It seems to us, however, that a suit for accounts and for money due on taking accounts is not a suit for compensation for loss caused by breach of the contract to render accounts. There are no doubt some decisions in support of the view that Article 115 is applicable to such cases: see *Moti Lal Bose* v. *Amin Chand Chattopadhaya* (6), *Easin Sarkar* v. *Barada Kishore Acharyya Chowdhury* (3), *Jogesh Chandra* v. *Benode Lal Roy* (7) and *Jhapijhanessa Bibee* v. *Rama Sundari* (5), though in the last case Coxe, J., felt some difficulty in "regarding a suit for accounts or for the sum found due thereon as a suit for compensation for the breach of a contract." On the other hand in the case of *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (8) it was held on a review of the earlier authorities, including the decision of the Judicial Committee in *Asghar Ali* v. *Khurshed Ali Khan* (1), that Article 89 is applicable to a suit for accounts by a principal against his agent. The case of *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (8) does not appear to have been considered in the cases of *Easin Sarkar* v. *Barada Kishore Acharyya Chowdhury* (3) and *Jogesh Chandra* v. *Benode Lal Roy* (7). Then again the cases of *Jogendra Nath Roy* v *Deb Nath Chatterjee* (9), *Hafezuddin Mandal* v *Jadu Nath Sahu* (10) and *Chandra Madhab* v. *Nabin Chandra* (11), *Madhusudan Sen* v. *Rakhal Chandra Das* (4) show that Article 89 is applicable to such cases. The case of *Chandra Madhab* v. *Nabin Chandra* (11) was taken up to the Privy Council [see *Nabin Chandra* v. *Chandra Madhab* (12)] and although there was an agreement in that case to render accounts from time to time, Article 89 was applied to the case. We are accordingly of opinion that the suit is governed by Article 89, although there was an agreement to render accounts every year.

The result is that the decree of the Court below is set aside in so far as it disallows accounts from 1309 to the end of 1316. The case will accordingly go back to the Court of first instance in order that accounts may be taken as directed by the preliminary decree of that Court. Costs will abide the result.

Case remanded.

(6) 1 C. L. J. 211.
(7) 5 Ind. Cas. 59; 14 C. W. N. 122.
(8) 32 C. 719; 1 C. L. J. 282.
(9) 8 C. W. N. 113.
(10) 35 C. 203; 7 C. L. J. 279; 12 C. W. N. 820.
(11) 18 Ind. Cas. 735; 40 C. 103; 17 C. L. J. 103.
(12) 35 Ind. Cas. 1; 44 C. 1; 24 C. L. J. 500; 20 M. L. T. 430; 21 C. W. N. 97; 14 A. L. J. 119; 18 Bom. L. R. 1022; 31 M. L. J. 836; (1916) 2 M. W. N. 525; 5 L. W. 452 (P. C.).

MADRAS HIGH COURT.

APPEAL No. 200 OF 1917.

April 25, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

SUJJADA SHAH MAHAMAD USUF *alias* ESU MIAH SAHEB—DEFENDANT—APPELLANT

versus

Peerjada Khaja Syed SHAW HABIT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Waqf—Cy pres, *doctrine of, applicability of, to India*—Sajjadanashin *powers and duties of*—*Court, whether can remove* sajjadanashin—"Urs" *and* "Fatehas", *performance of, legality of*—*Appeal, second*—*Remand*—*Matter decided in order of remand, whether can be re-opened.*

SUJJADA SHAH *v.* SHAW HABIT.

The doctrine of *cy pres*, being in harmony with the spirit of the Muhammadan Law relating to the administration of charities, is applicable to India, and is applied when from lapse of time and change of circumstances it is no longer possible beneficially to apply the property left by the founder or donor in the exact way in which he has directed it to be applied but it can only be applied beneficially for similar purposes by different means. [p. 681, col. 2]

A Court has the power to remove a *sajadanashin*, or to appoint a new man in the office, supposing it to be one which truly involves the performance of the duties of a spiritual and religious character inseparably connected with the personality of the *sajadanashin*, unless there is very strong and clear evidence of custom and usage by which it can be shown that if the *sajadanashin* misconducts himself in his office he cannot be interfered with by the Court. The ordinary law of *waqfs*, with such modifications as may be required by the practice of the institution concerned or of similar institutions, applies to a *sajadanashin*. [p. 682, cols. 1 & 2.]

The performance of *urs* and *fatehas* is valid according to the Muhammadan Law, as administered in India, if these rites involve the distribution of food to the poor. [p. 681, col. 2.]

It is not open to the High Court to re-open any decision arrived at by it in an order of remand in second appeal, when the matter again comes up before it after remand. [p. 680, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Nellore, dated the 12th February 1917, in Original Suit No 50 of 1913.

Mr. *L. A. Govindaraghava Iyer*, for the Appellant.

Messrs. *P. R. Ganapathi Aiyar* and *T. V. Venkatarama Aiyar*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—In this appeal we are asked to consider a scheme with respect to certain *waqf* properties in the District of Nellore, which has been framed by the Subordinate Judge under the directions of this Court. In order that our conclusions on the important points raised before us may be fully understood, it is necessary that the history of the institution and the litigation in connection with it should be briefly recited. It appears from the entries in the Inam Register of 18.1 that Fauzdar Abdul Khader Khan, brother of Nawab Wallajah, the ruler of the Carnatic, granted two villages called Velpulagunta and Komalammapadu in Fasli 1185 (about 1775 A. D.) to Hazarath Khaja Rahamtulla Saheb, a religious-minded and pious Mahomedan, "as a present to the Prophet Muhammad for the purpose of feeding the poor." The grant was subsequently confirmed by Nawab Wallajah himself. In the order of confirmation it was stated that the villages were placed in the charge of the donee so that he might feed Syed Mahomedans, good men and poor men and ascribe the virtue to Muhammad (meaning the Prophet). Eight other villages forming part of the *waqf* and set out in the Inam Register were about the same time purchased by Khaja Rahamtulla Saheb for a nominal price from the then Jagirdar of Udayagiri for the purpose of dedicating them to pious objects, namely, feeding the poor and meeting the expenses of a mosque which Khaja Rahamtulla Saheb had built.

This pious founder died without leaving any issue or heir, but in his lifetime he had nominated his wife's brother's son, one Ghulam Nakshband Saheb, as his successor in charge of the *waqf* properties. Ghulam Nakshband, apparently a Pathan by birth, was succeeded by his son Mohideen Saheb and on the latter's death, his brother Mahomed Akbar Khan assumed management in disregard of the claims put forward on behalf of the minor son of Mohideen Saheb on Ghulam Rahamtulla Saheb. This was at the time of the Inam inquiry in the sixties. By that time it would seem that the memory of Hazarath Khaja Rahamtulla Saheb, who was virtually the founder of the whole *waqf* properties, for it was he that was apparently instrumental in inducing the Nawab of the Carnatic to make a free grant of the two villages mentioned above, had, as it often happens, gathered considerable sanctity. His tomb became a shrine and an object of veneration in the locality and people began to resort there to redeem their vows. His Urs came to be celebrated with much ceremony and his tomb gradually began to overshadow the mosque. There can be little doubt that the pious founder himself would have been much surprised at the way his original objects were getting transformed about a century after his death and much more so at the state of things prevailing at the present time. There could be no doubt that his main intention by the endowment was to maintain the mosque built by him in an efficient condition as a house of prayer, so that the religion of Islam might spread in the neighbourhood. The other object which he had in view was to help deserving poor men, especially among the Syeds, who in those days were prominent in Mahomedan

society as a cultured and enlightened class and helped much in spreading Islamic civilisation in India. To what extent the original objects which Khaja Rahamatulla Sahib had in view were becoming obscured in the sixties would appear from the prominence which the performance of Urs and Fatehas at the tomb had acquired as a feature of the institution. That, it is needless to point out, could not have been within the contemplation of the founder himself. When we come to more recent times, we find that the so-called Sajjadanashin for the time being began to treat the *waqf* properties as if they were his private properties. Only some of the religious ceremonies were kept up, which no doubt served to secure the homage of the ignorant Mussalmans of the neighbourhood for the holder of the office and his family. He began to make free grants of *waqf* properties to his wife and children and to make alienations by way of mortgages and leases for long terms. The mismanagement and misappropriation which were apparent even in the sixties became more and more flagrant, coming to a head in the time of the father of the present appellant Shah Muhammad Usuf and the appellant himself. The list of alienations set out in the plaint is enough to indicate the state of things at the time of the suit. The acting District Judge, Mr. Wallace, before whom the suit (Original Suit No. 21 of 1906) for the removal of the defendant from his office was first tried, summed up his findings in this way: "Finding as I do that the defendant, when he assumed office, acquiesced in all the irregularities and illegal alienations of trust property by his predecessor, that he obtained from him no accounts or record of his administration, that he made no attempts to get back the trust properties improperly alienated, that he has deliberately withheld from the Court important accounts of the trust, that he has neglected to maintain any intelligible system of accounts, that he has produced in Court as the accounts of the trust accounts altogether unreliable and probably fabricated, and this in spite of the warnings conveyed by several Government Officials and that this is done in all probability to hide his acts of misappropriation of the trust funds, that he has given large bonds on his personal security, while practically pledging trust properties therefor, that he has never made any proper enquiries whether the bonds which he allowed to be met from trust funds are chargeable on trust funds, that he has inextricably mixed up his personal credit with the trust credit and regarded them as one and had made no attempt to keep his personal obligations and liabilities separate from those of the trust, that he has not in fact resumed the Inams noted in paragraph above and thus secured their rents for the trust, while he has out of trust property presented his own wife with Inam land, that he has not been properly carrying out the conditions of the endowment and has, without the Court's sanction, ceased the performance of the Urs ceremonies for deceased Sajjadas, that owing to his incompetent administration the allowance due to the founder's descendants and the wages due to servants are irregularly paid or are largely in arrears, I am emphatically unable to hold that his continuance in the office is for the benefit of the trust. I hold that his administration is shown to be grossly incompetent with no check whatever on wholesale frauds and misappropriations and that the trust must inevitably suffer if it remains longer in his hands." The truth and accuracy of that finding has not been seriously challenged in subsequent proceedings and it could not well be, as it is in absolute accordance with the facts.

Mr. Wallace directed the removal of the appellant from the headship of the institution, to which office the designation of Sajjadanashin or rather "Sujjada" was erroneously attached. When the matter came up here, the High Court by its order dated 15th November 1915 remanded the case for finding on some fresh issues among others as to what were the functions of the Sajjadanashin which were in any way distinct from those of an ordinary Mutawalli and were of a spiritual nature? This order was passed in the two Appeals Nos. 244 of 1911 and 109 of 1914 preferred respectively from the decrees in Original Suit No. 1 of 1906 already mentioned and Original Suit No. 50 of 1913. Mr. Wallace having directed the removal of the trustee by his decree in the first suit, Suit No. 50 of 1913 was instituted for the framing of a proper scheme and the appointment of a new trustee and for similar reliefs. The lower Court after enquiry found that the persons

holding the so called Sajjadanashin's office in this institution were not spiritual or religious preceptors in any sense and that they had no disciples and no doctrines of Sufiism or anything else to teach. In short the duties ordinarily attached to office of a Sajjadanashin did not appertain to the position which the defendant and his ancestors have been occupying. All that they had to do was to conduct the annual Urs and to offer Fatehas at tombs, and none of these could be said to be functions incapable of being performed by other Mahomedans. As regards maintenance of the daily service at the mosque or of the especial services in the mosque on Fridays or on the occasion of the Ramzan, the Eedul-Fitar and the Bakrid, the work was capable of being attended to by any Mutawalli of a mosque. As regards the income of the trust properties the finding is that the net income is about Rs. 5,586, after paying the Government Peishcush. Out of this the descendants of the 2nd Sajjadanashin, Ghulam Nakshband, have been receiving allowances of Rs. 151 8-0 a month, that is, Rs. 1,818 0 0 annually, as set out in Exhibit J. The balance of Rs. 3,778 was what was available for the maintenance of the mosque and the tomb and for the upkeep of the charities and the performance of religious rites and ceremonies. After meeting all these expenses about Rs. 1,000 a year is estimated as the annual saving, exclusive of the income of the two villages which at the date of the suits had been reserved by the Government but to recover which action has, we understand, been taken. If those two villages are restored, the annual surplus would ordinarily be between two and three thousands a year or more.

On receipt of this report Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Iyengar gave certain directions for the framing of a scheme with liberty to the parties to apply. This scheme has now been submitted to us, and in connection therewith we have first to consider what exactly was the scope of the directions given by the learned Judges. It is not open to us at the present stage to re-open any decisions arrived at by them on any of the questions in controversy. See *Latchumammal* v. *Gangammal* (1). The learned Judges have held: "In this case it is clear that the religious duty, which the defendant, as Sajjada, is bound to perform in connection with this institution, ought to be differentiated from the secular management of the tomb, mosque and its endowments. The broad effect of this, I take it, is that the office of Sajjadanashin should be kept up. The religious duties peculiarly attached to that office are the performance of the Urs and the Fatehas according to the usage of the institution. The rest of the duties in connection with the mosque and the tomb can be separated and relegated to an ordinary Mutawalli or trustee." I must say that if the matter were *res integra*, I should have had no hesitation in holding that it was wholly superfluous to retain the office of the so called Sajjadanashin in addition to that of a trustee or Mutawalli. The term Sajjadanashin is an absolute misnomer in connection with this institution, though this is not only instance in which I have found the word wholly misapplied in this Presidency [see for instance *Dost Muhammad Khan* v. *Nazir Ali Sahib* (2)]. The attempt made by the defendant, who has been guilty of every conceivable act of mismanagement and misappropriation in connection with the trust, to bolster up his position on the strength of the designation of Sajjadanashin is utterly wanting in *bona fides*. His evidence in support of his pretensions is transparently false. However that may be, we must give effect to the order of the Court already made in his favour.

The next question argued upon the directions relates to the allowances which the descendants of the 2nd Sajjadanashin are being paid. These persons' names are set out in Exhibit J, and a reference to it would show that most of them receive small doles, sometimes as little as annas 8 a month, aggregating altogether to about Rs. 150 a month.

Though the language of the directions on this point is not very clear or explicit, I do not think that the learned Judges could have intended that this system should be perpetuated. In the first place, payment of those allownces is based entirely on a practice which clearly came

(1) 7 Ind. Cas 855; (1910) M. W. N. 692; 34 M. 72; 8 M. L. T. 233.

(2) 42 Ind. Cas. 474; 6 L. W. 184.

to be prevalent owing to the misconduct of a succession of men in charge of the trust properties. In the second place, supposing we are in a position to impute to the founder the intention of benefiting the descendants of the man whom he had nominated as his successor with some portion of the income of these properties, the present method does not, in my opinion, carry out the intentions in the true sense. With every generation the allawances available for each individual must necessarily diminish, and it could not be for the benefit of the family of the 2nd Sajjadanashin that every individual among his descendants should get insignificant doles on a steadily decreasing scale. The learned Judges at the same time may be taken to have held that the persons who are at present receiving allowances should not be deprived of them and that in any scheme to be framed for the future some portion of the income should be so applied as to afford a chance to the descendants of the 2nd Sajjadanashin generally to benefit thereby. I may here appropriately quote some observations made by Jessel, M. R., in the well-known case in *Campden Charities, In re* (3) in propounding the principle of *cy pres* doctrine. "In the first place, the scheme is made in pursuance of what is commonly known as the *cy pres* doctrine, and, in cases like this, it is applied where, from lapse of time and change of circumstances, it is no longer possible beneficially to apply the property left by the founder or donor in the exact way in which he has directed it to be applied, but it can only be applied beneficially to similar purposes by different means." (page 323.) Then at page 327: "But ought we, sitting here simply to interpret the law, to hold ourselves bound by the words of the Will to distribute the large sum of money in doles in this fashion? I think we ought not. As I said before, we must consider not only the change in amount, but the change in circumstances. * * *, A distribution of 50 shillings in each half year among a few poor people in a small village, as I said before, would be intolerable on a large scale in a large town like Kensington. But was it the intention of the testatrix? Here again I would say emphatically, No."

The *cypres* doctrine is applied when from lapse of time and change of circumstances it is no longer possible beneficially to apply the property left by the founder or donor in the exact way in which he has directed it to be applied but it can only be applied beneficially for similar purposes by different means. This general principle, as I had occasion to point out from original Arabic authorities in *Muthukana* v. *Vada Lavvai* (4) is also in harmony with the spirit of the Muhammadan Law relating to the administration of charities. Now it cannot be questioned that the eleemosynary doles are as demoralising and mischievous in their effects in this country as elsewhere. The history of this very family is but an illustration of the way in which doles have the effect of pauperising the recipient. Having regard to the change of circumstances, the maintenance and support of poor Mohamedan students giving preference to those among the descendants of the 2nd Sajjadanashin would undoubtedly best carry out the benevolent intentions of the founder. For this purpose a fund should be formed out of the surplus left after meeting the expenses of the repair and maintenance of the tomb, the salaries of the trustees and the Sajjadanashin and the necessary establishments and expenses in connection with the celebration of the Urs and Fateha ceremonies according to the practice prevalent hitherto as found by the Subordinate Judge. The persons named in Exhibits J and F shall receive their allowances during their lifetime. As each one dies, the amount payable to him or to her shall lapse into the fund for the support of poor Mohamedan students.

I ought to mention that the performance of Urs and Fatehas has not been objected to in this case, and Benson, J., and myself held in the above mentioned case in *Muthukana* v. *Vada Lavvai* (4) that such objects are valid according to the Muhammadan Law as administered in India, if these rites involve the distribution of food to the poor. That decision has been con-

(3) (1880) 18 Ch. D. 310 at p. 323; 50 L. J. Ch. 646; 45 L. T. 152; 40 W. R. 4 6.

(4) 6 Ind. Cas. 1; 34 M. 12; (1910) M. W. N. 80; 20 M. L. J. 254; 8 M. L. T. 16.

firmed by their Lordships of the Privy Council and as in this case the evidence shows that on the occasion of the Urs and the Fatehas at this institution food is distributed to the poor, such a gift must be held to be valid.

Mr. L. A. Govindaraghava Aiyar, in his arguments, on behalf of his client relied much on the sacred character of the office of Sajjadanashin and reference was made to the well known case relating to *khankhahs* in *Mohiuddin* v. *Saiyiduddin* (5), *Secretary of State for India* v. *Mohiuddin Ahmed* (6), *Piran* v. *Abdool Karim* (7). He also relied strongly on a decision of Banerjee, J., in *Ishtiaq Ahmed* v. *Saiyid Massaod Ahmed* (8). As regards this last case, I am not at present prepared to express my assent to the proposition laid down there that the Court has no power to remove a Sajjadanashin or to appoint a new man in the office, supposing it to be one which truly involves the performance of the duties of a spiritual and religious character inseparably connected with the personality of the Sajjadanashin. The nature and the functions of the office of Sajjadanashin properly so-called are, if I may say so with respect, correctly set out in their general features in *Piran* v. *Abdool Karim* (7) and *Mohiuddin* v. *Saiyiduddin* (5) mentioned above. But in none of those cases does Mr. Justice Ameer Ali, now a member of the Judicial Committee, lay down the proposition enunciated in *Ishtiaq Ahmed* v. *Saiyid Massaod Ahmed* (8). On the other hand he applies the law of *waqfs* to these religious institutions, though he points out at the same time that by usage there are certain peculiar features in the office of Sajjadanashin which distinguish it from that of an ordinary Mutawalli. But it is difficult to see that if the office is capable of being transferred at all from one person to another, why the power of changing the incumbent of the office, in the absence of any such reservation in the grant itself, should be confined to the existing incumbent. Whatever the Sufisitic doctrines may be that are taught in any particular *khankhah*, it can hardly be pretended that there would be anything peculiar and absolutely confined to that individual institution. Nor could it well be said, for instance, that if a Sajjadanashin dies without nominating a successor, the *khankhah* with all its properties must remain without a head. The different orders of Sufis or Fakeers in India have their own *khakhahs* or *takias*, and it could not be an insuperable difficulty for the Court in a proper case to select a fit candidate on the advice of competent persons well versed in the rules of that or similar institutions or relegate the appointment to them. Unless there is very strong and clear evidence of custom and usage by which it can be shown that if the Sajjadanashin misconducts himself in his office he cannot be interfered with by the Court, I should be inclined to say that the ordinary Muhammadan Law of *waqf* must apply to him with such modifications as may be required by the practice of the institution concerned or of similar institutions. I do not think it would be safe to draw much upon the analogy of Hindu Mutts, which no doubt present some features of resemblance to *khankhahs* but which must be governed by rules of Hindu Law and their own usages. But I only wish to mention that the latest pronouncement of the Judicial Committee on the position of the head of a Mutt has thrown considerable doubt on the view of the law propounded in *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (9). It is not, however, necessary in this case to discuss any further the law relating to Sajjadanashins properly so called, for the office which the defendant and his ancestors have been holding is that of Sajjadanashin merely in name but in fact nothing more than the office of an ordinary Mutawalli or trustee.

Mr L. A. Govindraghava Aiyar raised the question relating to the importance of the office of Sajjadanashin in order to plead for a large stipend to his client than that of Rs. 30 per mensem allowed in the scheme of the Subordinate Judge. It seems to me, this amount is more than sufficient for the duties he has to perform. The trustee on the other hand who will have the charge of the trust properties and their management should be paid an adequate salary according to the qualifications of the

(5) 20 C. 810; 10 Ind. Dec. (N. S.) 545.
(6) 27 C. 674; 14 Ind Dec. (N. S.) 443.
(7) 19 C. 203; 9 Ind. Dec. (N. S.) 531.
(8) 3 Ind. Cas. 508; 6 A. L. J. 632.
(9) 27 M. 435; 14 M. L. J. 105.

men available As regards the establishment, it does not seem to be necessary to have a separate revenue inspector. On the other hand it would be desirable to secure a competent clerk who, in addition to keeping accounts and writing letters, may be able to render some assistance to the trustee in the general management. The Peish Imam is allowed in the lower Court's scheme a salary of Rs. 4 per month. This seems to me to be wholly inadequate. He is an important functionary, his duty being to lead the prayers and deliver sermons, and he ought to be well read in Mahomedan religion and theology. He should be a man able to inspire respect by his character and bearing and the pay should be sufficient to attract men of such qualifications. Appeal dismissed with costs and memorandum of objections allowed. Costs to come out of the estate.

SESHAGIRI AIYAR, J.—I have had the advantage of reading the exhaustive judgment of my learned brother. In a case relating to charity in Hindu temples *Muthukrishna Naicken* v. *Ramchandra Naicken*(9)] which was heard by both of us a few days after, I have discussed at some length the applicability of the doctrine of *cypres* to Indian customs. I am in entire agreement with my learned brother in holding that the doctrine of *cypres* as expounded by the Master of the Rolls in *Campden Charities, In re* (3) is applicable to India. In this country the mode of feeding in temples and Mutts is of such a character that it is not the needy or incapable that receive assistance, but is the idler and the profane that are benefited. The question put by Jessel, M. R., might very well be put in India: "Could it have been the intention of the donor that his money should be spent upon such men?" My answer is what the learned Lord Justice has so emphatically given. I, therefore, agree with the judgment of my learned brother and in the order as to costs in the appeal and in the memorandum of objections.

M. C. P.

Appeal dismissed;
Memo. of objections allowed.

(9) 47 Ind. Cas. 611; 37 M. L. J. 489.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 61 OF 1919.

July 17, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

PADDU—DEFENDANT—APPELLANT

versus

MAHABIR PRASAD—PLAINTIFF—RESPONDENT.

Adverse possession—Acquiescence—Estoppel, equitable—Land lying unoccupied—Encroachment by erecting buildings—No mistaken belief as to ownership—Demolition of buildings.

No question of adverse possession or limitation can arise in respect of land practically lying unoccupied. [p 684, col. 1.]

A question of acquiescence or equitable estoppel may arise where the owner of land sees another person erecting buildings upon it and, knowing that such person is under the mistaken belief that the land is his own property, purposely abstains from interference with the view of claiming a demolition of the buildings when erected. Where, however, the person encroaching on the land of another cannot be said to have been acting under any mistaken belief as to the ownership of the land, no question of acquiescence or equitable estoppel can arise. [p. 684, cols. 1 & 2.]

Appeal from the decree of the Subordinate Judge, Sultanpur, dated the 21st February 1919, reversing that of the Munsif, Sultanpur, dated the 29th November 1918.

Messrs. *Haider Husain* and *St. C. Thompson*, for the Appellant.

Syed *Ali Mohammad* and *Mr. S. M. Ahmad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for possession of certain land by the demolition of the *chabutra* built thereon by the defendant and the closing of a door which the defendant had opened in his house towards it. The allegation of the plaintiff was that the land over which the *chabutra* had been built and towards which the door had been opened formed part of No. 1405 *khasra* and belonged to the plaintiff. The *chabutra* in question is said to have been constructed and the door opened some time in 1907. The defendant pleaded that he had built the *chabutra* with the permission of the Municipal Board to whom the land belonged.

The Court of first instance dismissed the claim but the lower Appellate Court decreed it so far as the *chabutra* stood on plot No. 1405 *khasra abadi*.

It appears from the *khasra abadi* prepared at the time of the First Regular Settlement

that plots Nos. 1404 and 1405 were in the occupation of Dwarka Prasad, the ancestor of the plaintiff, whose house and *chhappar* stood thereon. Plot No. 1397 belonged to the predecessor-in-interest of the defendant. Plot No. 1403, which is something like a square or open piece of land standing between houses Nos. 1402, 1405 and 1397, was entered as the *sahan* of all those houses. The Nazul Register and some other documentary evidence produced go to show that in 1905 the defendant applied for permission to build a *chabutra* on the Nazul land. He was asked to pay rent, to which he agreed. He was thereupon granted permission to built *chabutra* on plot No. 1403 1 *khasra*, which stands between plot No. 1404 and No. 1397. Instead of confining the *chabutra* to that portion, the lower Court finds that he has encroached on a portion of plot No. 1405, thereby converting to his own use that portion of the land which was lying between the houses of the parties and belonged to the plaintiff. The finding cannot be challenged in second appeal.

No question of adverse possession or limitation can arise in respect of that land, because that land was practically lying unoccupied. No acts of physical possession could have been exercised over it by either party, and the plaintiff's title to it continued undisturbed till the *chabutra* was built thereon by the defendant after obtaining permission in respect of plot No. 1403 1 in 1906. Having obtained permission to build on plot No. 1403-1, it cannot be said that he acted *bona fide* in building a *chabutra* on plot No. 1405 *khasra*.

As pointed out by their Lordships of the Privy Council in *Beni Ram* v. *Kundan Lal* (1), where the owner sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with the view of claiming a demolition of the building, when it is erected, a question of acquiescence or equitable estoppel may arise. Such is not the case here. The defendant has not produced the lease, which was granted to him by the Municipal Board A plan must have been prepared at that time, showing how far the land extended, which was included in the lease. No copy of such a plan, if it was prepared, has been produced. It cannot, therefore, be said that he was acting under some mistaken belief as to the extent of the land leased to him.

The plaintiff respondent has filed a cross objection with regard to the dismissal of his claim for closing the door but that cross objection is not now pressed.

The appeal and the cross-objection are dismissed with costs.

Appeal and cross objection dismissed.

(1) 21 A. 496 at p. 502; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. s.) 1022.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 54 OF 1918.

May 15, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

MARK D'CRUZ—PLAINTIFF—APPELLANT

versus

JITENDRA NATH CHATTERJEE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss 92, proviso 4, 115—Lease—Oral evidence showing that condition was dispensed with, admissibility of—Estoppel.

A written lease for five years provided that if the lessee desired a renewal, he should give a notice in writing three months before the expiration of the term of the lease The last day on which such notice was to be given was the 31st of January 1917. No written notice was in fact given by the lessee, but he brought a suit for the renewal of the lease and wanted to prove that on the 15th of January 1917 one of the lessors had told his wife that there was no need to give a written notice provided for by the lease and hence no written notice for renewal had been given:

Held, (1) that in view of the provisions of section 92, proviso 4, of the Evidence Act, the alleged statement of the lessor regarding the written notice for renewal was not admissible in evidence; [p. 688, cols. 1 & 2.]

(2) that such a statement, on being assented to by the lessee, amounted either to a modification or rescission of the contract of lease within the meaning of section 92, proviso 4, of the Evidence Act; [p. 688, cols. 1 & 2]

(3) that the statement did not amount to an estoppel on the part of the lessor so as to preclude him from denying that the notice provided for by the lease had in fact been given. [688, cols. 1 & 2.]

D'CRUZ v. JITENDRA NATH.

Appeal against the following judgment of Mr. Justice Greaves, dated the 20th June 1918 :—

"In this suit the plaintiff claims specific performance of a covenant for renewal contained in a lease dated 8th July 1912 and made between the defendants of the one part and the plaintiff of the other part, whereby the defendants demised premises No. 1, Beparitolla Lane, to the plaintiff for a term of five years commencing on the 1st May 1912 and terminating on the 30th April 1917, at the rent and upon the covenants contained in the indenture of lease. One of the covenants contained in the indenture provides that, in case of due payment by the lessee (that is the plaintiff) of the rents reserved and the due performance and observance of the conditions and covenants therein contained, the lessee should be entitled to a renewal of the lease for a further period of five years on the same terms and conditions as those contained in the lease except the condition as to a further renewal, and the covenant further provides that notice in writing must be given by the lessee to the lessors of the lessee's intention to renew the lease three months before the expiration of the first mentioned period of five years. It is common ground between the parties that no written notice in writing to renew the lease was given by the plaintiff to the defendants three months before the expiration of the lease, that is to say, the 30th April 1917. But the plaintiff's case is that on or about the 15th January 1917 one of the defendants, Ganga Churn, came to the premises to collect the rent, that he there met the wife of the plaintiff who said that she and the plaintiff were going to leave the house and that thereupon Ganga Churn said that they had been good tenants, that he desired them to remain and said that there was no need to give the written notice provided by the lease. It appears that on the 30th March 1917 the plaintiff wrote to the defendants stating that his lease was about to expire and that he would be glad to have a renewal for a further period of five years on the same terms and conditions as those specified in the original lease. No answer as given to this letter until the 23rd April, when the defendants' Attorney wrote to the plaintiff saying that no written notice as provided by the lease had been given by the plaintiff to renew his lease and that he must deliver up possession at the expiration of the term covered by the lease. It is the plaintiff's case that on the 7th April 1917 Ganga Churn, the defendant, again came to the premises, saw the plaintiff and agreed with him to renew the lease, and, therefore, his case is that, although no written notice was given in accordance with the terms of the lease, such written notice was waived by the defendants and that, this being so, he is entitled to a renewal of his lease of the premises. Counsel for the defendants raised the following issue:—

'Did the plaintiff give notice in writing to the defendants of his intention to take a renewal of the lease three months prior to the expiration of the lease, and if not, is the plaintiff entitled to any relief?'

Counsel for the defendants further contended that having regard to the provisions of section 92, proviso 4, of the Evidence Act, it was not open to the plaintiff to give any evidence of any verbal modification of the lease and that, therefore, I could not go into the question raised on behalf of the plaintiff as to whether or not Ganga Churn agreed to waive written notice of renewal. I think that this contention of the defendants is well-founded. Section 92, proviso (4), of the Evidence Act provides that the existence of any distinct subsequent oral agreement to rescind or modify any contract, grant, or disposition of property may be proved except in cases in which such contract, grant, or disposition of property is by law required to be in writting or has been registered according to the law in force for the time being as to the registration of documents. Now, it seems to me that the lease, being for a term of five years, must be registered and being for a period of more than one year it must be in writing. Having regard, therefore to the provisions of section 92, sub section 4, of the Evidence Act, I think that if I allow evidence to be given of the alleged verbal agreement to waive written notice, it would be a modification of the contract within the meaning of proviso (4) of section 92.

On behalf of the plaintiff the following argument was raised upon the proviso, namely

that an option for renewal is not required by law to be registered and that, therefore, he is not debarred by proviso 4 from giving evidence with regard to the written arrangement. But I think that this argument is founded on a fallacy. The contract which the plaintiff seeks to modify is not a particular clause in the lease but the indenture of the 8th July 1912, which admittedly required registration, and it is not open, I think, to the plaintiff to split up the various clauses and provisions of that indenture and say that each of them is a separate contract.

Then on behalf of the plaintiff further arguments are urged. It is said that, although the option provides for a three months' notice, time is not of the essence of the contract, and I was referred in support of this proposition to various cases and, amongst others, to the case of *Lennon* v. *Napper* (1) and to some remarks which will be found, of, I think, Lord Mansfield, at page 685 of the report. So far as *Lennon* v. *Napper* (1) is concerned, I think the case and the remarks to which I was referred have no bearing upon the case before me. The remarks seem to me to deal with cases of leases for lives and of the right to substitute another life on the dropping of one of the lives named in the lease, and there Lord Mansfield is dealing with the construction of such a contract as a whole and is considering whether upon the construction of such a contract time is of the essence of the contract. The other cases to which I was referred are the well known cases dealing with contracts of land where Courts of equity for very good reasons, having regard to difficulties of title, have always held that time, unless specifically made of the essence of the contract, is not of the essence of the contract in such cases. Therefore, I think that none of these cases have any application to the matter before me and I think that clearly the time of three months provided in the option for renewal contained in the lease was of the essence of the contract. Then, secondly, it is said that although the option specifically provides that the notice shall be in writing that is really not essential and that any notice would be good. That to my mind would be to make a new contract for the parties, which the Court cannot do. The parties have agreed that the option for renewal should be exercisable by means of a notice in writing, and presumably they meant what they said and I do not think that that will be satisfied by any oral notice.

Then the last argument that was urged on behalf of the plaintiff was that the oral agreement alleged, waiving a written notice, was a substituted mode of performance of a term in the contract. I confess I do not quite understand what is meant by this, but it seems to me, for the reasons that I have already stated, that if I were to accede to this and allow evidence of the oral agreement to be given, I should be disregarding the provisions of section 92, proviso 4, of the Evidence Act.

I have taken no evidence in this case and, therefore, I am expressing no opinion as to whether or not the plaintiff would succeed in establishing before me the case that was opened in his behalf, but I am simply deciding the case upon the preliminary objection taken by Counsel for the defendants that in this case oral evidence is not admissible to prove that written notice was waived by the defendants or one of them. For these reasons, the suit fails and must be dismissed with costs on scale No. 2."

Messrs. *Sasmal* and *J. N. Sinha*, for the Appellant.

Messrs. *Zorab* and *S. K. Mullick*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This is an appeal against a judgment of my learned brother Mr. Justice Greaves, by which he dismissed the plaintiff's suit.

The suit was for the specific performance of an agreement contained in an indenture of a lease dated the 8th of July 1912, which was for a period of five years from the 1st May 1912, to grant the plaintiff a renewal of the lease of the premises in question: and, the matter depends upon a covenant in the lease which was to this effect:—"That in case of due payment by the lessee of the rent hereinbefore contained hereby reserved and the due performance and observance of the conditions and

(1) (1802) 2 Sch. & Lef. App. 682.

covenants on his part to be performed and observed the lessee shall be entitled to have a renewal of the lease of the said demised premises for a further period of five years on the same terms and conditions as are herein contained except the present condition as to further renewal provided that the lessee gives notice in writing to the lessors of his intention to take such renewal three months before the expiration of the said first mentioned period of five years." There is no doubt that a notice in writing of the lessee's intention to take a renewal was not given three months before the expiration of the said first-mentioned five years. Such a notice, in order to comply with the terms of the covenant, ought to have been given on the 31st of January 1917, at the latest. It was not so given, and the plaintiff has alleged that the notice as required by the contract was not given because of certain communications which passed between the plaintiff and his wife on the one hand and one of the defendants on the other: and, with regard to that, the statement of the learned Judge may be taken as accurately setting out the facts: He says, "The plaintiff's case is that on or about the 15th January 1917 one of the defendants, Ganga Churn, came to the premises to collect the rent, that he there met the wife of the plaintiff who said that she and the plaintiff were going to leave the house and that thereupon Ganga Churn said that they had been good tenants, that he desired them to remain and said that there was no need to give the written notice provided by the lease. It appears that on the 30th March 1917 the plaintiff wrote to the defendants stating that his lease was about to expire and that he would be glad to have a renewal for a further period of five years on the same terms and conditions as those specified in the original lease. No answer was given to this letter until the 23rd April, when the defendants' Attorney wrote to the plaintiff saying that no written notice as provided by the lease had been given by the plaintiff to renew his lease and that he must deliver up possession on the expiration of the term covered by the lease. It is the plaintiff's case that on the 7th April 1917 Ganga Churn, the defendant, again came to the premises, saw the plaintiff, and agreed with him to renew the lease, and therefore, his case is that, although no written notice was given in accordance with the terms of the lease, such written notice was waived by the defendants and that, this being so, he is entitled to a renewal of his lease of the premises."

The question, in my judgment, depends upon the terms of section 92, proviso (4) of the Indian Evidence Act. The first part of the section is as follows: "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms." For the purpose of seeing what is meant "by any such contract grant, &c.," it is necessary to refer to section 91 which provides as follows: "When the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract....."

Section 92, proviso (4), is to this effect: "The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents." There is no doubt in this case that the lease which is the contract in question was reduced to writing, and inasmuch as it was a lease for five years, it was required by law to be reduced to writing and it was also necessary to register it—there was no dispute that the writing required registration according to law. Therefore, if the alleged agreement, which is relied on by the plaintiff, amounted to a rescission or a modification of the lease, evidence of that

agreement could not be given inasmuch as the alleged agreement was made orally.

But the learned Counsel who appeared for the appellant in this Court has argued that the arrangement, which was verbally made between the plaintiff's wife and one of the defendants on one occasion and between the plaintiff and that defendant on another occasion, was not a rescission or modification of the contract, but it was merely a waiver of the performance of one of the provisions of the contract. For the purpose of deciding this question it is necessary to consider what was the real nature of the transaction. In my judgment, the arrangement, if made as alleged by the plaintiff, amounted to an oral agreement to rescind the clause in the contract, which provided that a written notice should be given: or, it may be said that the alleged arrangement amounted to an oral agreement to modify the contract (which was the lease in this case), and that consequently evidence of the alleged oral agreement was not admissible. I base my judgment upon the express terms of the section and I think it is not necessary to refer in detail to the many cases which have been cited to us.

Then it is said that the alleged arrangement between parties amounted to an estoppel and the defendants are estopped from denying that the notice provided by the contract had in fact been given. In my judgment, that point will not avail the plaintiff. This was not, in my judgment, a case of estoppel—there was no representation of an existing fact upon which the plaintiff changed his position: on the contrary, if it amounted to anything, it amounted to an undertaking by one of the defendants that he would not in future call upon the plaintiff to perform a provision of the contract, which, in my judgment, cannot be relied upon as an estoppel in this case.

For these reasons I think that the judgment of the learned Judge was right and it should be upheld. The result follows that the appeal should be dismissed with costs.

WOODROFFE, J.—The lease in this case provided that a notice should be given in writing if renewal was desired. The last day on which such notice was to be given was the 31st of January 1917. No written notice was in fact given The appellant, however, says that on the 15th of January 1917 one of the defendants told his wife that there was no need to give a written notice provided for by the lease. What was then the effect of this alleged statement made by one of the lessors and assented to by the appellant? Is it a waiver, or is this a case of rescission or modification of the written agreement, or have we to deal with it as a case of estoppel? In my opinion, there was no waiver, because what was said was said before any breach of the contract occurred, namely, on the 15th of January, and the written notice of renewal was not due until the 1st of February. Upon the facts stated, if true (they are denied, though our judgment must proceed upon the assumption that the statement was made), this was a statement that the lessee need not do something on a future date which under the lease he had contracted to do in the event of his desiring to continue the lease for a further period of five years. Such a statement, in my opinion, amounted to either a modification or rescission within the meaning of section 92, proviso (4), of the Evidence Act. It may be regarded as a modification if we look to the whole of the lease of which this term was a part, or we may call it a rescission if we look to this particular clause of the lease the operation of which, it was said, was dispensed with by this arrangement. Section 92, proviso (4), excludes this oral statement or agreement.

Thirdly, there was no estoppel, because, though, if the facts were correctly stated, there may have been a representation, and possibly an alteration of the condition, there was in fact no representation of a thing within the meaning of section 115 of the Evidence Act. Such representation as there was was not a representation as to a past or present fact but was a statement of the intention of one of the lessors that on a future date he would no insist upon the performance of a condition to which he was entitled by virtue of the lease: in other words, he would dispense with the written notice which the lease provided for.

On these grounds I hold that the appeal fails and must be dismissed with costs.

Appeal dismissed.

KANDASWAMI MUDALIAR, *In re.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 394 OF 1919.
(CRIMINAL REVISION PETITION No. 327 OF 1919).

September 26, 1919.

Present:—Mr. Justice Seshagiri Aiyar.

In re P. KANDASWAMI MUDALIAR—ACCUSED—PETITIONER.

Penal Code (Act XLV of 1860), s. 269, scope and applicability of—Madras City Municipal Act (III of 1904), s 366—Small-pox patient directed to be removed by Health Officer to Isolation Hospital—Removal to isolated house, whether unlawful disobedience of order—Prevention of infection—Prosecution, what to prove.

In a case under section 269, Indian Penal Code, the prosecution must make out not only that there was disobedience to an order of an executive officer directing the doing of a certain act to prevent the spread of an infectious disease but also that the disobedience was unlawful and negligent and had also the effect of spreading the infectious disease. The gist of the unlawful act is that there must be danger of the infection spreading. If care is taken to avoid the infection, the act cannot be said to be unlawful or negligent and no offence is committed under the section The mere failure to carry out an order which could otherwise have been *bona fide* obeyed by the avoidance of the danger of infection, cannot be regarded as an offence under section 269 of the Penal Code. [p. 690, col. 2; p. 691, cols. 1 & 2.]

The Health Officer of the Madras Municipality directed the removal of a small-pox patient to an Isolation Hospital, but the patient's father removed him instead to an isolated house under the advice of his doctor:

Held, that the disobedience to the Health Officer's order under section 366 of the Madras City Municipality Act did not amount to an offence under section 269, Indian Penal Code, as the accused's action prevented the spread of the infectious disease. [p. 691, col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the conviction and sentence passed on the petitioner by the Court of the Presidency Magistrate, Egmore, Madras, in C. C. No. 7124 of 1919.

FACTS.—Accused was convicted under section 269, Indian Penal Code, for disobeying an order of the Corporation Health Officer under section 363 of the Madras City Municipal Act (III of 1904). The accused's son was suffering from small-pox and he was ordered to remove him to the Isolation Hospital. But instead the accused removed him to an isolated house.

Mr. *K. P. Kesava Menon*, for the Petitioner.—Section 366 of the City Municipal Act is drafted on the corresponding section of the English Public Health Act of 1886, and it has been held that a sufficient compliance with the order would satisfy the requirements of the law. The object of the law is not to punish but to prevent the danger spreading to others. See 23 Halsbury's Laws of England, page 454, *Warwick* v. *Graham* (1).

[SESHAGIRI AIYAR, J.—The Health Officer is the judge of fact under section 366. The question, therefore, is whether the Magistrate was competent to go into the question at all.]

I submit that section 269 requires that the Act should be unlawful or negligent. In the present case, the removal was without delay to a place which was accommodative and isolated. Mere disobedience of a technical kind will not suffice.

The Crown Prosecutor, for the Crown.—The English law is differently worded. Section 366 constitutes the Health Officer the sole judge. The disobedience of the order is an unlawful act within the meaning of section 269, Indian Penal Code. Section 366 imputes knowledge by notice. An offence under section 269, Indian Penal Code, is to be deemed to have been committed. See clause (3).

[SESHAGIRI AIYAR, J.—In cases of resistance or disobedience like the present, it can be contended that the public servant ought not to have promulgated the order.]

Section 366 excludes the possibility of such contentions. Compare section 188, Indian Penal Code. In *Cahoon* v. *Mathews* (2) the want of this power of ordering removal to hospitals necessitated an acquittal. See pages 498-499.

ORDER.—The facts of the case are these. The accused was asked by the Health Officer of the City of Madras to remove his son to the Isolation Hospital at Krishnampet as the child was then suffering

(1) (1899) 2 Q. B. 191; 68 L. J. Q. B. 1001; 80 L. T. 773; 63 J. P. 692; 19 Cox. C. C. 363, 15 T. L. R. 410.
(2) 24 C. 494; 1 C. W. N. 274; 12 Ind. Dec. (N. s) 997.

from small-pox. The child was being treated by Dr. V. Rama Kamath, a certified medical practitioner. This gentleman advised the accused to remove the patient to an isolated house, which was done. Thereupon this prosecution was launched under section 269 of the Indian Penal Code. The Magistrate was apparently of opinion that as the Health Officer was the sole judge of the justness of the order to remove the infected child to a hospital, he had no option but to convict the accused of the offence. There is an affidavit that the Magistrate did not permit evidence being given as to the precautions taken by the accused to avoid infection. The question for consideration is whether this conviction is right. Under section 366 of the Madras Municipality Act (Act III of 1904) under which the order for removal was made, it must appear to the Health Officer that a person is suffering from a dangerous disease, has no proper lodging or accommodation or is lodged in a place occupied by more than one family. Then he can order the person to be removed to the Isolation Hospital. So the Health Officer has to be satisfied not only that a person is suffering from infectious disease but also that the infected person has no proper lodging or is lodged in a place which is occupied by more than one family. In this case, no doubt, at the time the order was made the son of the accused was being lodged in a place which was occupied by more than one family. Therefore, the order in its inception was right, although it is defective in that it gave no option to the accused to lodge his son in a proper place. The further question is whether the action of the accused in providing a separate lodging in which there were none living but the patient and himself was such a violation of the order as brought him under section 269 of the Indian Penal Code. The 3rd clause of section 366 says: "Whoever, having charge of a person in respect of whom an order is made under sub-section (1), disobeys the said order shall be deemed to have committed an offence punishable under section 269 of the Indian Penal Code." The learned Crown Prosecutor suggested that this notional imputation of crime deprived the Magistrate of power to enquire into elements which constitute the offence under section 269. It would be dangerous to hold that the prosecution is not bound to prove the offence, because the local Legislature has enacted that a violation of the order of an executive officer is punishable under a particular section of the Code. The Penal Code is an all India Statute, and anybody charged under it has the right to expect of the prosecution proof that he has committed the offence as defined in the section. Turning to the Indian Penal Code I find that, to bring the offender within it, he should have unlawfully or negligently done an act which he knew or had reason to believe to be likely to spread the infection of any disease dangerous to life. The accused in this case is not charged with disobeying the order of a public servant lawfully promulgated. He is charged with having knowingly spread the infection of disease; wherefore the question is, not whether the order of the Health Officer in its inception was right, but whether the conduct of the accused in choosing the alternative of sending his son to an isolated house was an offence under section 269. Before I refer to cases I must draw attention to the language of the section. It uses the words "unlawfully or negligently" and not "illegally". As was pointed out by Lord Ellenborough in *Reg.* v. *Vantandillo* (3), an indictment which charges a person to have done an act unlawfully or injuriously must assume or prove that there was no lawful excuse. Le Blanc, J., said this: "Neither did they pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner, and the patient was kept from the society of others so as not to endanger a communication of the disease. In such a case the law did not pronounce it to be an offence." So the gist of the unlawful act is that there must be danger of the infection spreading. If care is taken to avoid such an infection, the act cannot be said to be unlawful or negligent. In fact the City Municipality Act contemplates that the action will not amount to an offence if a proper lodging or accommodation is found for the infected person. When we remem-

(3) (1815) 4 M. & S. 73; 16 R. R. 389; 105 E. R. 762.

ber that section 269 does not use the word "illegal" which has been defined by section 43 as being applicable "to everything which is an offence or which is prohibited by law" but uses the word "unlawful," it is clear that the prosecution must make out not only that there has been disobedience to the order of the Health Officer but also that the disobedience was unlawful and negligent and had also the effect of spreading the infectious disease. The case near in point is *Cahoon* v. *Mathews* (2). In that case a mother was directed to remove her daughter to an Isolation Hospital. She refused to comply with the order unless she was herself allowed to accompany her child. Thereupon she was charged under section 269 of the Indian Penal Code. The learned Judges held that as in her own house there were no lodgers, as the order to remove was passed upon a misapprehension as to the existence of lodgers and as sufficient accommodation was provided for the infected child, the mother did not act unlawfully or negligently. The learned Judges say and I entirely agree with these observations of theirs: "An act, however, may be lawful though it may be illegal." Therefore, although in the present case the refusal to comply with the direction of the Health Officer might have been illegal as defined in section 43, I am not prepared to hold that it was unlawful when it is found that proper precautions were taken to prevent infection and to provide a suitable lodging for the person infected. I may refer in this connection to the weighty observations of Lord Blackburn and Lord Watson in *Metropolitan Asylum District* v. *Hill* (4). Lord Blackburn said: "On those who seek to establish that the Legislature intended to take away the private rights of individuals lies the burden of showing that such an intention appears by express words or necessary implication." Lord Watson in the same case said:—"Where the terms of a Statute are not imperative, but permissive, the fair inference is that the Legislature intended that the discretion as to the use of the general powers thereby conferred should be exercised in strict conformity with private rights." The Health Officer would have been well within his rights if he had told the accused that he should either provide a proper lodging for the son or he should remove the child to the hospital. That would have been, in the language of Lord Watson, an exercise of discretion compatible with private rights. The mere failure to carry out an order which could otherwise have been *bona fide* obeyed by the avoidance of the danger of infection, cannot be regarded as an offence under section 269 of the Indian Penal Code. I must, therefore, quash the conviction. The learned Crown Prosecutor informed me that in case I came to the conclusion that the Magistrate was not justified in shutting out evidence he was not prepared to press for the case being sent down for further enquiry. All that is necessary in a case of this description is to state the principle which should guide the Magistrate under similar contingencies. The fine, if paid, must be refunded.

M. C. P.

Conviction quashed.

(4) (1881) 6 App. Cas. 193 at p. 203; 50 L. J. Q. B. 353; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No 311 OF 1919.

June 4, 1919.

Present:—Pandit Kanhaiya Lal, J. C., and Mr. Ashworth, A. J. C.

Musammat JASODA—PRISONER—APPELLANT

versus

EMPEROR—RESPONDENT.

Confession—Statement by accused—Guilt, inference as to—Co-accused, whether affected—Accused, presence of, as accessory, effect of—Corroboration.

A statement made by an accused person which suggests an inference of guilt may amount to a

confession, though the person making the statement may directly repudiate his participation in the crime Such a statement may be taken into consideration against the person making the statement, but it may be unsafe to use it against a co-accused. Where, however, it appears that the person making the statement was at all events an accessory present at the commission of the crime, the statement can be used against the co-accused, if sufficient corroboration is forthcoming [p. 693, cols. 1 & 2.]

Appeal against the order of the First Additional Sessions Judge, Lucknow, dated the 5th May 1919.

Mr. *G. H. Thomas*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—On the 13th February last Ram Sarup, son of Ganga Prasad, aged 6 years, was murdered for the sake of his ornaments. In consequence of a statement made by *Musammat* Gulaba, the body of Ram Sarup was recovered in the afternoon from a place where it was buried in the house belonging to Narain, her father. The ornaments worn by the boy when he was murdered were also recovered from another place in the same house, where they were buried. *Musammat* Gulaba stated that *Musammat* Jasoda had brought Ram Sarup into her house and killed him. *Musammat* Jasoda is also called *Musammat* Menda.

Both *Musammat* Jasoda and *Musammat* Gulaba were tried for murder and convicted. The former has been sentenced to death and the latter to transportation for life. They appeal and the reference for confirmation of the sentence of death passed on the former is also before us.

It appears that Ram Sarup was playing on the morning in question somewhere outside the house of Narain. *Musammat* Gobindi, the daughter of Gokul, aged 15 years, and Debi Dayal, son of Gokul, aged 18 years, were playing with him at marbles. Siddhu and Gauri Shankar, the brothers of *Musammat* Gulaba, were also playing there. *Musammat* Gulaba was returning after easing herself when *Musammat* Jasoda, who lives in an adjoining house, met her and told her that she would enable her to have enough to eat and drink for two months and that she would ask her father, Narain, to post a letter to her brother and get her married at Parer. Her suggestion was that Ram Sarup should be killed and his ornaments divided. *Musammat* Gulaba asked her brother, Siddhu, to take away the cattle for grazing. She asked Gauri Shankar to go and get grass. There was no one in the house of Narain at the time.

Musammat Jasoda asked Ram Sarup to come, saying that she would give him a kitten. *Musammat* Gulaba offered to give him some marbles. As the boy approached *Musammat* Jasoda took him by the hand into the house of Narain and closed the door from inside. *Musammat* Gulaba went along with them too. Ram Sarup was wearing bangles on the hands and feet and a Kardhani or girdle made of silver. He was not thereafter seen alive.

At noon the mother of Ram Sarup, finding that the boy had not come back to the house, went and informed her husband, Ganga Prasad, who made a search but without any effect. On the same day he made a report at the Police station, Safipur, stating that his son, Ram Sarup, was missing. On his return he learnt from Debi Dayal and *Musammat* Gobindi that *Musammat* Jasoda and *Musammat* Gulaba had taken the boy to the house of Narain. He asked *Musammat* Jasoda and *Musammat* Gulaba, but they said that they knew nothing of the boy. He set people to watch round the house of Narain and himself sat watching during the night. Early on the next morning he went to the Police station and made another report at 9 A. M. stating that the disappearance of his son was due to the collusion of Bihari, his wife and the daughter of Narain, who were not giving out any clear facts and making statements which gave rise to a suspicion in his mind that his son was the subject of their machinations.

Maula Bakhsh, the Head Constable attached to the Police station, started the investigation. He searched the house of *Musammat* Gulaba but found nothing there except a bamboo stick and a log of wood, both of which were stained with blood. He also searched the house of *Musammat* Jasoda and found a Dhoti and a Lenhga, which, he suspected, were blood-stained. *Musammat* Gulaba had gone that morning to bathe in the Ganges. At about 3 P. M. when she returned home, he enquired from her and got information which led to the discovery in the house of Narain of the body of Ram Sarup and the ornaments which he was wearing when he was murdered. *Musammat* Jasoda was present at

the time when the body and the ornaments were discovered. In fact it is stated that when *Musammat* Gulaba was unable to find the ornaments at the place where she was digging, *Musammat* Jasoda asked her to dig near the wall. *Musammat* Gulaba then dug as *Musammat* Jasoda had directed and found the ornaments there. The finding of the body and the ornaments was reported at the Police station at 4 P M.

Musammat Gulaba made a statement which was recorded by the Committing Magistrate under section 164 of the Code of Criminal Procedure on the 16th February 1919. Therein she did not directly incriminate herself. She stated that *Musammat* Menda *alias Musammat* Jasoda had committed the murder and that she told her not to do so but *Musammat* Jasoda threatened to kill her. She admitted that she had caught the boy when he was killed, a circumstance from which an inference as to her guilt might reasonably be made, but suggested that she had done so with the intention of saving the boy. When examined by the Committing Magistrate afterwards under section 364 of the Code of Criminal Procedure, she said that *Musammat* Jasoda told her that if she joined her in killing Ram Sarup both of them would go and sell the ornaments at Safipur and share the proceeds by halves. She admitted that she had directed her brother, Siddhu, to take away the cattle and her other brother, Gauri Shankar, to go to the Arhar field, but denied that she had caught hold of the boy or joined in committing the murder. She asserted that she had caught hold of *Musammat* Jasoda to save the boy, but judging from her previous conduct and the story she had related on the 16th February 1919 that statement is an absolute lie.

A statement made by an accused person which suggests an inference of guilt may amount to a confession, though the person making the statement may directly repudiate his participation in the crime. Such a statement may be taken into consideration against the person making the statement, but as pointed out in *Empress of India* v. *Gunraj* (1), it might be unsafe to use it against a co accused. The statement made by *Musammat* Gulaba before the Committing Magistrate under section 364 of the Code of Criminal Procedure, to which she adhered in the Court of Session, shows her, however, to have been at all events an accessory present at the murder; and if that was so, it can be used against the co-accused, if sufficient material corroboration is forthcoming. *Musammat* Gobindi and Debi Dayal state that they were playing with the boy Ram Sarup when *Musammat* Gulaba sent her brothers away and that *Musammat* Jasoda and *Musammat* Gulaba took the boy into the house and chained the door from inside. The dead body of the boy and his ornaments were subsequently found buried in that very house.

It is suggested on behalf of *Musammat* Jasoda that Gokul, the father of *Musammat* Gobindi and Debi Dayal, bore an ill-will towards her. *Musammat* Jasoda states that about 3 years ago a daughter of Gokul named *Musammat* Parbati had eloped with a person named Chhedi and that Gokul had suspected her of having brought about the elopement and stopped his women-folk from visiting her house. It does not, however, appear that Gokul was in a position to influence *Musammat* Gulaba. *Musammat* Gulaba returned from her bath in the Ganges at about 3 P. M. The body was soon afterwards recovered and a report of the recovery made at the Police station at 4 P. M. In the report made by Ganga Prasad on the 14th February 1919 at 9 P. M., it was stated that both *Musammat* Jasoda and *Musammat* Gulaba were suspected. Ganga Prasad says that he had learnt from Debi Dayal and *Musammat* Gobindi on the previous night that *Musammat* Jasoda and *Musammat* Gulaba had taken Ram Sarup to the house of Narain. There is no allegation that Ganga Prasad bore any ill-will towards *Musammat* Jasoda, and there is no reason why he should have helped in the concoction of evidence against her.

The learned Additional Sessions Judge and the Assessors believed the evidence for the prosecution and we see no reason to take a different view. The complicity of *Musammat* Jasoda and *Musammat* Gulaba is in our opinion established beyond the possibility

(1) 2 A. 444; 4 Ind. Jur. 591; 1 Ind. Dec. (N. s.) 858.

of reasonable doubt. A log of wood and a bamboo stained with blood, with which the boy was struck before he was killed with an axe, were recovered from the house of *Musammat* Gulaba before the body was recovered.

Musammat Jasoda was the prime mover in the murder. She took the boy inside the house of *Musammat* Gulaba and murdered him and buried his body and the ornaments there, because, as *Musammat* Gulaba says, she said that she was a kept woman and her house would be the first to be searched. There is nothing to extenuate her guilt. *Musammat* Gulaba, being a young girl, was persuaded by her to join in the murder.

We dismiss the appeals of *Musammat* Jasoda and *Musammat* Gulaba accordingly, confirm the sentence of death passed on *Musammat* Jasoda and direct that it be carried into effect according to law.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 275 OF 1919.

August 4, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

In re PULI SUBBA REDDI—PRISONER—APPELLANT No. 24.

Criminal Procedure Code (Act V of 1898), ss. 298, 300—Trial by Jury—Omission to direct Jury not to be influenced by non-admissible statement—Misdirection—Juror conversing with stranger before conclusion of charge, effect of—Verdict, whether should be set aside.

The mere omission to direct a Jury not to be influenced by a statement which they are told is not evidence, does not amount to a misdirection of any importance. [p. 694, col. 2.]

The fact that a Juror has a conversation with a stranger during an adjournment of the Court before the Judge's charge is concluded, is not a sufficient ground for interference by the High Court. [p. 695, col. 1.]

Appeal against the order of the Court of Session of the Vellore Division, in Case No. 12 of the Calendar for 1919.

Dr. *S Swaminathan*, for the Appellant.—The evidence of P. W. No. 35 regarding the contents of a case diary maintained by the Police Inspector should not have been received. The Judge should have told the Jury in his charge that they should not allow their minds to be influenced by it. This amounts to a misdirection.

The affidavit of the Pleader who defended the 24th accused in the lower Court refers to an irregularity in the conduct of the trial. A Juryman was seen conversing with two strangers, when the Court adjourned and while the charge was yet unfinished. That is in contravention of the 2nd paragraph of section 300, Criminal Procedure Code, which has the effect of rendering the verdict illegal. *Benimadhab Kundu* v. *Emperor* (1).

The Public Prosecutor, for the Crown.—As to the misreception of evidence the Judge distinctly told the Jury that it was not evidence. That is enough.

As to the conversation of the Juryman with strangers, the fact was not mentioned to Court immediately and it is urged for the first time only in appeal.

JUDGMENT.—There was no doubt some misreception of evidence when prosecution 35th witness's statement in re-examination as to what was written in a case diary kept by the Circle Inspector, who was not a witness, was allowed to go on the record. The Judge, however, told the Jury that this was not evidence and his mere omission to direct the Jury not to be influenced by this statement does not, in our opinion, amount to a misdirection of any importance. The Judge further reminded the Jury on the question of identification that the identification parade had been held after the 24th accused had been taken to Kaligiri in the presence of the witnesses who afterwards identified him, and he observed that it was useless for the Sub-Inspector to deny it.

It was for the Jury after this to put what value they thought proper on the evidence of the identifying witnesses.

As regards the finding of stolen property in the possession of this accused, there was no misdirection as the Judge clearly explained to the Jury the nature of the possession that there was in this case.

Dr. Swaminathan has asked us to find that the verdict of the Jury was vitiated by

(1) 46 Ind. Cas. 513; 46 C. 207; 27 C. L. J. 553; 22 C. W. N. 740; 19 Cr. L. J. 737.

the fact, asserted in an affidavit filed in this Court and sworn to by the Pleader who defended the 24th accused in the Sessions Court, that during an adjournment of the Court before the Judge's charge was finished one of the Jurors was seen conversing with two strangers. In *Benimadhab Kundu* v. *Emperor* (1) a fresh trial was ordered in a case where one of the Jury held some communication with a stranger in the Court compound after the Judge had finished his charge but before the Jury had delivered their verdict. That was a case which fell within the scope of section 300 of the Criminal Procedure Code.

The present case does not do so, as the charge was not over at the time. The proper course for the Pleader to have taken was to inform the Sessions Judge what he had seen as soon as the Judge resumed his seat on the Bench, but he did not do so and nothing was in fact done in the matter till the accused was convicted and the case came up to this Court in appeal. In the circumstances we do not consider we should interfere.

The appeal is dismissed.

M. C. P.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 89 OF 1919.

July 17, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

BRINDABAN—ACCUSED—APPLICANT

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 182—Giving false information of threatened breach of peace—Burden of proof—Offence, essentials of—Criminal Procedure Code (Act V of 1898), s. 476, proceeding under—Notice to accused, whether necessary—Failure to give notice, effect of.

Where proceedings are initiated against a person under section 182 of the Penal Code for giving false information of a threatened breach of the peace, it is necessary for the prosecution to prove not merely an absence of a reasonable and probable cause for giving the information but a positive knowledge or belief of the falsity of the information given. [p. 696, col. 1.]

Although notice to the person immediately concerned is not essential in a proceeding under section 476 of the Criminal Procedure Code, yet an order passed without such notice, particularly where there is no evidence one way or the other to show a dishonest motive, will not be upheld. [p. 696, col. 1.]

Revision against the order of the District Magistrate, Unao, dated the 9th June 1919.

Babu *Jiban Krishna Banerji*, for the Applicant.

The Government Pleader, for the Opposite Party.

JUDGMENT.—Jagannath Prasad has a daughter, who is stated to have been first betrothed to Brij Kishore, one of the sons of Brindaban. The 9th June 1919 was fixed for the celebration of the marriage; but before that date arrived, Jagannath Prasad for some reason or another entered into an engagement with another person named Jagannath for the marriage of that daughter with the brother of the latter, fixing the same date for the purpose. It is obvious that there was in the circumstances a danger of two marriage parties reaching the house of the father of the bride. Brindaban came to know of the engagement made by the father of the bride with the brother of Jagannath and feeling that there was a danger of a breach of the peace, if both the marriage parties reached simultaneously, he moved the District Magistrate to restrain both the parties for a week from proceeding with the celebration of the marriage. The learned District Magistrate granted an *ex parte* order in the terms asked for.

On the next day Jagannath, the brother of the prospective bridegroom, appeared and objected to the restraint imposed on him. The learned Magistrate set aside his previous order and directed the prosecution of Brindaban under section 182 of the Indian Penal Code. It was not proper, however, for him to have passed such an order without giving an opportunity to Brindaban to show cause against it. No evidence was taken. Brindaban apparently believed that there would be a danger of a breach of the peace, if both the marriage parties proceeded simultaneously to the house of the father of the bride.

SHER DIL *v.* EMPEROR.

He was, of course, ill-advised in moving the Criminal Court for a redress, for even if the contract of betrothal was broken, his remedy lay elsewhere. There is no reason, however, to question his *bona fides*.

As pointed out in *Emperor* v. *Ramchandra Yeshwant Adurkar* (1), to bring a case under section 182 of the Indian Penal Code it is necessary for the prosecution to prove not merely an absence of a reasonable and a probable cause for giving the information but a positive knowledge or belief of the falsity of the information given. If it is true that the marriage had been first settled with one of the sons of Brindaban and was afterwards settled without any information to Brindaban with the brother of Jagannath, as asserted here, it cannot be said that the information given was false. It is possible that Brindaban may have had notice that the engagement made with his son had been broken off; but this is a matter on which no evidence was gone into.

Section 476 of the Code of Criminal Procedure nowhere says that in proceedings under that section a notice shall be given to a person who is immediately concerned thereby, but as observed in *Thakur Das* v. *Emperor* (2) and *Ram Piari Rai* v. *Emperor* (3), the Court looks with disfavour upon any order which is passed without such notice, particularly in a case where there is no evidence one way or the other on the record to show a dishonest motive.

The application is, therefore, allowed and the order passed by the Court below discharged.

Revision accepted.

(1) 31 B. 204; 9 Bom. L. R. 33; 5 Cr. L. J. 105.
(2) 22 Ind. Cas. 1001; 17 O. C. 25; 15 Cr. L. J. 217.
(3) 16 Ind. Cas. 515; 10 A. L. J. 247; 13 Cr. L. J. 707.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 598 OF 1918.

November 22, 1918.

Present :—Mr. Justice Wilberforce and Mr. Justice Martineau.

SHER DIL—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 288—Evidence given at preliminary inquiry retracted at trial—Conviction, whether can be based on such evidence.

A conviction based solely on evidence given by the witnesses before the Committing Magistrate and retracted by them at the trial is unsustainable. [p 698, col. 2]

Umar v. *Empress*, 51 P. R. 1887 Cr, *Queen-Empress* v. *Jeochi*, 21 A. 1 1; A W N. (1898) 196; 9 Ind. Dec. (N. S.) 780; *Emperor* v *Dwarka Kurmi*, 28 A. 683; A. W N (1906) 187; 3 A. L. J. 852; 4 Cr. L. J. 61, followed.

Appeal from the order of the Additional Sessions Judge, Shahpur, dated the 21st August 1918, convicting the appellant.

Lala *Mul Chand*, R. S., for the Respondent.

JUDGMENT.—The appellant, Sher Dil, a Pathan of Mauza Chapri in the Mianwali District, has been convicted of the murder of Samundar Khan, who originally came from the same village, and sentenced to death.

The facts alleged by the prosecution are as follows: Samundar Khan went with his daughters, Ghanammi and Gulai, about 12 and 8 years old respectively, to look for work in the Canal Colony. He met Sher Dil, who was accompanied by his mother, sister and two brothers, and they advised him not to go in the direction he intended as plague was prevailing. He turned back and the two parties travelled together. One morning they stopped to rest at a place about two *kos* from Rangpur, and while they were there, Sher Dil suddenly attacked Samundar Khan, giving him several blows with the back of a hatchet and killing him. He then dug a pit close by and buried Samundar Khan's body in it. The party proceeded on till they reached Pilo Wains where Sher Dil sold the two girls, whom he represented to be his sisters. *Musammat* Ghanammi was sold to Mehr Khan for Rs. 300 and *Musammat* Gulai to Shera for Rs. 88 and the marriages were performed. Sher Dil and his relations

then departed. In the morning *Musammat* Ghanammi began crying and told Shera's mother, *Musammat* Fatima, P. W. No. 15, that Sher Dil was not her brother and that he had killed her father. Mehr Khan and another man went after Sher Dil's party and told them that *Musammat* Ghanammi was crying and did not want to stay. Sher Dil returned with his relations, paid back the money he had received, and took the two girls away with him. They went to Khaglanwala, wher Sher Dil's mother, sister and brothers left him. In the morning the sentry on the roof of the Khaglanwala Police post saw *Musammat* Ghanammi and her sister running and crying, followed by Sher Dil who was threatening them. He asked the girls what was the matter and *Musammat* Ghanammi said that the man had murdered their father and she was afraid he might sell them again. *Musammat* Ghanammi's statement was recorded by the Sub-Inspector and Sher Dil was arrested. *Musammat* Ghanammi afterwards pointed out the place where she said her father had been killed and the place where he had been buried. The ground at the latter place had been dug up by animals. All that was found was a man's bones. The Assistant Surgeon to whom they were sent for examination says that there were no cuts on the bones, and he is unable to state the cause of death.

Before the Committing Magistrate the deceased's daughters, *Musammat* Ghanammi and *Musammat* Gulai, and the appellant's mother, *Musammat* Gul Masti, his sister, *Musammat* Shah Masti, and his brothers, Mir Badshah and Lal Badshah, all deposed to having seen Sher Dil kill Samundar Khan with a hatchet. Of these witnesses Mir Badshah was not examined in the Sessions Court as he had enlisted in a regiment at Quetta. The others all retracted in that Court the statements made before the Magistrate and deposed to the effect that Samundar Khan was not struck with the hatchet, but that he had fever and a boil on the groin and that as he was sitting down he fell back and died.

The case against the appellant rests on the depositions of these witnesses given before the Committing Magistrate and transferred to the record of the Sessions Court, Mir Badshah's under section 33 of the Evidence Act and the others' under section 288, Criminal Procedure Code.

The learned Sessions Judge has given certain reasons for believing those statements in preference to the statements made at the trial. First he says that if Samundar Khan had a plague bubo, he would hardly have been in a condition to travel on foot. But even if the statements of the witnesses he exaggerated in this respect, it is still quite possible that Samundar Khan may have died suddenly from heart failure. Next it is urged that if Samundar Khan had not been murdered, his companions would have carried him to the cemetery and buried him there. This argument has little force, seeing that the party was some miles away from the nearest village or habitation. Then it is said that *Musammat* Ghanammi had no good reason for falsely accusing Sher Dil of murdering his father. But it appears to us quite possible that she invented the story of the murder when she was at Pilo Wains because she did not wish to remain with Mehr Khar, and that she repeated the accusation at Khaglanwala in order to get free from Sher Dil, who she was afraid would sell her to some one else. It is also possible that she and her sister may not have been present when their father died, and that from his dying suddenly and being buried by Sher Dil they may have really thought that Sher Dil had murdered him.

As regards the fact of Sher Dil's mother, sister and brothers having given evidence against him in the Committing Magistrate's Court, this may be accounted for by their being afraid that they would themselves be charged with abetting the murder if they did not give evidence in support of *Musammat* Ghanammi, for it is admitted by the Sub-Inspector Aziz Beg that they were at the beginning suspected by the Mianwali Police of complicity in the murder and were under supervision.

There are, on the other hand, several points in favour of the appellant. To begin with, the story of the murder having been committed openly, not only in the presence of Sher Dil's relations but also in the presence of Samundar Khan's daugh-

ters, does not appear to be a probable one.

Secondly, it is, as noticed by the learned Sessions Judge, a point in the appellant's favour that no blood was found on the coat which Samundar Khan was wearing at the time of his death and which appears to have been recovered from a camel man to whom it had been given, notwithstanding that in the first information report *Musammat* Ghanammi said that blood had flowed from her father's mouth and nose.

Thirdly, there is the fact that after Samundar Khan's death Sher Dil took the children first to a Chhabil near Billu, where he bought food from Arjan Singh (P. W. No. 17) and then to two other villages before reaching Pilo Wains, where they arrived on the third day, and that the girls made no complaint at any of those places. The learned Sessions Judge thinks they might have been intimidated by Sher Dil, but would Sher Dil, if he had been the murderer of their father, have taken such a great risk, knowing that they might at any time have accused him to the people they met?

Then it is surely strange that the girls should have allowed themselves to be sold and given in marriage by their father's murderer without saying a word about the murder. It was not till the next morning that *Musammat* Ghanammi told *Musammat* Fatima that Sher Dil had murdered her father. What is still more remarkable is that, as is stated by *Musammat* Fatima and Mehr Khan, *Musammat* Ghanammi and her sister went to the length of embracing Sher Dil when he came back to Pilo Wains to take them away and return the money. This was most unnatural conduct if the prosecution theory as to Samundar Khan having been murdered is true. *Musammat* Fatima says that when Sher Dil returned, *Musammat* Ghanammi admitted that the story she had told was a pretence which she had made in order that she might be able to rejoin her party. If that is true, it is impossible to rely on the evidence which *Musammat* Ghanammi gave before the Magistrate.

In *Umar* v. *Empress* (1) Plowden, J., expressed the opinion and that a conviction based solely on evidence given by the winesses before the Committing Magistrate and retracted by them at the trial is unsustainable, and a similar view was taken by Banerji, J., in *Queen-Empress* v. *Jeochi* (2) and *Emperor* v. *Dwarka Kurmi* (3).

We think in the present case not only that it would be unsafe to convict solely on the statements made by the alleged five witnesses of the murder before the Committing Magistrate but that there are strong grounds, apart from the fact of the statements having been retracted, for doubting their truth.

We, therefore, accept the appeal, set aside the conviction and sentence, and acquit Sher Dil and direct that he be set at liberty.

Appeal accepted.

(1) 51 P. R, 1887 Cr.

(2) 21 A. 111; A. W. N. (1898) 196; 9 Ind. Dec. (N. S.) 780.

(3) 28 A. 633; A. W. N. (1906) 187; 3 A. L. J. 852; 4 Cr. L. J. 61.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1100 OF 1918.

February 7, 1919.

Present:—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

BHAIRAB CHANDRA BARUA —ACCUSED —PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 190 (1) (a), 200, 202—Complaint—Examination of complainant, omission of, effect of—Order calling upon accused to show cause why he should not be prosecuted for bringing false charge, nature of—Jurisdiction of Magistrate making order to proceed with trial.

A Magistrate who under section 190 (1) (a), Criminal Procedure Code, takes cognizance of a case on a complaint ought to examine the complainant before issuing summons. But his omission to do so is a mere irregularity and does not go to the root of his jurisdiction. [p. 701, cols. 1 & 2.]

An order passed by a Magistrate calling upon a person to show cause why he should not be prosecuted under section 211 of the Penal Code, is neither in form nor in effect an order under section 202, Criminal Procedure Code. Such an order is not one under any provision of the Criminal Procedure

Code and even where it leads to an inquiry by another Magistrate, it does not in any way affect the jurisdiction of the Magistrate who took cognizance of the case to summon the accused and proceed with the trial [p. 701, col. 2; p. 702, col. 1]

Rule against an order of the Sessions Judge of Jalpaiguri, dated the 22nd November, 1918, affirming that of the Deputy Magistrate of Jalpaiguri, dated the 15th September 1918.

Mr. *Pugh* and Babu *Bhupendra Chandra Guha*, for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.

RICHARDSON, J.—I agree in the conclusion arrived at by my learned brother. We recently had occasion (Criminal Revision No. 988 of 1918 decided on the 22nd November 1918) [*Harihar Roy* v. *Emperor* (1)] to consider the question whether the report of a Police Officer disclosing the commission of a non-cognizable offence was a "Police report" within the meaning of section 190 (1) (*b*) of the Criminal Procedure Code or a "complaint" within the meaning of section 1 (4) (*h*). The conclusion at which we then arrived was that it must be one or the other. That being so, the Magistrate in the present case had jurisdiction to take cognizance of the non-cognizable offence disclosed in the report submitted by the investigating Police Officer, the offence, namely, of making a false charge punishable under section 211 of the Penal Code.

If the question were free from authority, I should for my part be disposed to say that the report of a Police Officer in a non-cognizable case is a 'Police report' for the purposes of section 190 (1) (*b*) of the Criminal Procedure Code. In that case the Magistrate had clearly power to issue process against the petitioner as he has done. But if that view be not correct and the report in question was a complaint, then the only error which the Magistrate committed was in not examining the complainant, that is the Police Officer, on oath before issuing process. In the case I have referred to [*Harihar Roy* v. *Emperor* (1)], we held that such an omission was an irregularity only and that it did not go to the jurisdiction of the Magistrate. That being so, there is no reason why merely on this ground we should interfere in the exercise of our revisional jurisdiction and direct that the case be commenced *de novo*.

Then there is the proceeding which has been interpolated between the report of the Police Officer and the issue of process. The petitioner was called upon to show cause why he should not be prosecuted for making a false charge, and the proceeding was made over for hearing by Mr. Majid, the senior Deputy Magistrate, who had received the report, to a Junior Deputy Magistrate, Mr. Hollow. The petitioner took no exception at the time. He showed cause and produced witnesses. Mr. Hollow, after examining the witnesses, was of opinion that the case instituted was false and with this expression of opinion the case went back to Mr. Majid who issued process. Now it is quite true that the course so followed is not expressly sanctioned by the Code. But in *Queen-Empress* v. *Sham Lall* (2), which was decided by a Full Bench, Sir Comer Petheram laid it down that a prosecution for making a false charge should not be commenced "until it is clear that the original charge has been either dismissed or abandoned." He went on to say:—

"I should add that in order to show conclusively that such a charge (that is the original charge said to be false) has been abandoned, I think that before the order to prosecute for the false charge is made, the person who made the original charge should be offered an opportunity of supporting it or abandoning it."

Norris, J., also says:—

"I am also of opinion that a Magistrate should not take cognizance of an alleged offence under section 211, Indian Penal Code, until the alleged offender has had an opportunity of substantiating the original charge, and such original charge has been disposed of in due course of law."

Wilson, J., concurred in the judgments of Petheram, C. J. and Norris, J., and Tottenham and Ghose, JJ., concurred generally in those judgments. Tottenham, J.'s reservation is not pertinent to the question now under discussion.

Since *Sham Lall's case* (2) and in

(1) 52 Ind. Cas. 595; 23 C. W. N. 131; 29 C. L. J. 383; 20 Cr. L. J. 675.

(2) 14 C. 707 (F. B.); 12 Ind. Jur. 56; 7 Ind. Dec. (N. S.) 469.

deference to the opinion expressed in that case, the procedure adopted in the present case has been commonly followed and it is only recently that any exception has been taken to it. The position now is that if the person accused of having made a false charge is not afforded an opportunity of proving the charge, the Magistrate's proceedings are attacked on that ground on the authority of the Full Bench case. If having been given such an opportunity, he fails to prove the charge and is then prosecuted, he complains that the Magistrate had no jurisdiction to call upon him to show cause.

Different views may perhaps be held as to the propriety of calling upon an accused person to show cause why he should not be prosecuted for an offence. But clearly it was the opinion of the Full Bench, or at any rate of the majority of the Judges who composed it, that in the special case of a charge made to the Police and reported by the Police to be false, the maker should have notice before being prosecuted under section 211. In giving such notice the Magistrate, though he may not be acting under any express provision of the Code, cannot be said to act without jurisdiction. The maker may show cause or may refuse to show cause, but whichever course he adopts, having made the charge, he can hardly be heard to complain. Similarly in proceedings under sections 195 and 476 of the Code, a person could make no grievance out of the fact that before an order was made against him under either of those sections, he was given notice or was called upon to show cause why such an order should not be made.

Moreover, as my learned brother has said, if the proceedings held in such cases upon an order to show cause are without jurisdiction, the result is merely that those proceedings are null and void. They do not affect the Magistrate's jurisdiction to issue process.

What happened in the present case was this. On the receipt of the Police report Mr. Majid stayed his hand. He gave the petitioner the opportunity required or suggested by the Full Bench case before issuing process. I agree with my learned brother that in no view of the case can it be said that in issuing process Mr. Majid acted without jurisdiction and that the Rule should be discharged.

SHAMSUL HUDA, J.—This is a Rule calling upon the Deputy Commissioner of Jalpaiguri to show cause why the order of Mr. Majid, dated the 15th of September 1918, summoning the petitioner to answer a charge under section 211, Indian Penal Code, should not be set aside.

It appears that the petitioner lodged an information to the Police of a dacoity said to have been committed in his house. The Police after investigation submitted a report to the aforesaid Mr. Majid, the Senior Deputy Magistrate of Jalpaiguri, stating that the case was false and recommending the prosecution of the petitioner. This report purports to be one under section 173 of the Criminal Procedure Code. On receipt of this report on the 22nd of July 1918, the petitioner was called upon by Mr. Majid to show cause why he should not be prosecuted for an offence under section 211 of the Indian Penal Code, and subsequently on the 3rd of August 1918 he referred the matter to Mr. Hollow, another Deputy Magistrate, for disposal. Mr Hollow, after examining some witnesses produced by the petitioner, was of opinion that the charge of dacoity was false and recommended his prosecution. Mr. Majid accepted this recommendation and summoned the petitioner to appear before him to answer to a charge under section 211, Indian Penal Code. The Rule is directed against this order.

Mr. Pugh, who appeared in support of the Rule, contended that this order is illegal and should be set aside mainly on two grounds. In the first place, he contended that the report of the Police Officer who recommended the prosecution of the petitioner was not a Police report within the meaning of section 190 (1) (*b*), Criminal Procedure Code, as the Police report contemplated by that section is a Police report in a cognizable case, that an offence under section 211 being non-cognizable, the Magistrate was not competent to take cognizance of the case on such a report. This contention is based on the decision of a Full Bench of the Bombay High Court: *King-Emperor* v. *Sada* (3), in which it was held that where a Police Officer, of his own motion, makes a report

(3) 26 B. 150 (F. B.); 3 Bom. L. R. 586.

to a Magistrate in a non-cognizable case, it is not a Police report as there is no provision in the Criminal Procedure Code which empowers a Police Officer to make such a report. As observed by Mr. Justice Chandavarkar, "the Legislature has studiously attached to the expression 'Police report' a peculiar meaning throughout the Code wherever the expression occurs, and pointed out the occasions when and the purposes for which such reports should be made. Where a Police report goes beyond those occasions and purposes, it must fall within the definition of 'complaint' in section 4, clause (*h*) of the Code." The same view was taken by the Madras High Court in the case of *Chidambaram Pillai* v. *Emperor* (4), where it was held that a report of a Police Officer must be some statement made in connection with or at least under colour of the duty of the maker as a Police Officer. A somewhat different view was, however, taken by two learned Judges of this Court in the case of *Dilan Singh* v. *Emperor* (5), in which it was said that a Police report such as the report in the present case is not a complaint as defined in the Code, inasmuch as that definition expressly excludes a report of a Police Officer. I may, however, observe that if such a report is not a Police report within the meaning of section 190 (1) (*b*), it is not excluded from the definition of a complaint under section 4 (*h*). We have also been referred to the decision of Chapman and Walmsley, JJ., in *Gangadhar Pradhan* v. *Emperor* (6). If it were necessary in the present case to decide the point, perhaps I should not have felt very much pressed by these decisions, as the point was not directly raised in either of these two cases. The same remark applies to the decision of a Full Bench of this Court in *Queen Empress* v. *Sham Lall* (2). The question, however, does not appear to be of any practical value in the decision of this case, for conceding that the learned Counsel is right in his contention and that the report was not a Police report, as stated before, it would fall within the definition of a complaint and the Magistrate could take cognizance of the case under section 190 (1) (*a*), in which case he ought to have examined the complainant before issuing the summons (section 200, Criminal Procedure Code). But his omission to do so is a mere irregularity and does not go to the root of the Magistrate's jurisdiction.

In this view of the case the action of the Magistrate was not in excess of his powers. In support of the Rule reliance has also been placed on the case of *Tayabullah* v. *Emperor* (7), but as the order complained of is neither an order under section 195, Criminal Procedure Code, nor an order under section 476, that case seems to me not to have any bearing on the present question. I think, therefore, that the proceedings in this case have been properly initiated.

Next it is argued that Mr. Majid having made over the case for disposal to Mr. Hollow, it was Mr. Hollow alone who had seisin of the case and Mr. Majid had no jurisdiction to direct the issue of summons without an order of transfer passed in conformity with the provisions of section 528 of the Criminal Procedure Code. If the order were an order under section 202, Criminal Procedure Code, on the authority of the ruling in *Hari Charan Gorai* v. *Srish Chandra Sadhukhan* (8) the contention would have been well founded. The order making over the case to Mr. Hollow for disposal is not very clear, but both Mr. Majid and Mr. Hollow understood it to refer not to the actual charge under section 211 against the petitioner but to the proceedings calling upon the petitioner to show cause why he should not be prosecuted under that section. In my opinion the order was neither in form nor in effect an order under section 202, Criminal Procedure Code. Assuming that the Magistrate took cognizance of the case upon a complaint, it does not appear that the Magistrate was not satisfied as to the truth of the charge against the petitioner. His object in calling upon the petitioner to show cause was, no doubt, to give an opportunity to prove the charge of dacoity contained in the information laid by him before the Police and was in conformity with the practice that was recommended in the Full Bench case of *Queen Empress* v. *Sham Lall*

(4) 1 Ind. Cas. 36; 32 M. 3; 5 M. L. T. 16; 9 Cr. L. J. 130.

(5) 17 Ind. Cas. 570; 40 C. 360; 13 Cr. L. J. 826.

(6) 33 Ind. Cas. 626; 43 C. 173; 20 C. W. N. 63; 17 Cr. L. J. 146.

(7) 36 Ind. Cas. 845; 20 C. W. N. 1265; 43 C. 1152; 24 C. L. J. 134; 18 Cr. L. J. 13.

(8) 7 Ind. Cas. 747; 38 C. 68; 13 C. L. J. 43; 11 Cr. L. J. 525.

(2). But as pointed out in the case of *Sarba Mahton* v. *Emperor* (9) and *Tayabullah* v. *Emperor* (7), the procedure, though obviously fair, is not one under any provision of the Code and its adoption, even if it led to an enquiry by another Magistrate, can in no way affect the jurisdiction of the Magistrate who took cognizance of the case to summon the accused and proceed with the trial. I think, therefore, this Rule should be discharged.

Rule discharged.

(9) 20 Ind. Cas. 211; 17 C. W. N. 824; 14 Cr. L. J. 387.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 488 OF 1919.

September 17, 1919.

Present:—Mr. Justice Ryves.

SANTI LAL AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Certificate, forged, submitted to Collector—Sanction to prosecute, whether necessary.

Section 195 of the Criminal Procedure Code has no application to a matter coming before a Collector in his administrative capacity.

Where, therefore, an applicant for a Patwarship submitted a certificate as to his age, and criminal proceedings were taken against him on the ground that the certificate had been fabricated:

Held, that section 195 of the Criminal Procedure Code did not apply to the case, and that the proceedings were not bad because the sanction required by that section had not been obtained.

Criminal revision against the order of the Magistrate, Second Class, Sub Divisional Officer, Tahsil Karaoli, Agra District, dated the 29th of July 1919.

Mr. *J. M. Banerji*, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision asking this Court to quash a commitment to the Court of Session under section 456 of the Indian Penal Code. It appears that the applicant applied to the Collector to be appointed *patwari* in place of a former *patwari* who had died. He attached to that application a certificate of the "upper primary class" which was dated the 16th of May 1917. In that his age appears 15 years and 9 months. A complaint was lodged in the Court of the Committing Magistrate by one of the Zamindars of the village charging the accused with fabricating this document or at any rate using it knowing it to be fabricated. The Court below has found that a *prima facie* case has been made out against the accused and has committed him to the Court of Session. Two grounds are taken in revision against this commitment. First of all, it is said that sanction under section 195 of the Criminal Procedure Code is a condition necessarily precedent to the institution of the case. It seems to me section 195 has nothing whatever to do with the present case. The application was made to the Collector under Chapter III of the Land Revenue Act. I think it was made in his administrative capacity entirely and that he was not acting in any way as a Court.

The next ground taken is that the certificate was not used dishonestly and could not in any case mislead the Collector. The object of putting in the certificate, it is quite obvious, was to induce the Collector to believe the statement that the applicant was a major, that is, 18 years of age. The certificate, even as altered, does not show that the applicant had reached the age of 18. It only made him 17 years and some months of age. Further it has been said that the Collector has come to the conclusion that the applicant was in fact 18 years of age and, therefore, this document, even if altered, could not possibly deceive him. It seems to me that these are matters which may be considered at the trial, but I do not think that they would justify me at this stage in quashing the commitment. If the document was a forged document and if the forgery was intended to make out the applicant's age was approximately 18 years, then the intention of the applicant seems to be quite clear. I will not interfere.

Application dismissed.

BUGGA *v.* EMPEROR.

PRIVY COUNCIL.

APPEAL FROM THE MARTIAL LAW COMMISSIONERS AT LAHORE.

July 23, 1919.

Present:—Viscount Haldane, Lord Buckmaster and Lord Atkinson.

BUGGA AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT

Privy Council—Criminal jurisdiction—Interference by Board, when permissible.

The Judicial Committee of the Privy Council is not a Court of Criminal Appeal, but there is a class of cases which falls within the category of the ruling in *Dillet, In re* (1887) 12 App. Cas. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 24', in which the Sovereign is advised to interfere where there has been a miscarriage of justice referred for its meaning to the fundamental principles of justice, for instance, if there has been anything *coram non judice*. [p. 719, col. 1.]

FACTS appear from the arguments.

Sri *John Simon*, *K. C.* (with him Mr. *B. Dube*), for the Appellants.—My Lords, this is a petition by twenty-one subjects of the King, natives of India who have been sentenced, as regards twenty of them, to death, and as regards the other one, to seven years' rigorous imprisonment, by a Special Commission, which is purporting to exercise the powers of a Summary General Court-Martial.

[Sir *Erle Richards*, for the Respondent.—The death sentence has been commuted in fifteen cases.]

I did not know that that was the case. I suppose it has been commuted to penal servitude for life.

[Sir *Erle Richards*.—I do not know.]

At any rate the remaining prisoners are still under sentence of death.

[VISCOUNT HALDANE.—How many are still under sentence of death?]

Five, at any rate, are still under sentence of death.

[Sir *Erle Richards*.—I have not been able to ascertain exactly how many. Certainly two are. There is a doubt about three others on the cables. Fifteen have certainly had their sentences commuted.]

[VISCOUNT HALDANE.—However, it is a very serious matter?]

Yes, my Lord, in any view. The matter is not only very grave for these persons, but it is a matter, I think, of some constitutional importance, and though the materials on which this petition has been drawn, have, as I gather is also the case with my learned friend, been derived largely by cable, and, therefore, may be at little fragmentary, I think I shall be able with confidence to put the outline of the matter strictly before your Lordships. If your Lordships would be good enough to take the petition, I have had it drawn in a way which I think will most clearly indicate what the points are. In the first paragraph we set out that the petitioners, 21 in number, are native British subjects, living at Amritsar in the Punjab, who have been sentenced to death, "with the exception of your petitioner Ghulam Hussan (No. 16), who has been sentenced to seven years' rigorous imprisonment, under Martial Law by a Special Commission purporting to exercise the powers of a Summary Court Martial. Your petitioners, however, are not soldiers or subject to military law, and desire to obtain special leave to appeal from the sentences pronounced upon them in the circumstances following. On the 10th April 1919 there was a riot in the city of Amritsar."

[VISCOUNT HALDANE.—A question may arise as to the powers of the General Summary Court-Martial.]

Yes.

[VISCOUNT HALDANE.—And a question may arise whether the Sovereign in Council would review the proceedings of a General Court-Martial. I have never heard of it being done.]

I think we shall have to go through the story. I quite agree that may be a question. That particular point may be avoided by saying that this Special Commission, though it really derives its authority, if it has any, from a Regulation which provides for the trial of persons by Courts-Martial, is nonetheless composed of not three soldiers but one soldier and two civilians.

[VISCOUNT HALDANE.—What arrested my attention was something rather in your favour; that it is only purporting to exercise the powers of a Summary General Court-Martial.]

Yes.

[VISCOUNT HALDANE.—It may be still a Court with the powers of a Court-Martial?]

That, I think putting it roughly, will turn out to be the position, but nonetheless

my clients are in the position of persons who have been dealt with under the conditions of Martial Law. "On 10th April 1919 a riot took place in the city of Amritsar. The riot was over by the evening of that day. None of your petitioners were taken in arms or taken in the actual commission of any overt act of rebellion, or otherwise taken in the act within the meaning of paragraph 1 of Regulation X of 1804"—It will be necessary to look at that Regulation—"which Regulation confers powers to provide for the immediate punishment of the offences therein specified by sentence of Court-Martial. By Act IV of 1872, passed by the Governor-General of India in Council, section 3, Regulation X of 1804, is declared to be in force"—this was in the Punjab—"but this Regulation only confers power to punish civilian inhabitants by sentence of Court-Martial within the limits above indicated, and your petitioners, therefore, did not fall within it." The point is this. Under Regulation X of 1804 which has just been given a continuing legislative operation, it has been pointed out by a learned commentator, and I think will be probably accepted as correct, that paragraph 2 of the Regulation is really strictly limited to cases in which the civilian is really taken in *flagrante delicto*.

[VISCOUNT HALDANE.—That is the Regulation of 1804?]

Yes. May I read the recital first? I will read the first paragraph which is really the recital: "Whereas, during wars in which the British Government has been engaged against certain of the native powers of India, certain persons, owing allegiance to the British Government, have borne arms in open hostility to the authority of the same, and have abetted and aided the enemy, and have committed acts of violence and outrage against the lives and properties of the subjects of the said Government; and whereas it may be expedient that, during the existence of any war in which the British Government...may be engaged with any power whatever, as well as during the existence of open rebellion against the authority of the Government"—we are coming to a document which was issued by the Governor-General, in which he recites that in his judgment open rebellion had occurred—"in any part of the British Territories subject to the Government of the Presidency of Fort William, the Governor-General.....should declare and establish Martial Law within any part of the territories aforesaid, for the safety of the British possessions, and for the security of the lives and property of the inhabitants thereof, by the immediate punishment of persons owing allegiance to the British Government who may be taken in arms, in open hostility to the said Government, or in the actual commission"—that means who are taken in the actual commission—"of any overt act of rebellion against the authority of the same, or in the act"—this is to say, who may be taken in the act—"of openly aiding and abetting the enemies of the British Government within any part of the territories above specified: the following Regulation has been enacted by the Governor General in Council, to be in force throughout the British Territories immediately subject to the Government of the Presidency of Fort William from the date of its promulgation." Then section 2: "The Governor-General in Council is hereby empowered to suspend or to direct any public authority or officer to order the suspension of, wholly or partially, the functions of the ordinary Criminal Courts of Judicature within any zilla, district, city or other place, within any part of the British Territories subject to the Government of the Presidency of Fort William and to establish Martial Law therein, for any period of time while the British Government in India shall be engaged in war with any native or other power"—of course that is not this case—"as well as during the existence"—I lay particular stress on 'during the existence':—"of open rebellion against the authority of the Government, in any part of the territories aforesaid, and also to direct the immediate trial by Courts-Martial of all persons owing allegiance to the British Government, either in consequence of their having been born or of their being residents, within its territories and under its protection"—these 21 persons are certainly British subjects, and owe allegiance—"who shall be taken in arms in open hostility to the British Government, or in the act of opposing by

force of arms the authority of the same or in the actual commission of any overt act of rebellion against the State, or in the act of openly aiding and abetting the enemies of the British Government within any part of the said territories." On that I make these two comments: first that the persons who are contingently subject to such a mode of trial are all persons who are taken in *flagrante delicto*, and none of these 21 persons is in that position.

[VISCOUNT HALDANE.—Or in the act of openly aiding or abetting the enemy.]

Yes, but "taken" governs all. These persons were not taken in the commission of any overt act at all. They were at their homes five or six days afterwards when they were arrested. The other point I make on section 2 is this. Your Lordship notices that it is introduced by the power of the Governor-General in the case of an open rebellion to suspend wholly or partially the functions of the ordinary Criminal Courts of Judicature, and to establish Martial Law therein. The two things are related, and the scheme of this power, therefore, is: *first*, it is limited to persons who are taken in *flagrante delicto*, and *secondly*, the extent to which you set up an exceptional tribunal is precisely the same, is co-extensive with the suspension, for the time being, of the ordinary Courts for dealing with such cases, and that, of course, is quite consistent with the well-understood theory in our constitution here at home that in time of actual necessity, when the immediate necessity is to deal with persons who are actually found in a state of rebellion, it may be that on the principle of some sort of law of necessity—

[VISCOUNT HALDANE.—Martial Law is not law. It is this; that the Commander-in-Chief supersedes all the Courts. He in the exercise of his power tries them by Court Martial.]

Yes, I am only anxious to show the limitation of that. Your Lordship will take it from me, perhaps without reading it, that there is a legislative provision.

[VISCOUNT HALDANE.—He may partially suspend. He may allow the Civil Courts to proceed in certain cases. A State can do anything. This is not quite consistent with the real theory of Martial Law. The Government can do things which are analogous to Martial Law.]

Yes.

[VISCOUNT HALDANE.—There was a case before this Board which I argued, and argued unsuccessfully, on appeal against the sentence of Court-Martial in South Africa, in which Lord Halsbury gave a famous definition.]

Yes. It is a matter which has been the subject of much discussion since.

[VISCOUNT HALDANE.—There it was held that Martial Law had survived the hostilities, I think.]

Not quite. At present I am not proposing to argue the matter, but only to put before your Lordships in order five or six matters.

[LORD BUCKMASTER.—It sets up a Special Tribunal, and imposes on that tribunal the obligation of passing one sentence, and one sentence only, on the people who are brought before it.]

May I go on with my argument—though we may have to return to the consideration of the constitutional aspect of this? I had the South African case in my mind. I am pointing out that in paragraph 2 we say: Here is Regulation X of 1804, and on the true construction of that Regulation it is limited to the case of persons who are taken in the act of doing a number of specified things. It is confirmed by the legislative provision of 1872.

[VISCOUNT HALDANE.—There is a remarkable provision in section 4, which says that the Governor General may direct people to be tried before the ordinary Court notwithstanding all this, which by hypothesis would supersede it.]

Yes, it is curious.

[VISCOUNT HALDANE.—I do not suppose you are going to argue that the Governor-General could not get himself empowered to do all these things by the Indian Legislature?]

That is not the point I am going to make at all. Your Lordships will come to the point.

[VISCOUNT HALDANE.—I only wanted to clear it out of the way.]

Your Lordships will understand that it will be important for the moment to see what is the extent to which the Regulation of 1804 can go. I make the point that the Special Tribunal exceeded its powers. Then paragraph 3:—"On the contrary, your peti-

tioners were arrested while peaceably occupied at their homes, or otherwise, some days after the riot was over." It is perfectly plain that they were not taken in the act of anything. "No copy of the charges against them is available, but the accusation against your petitioners was that of committing an offence under section 121 and other sections of the Indian Penal Code (Act XLV of 1860)." Section 121 is as follows:—"Whoever wages war against the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with death or transportation for life, and shall forfeit all his property." Offences against the Indian Penal Code are to be tried by the Criminal Courts referred to in section 28 of the Code of Criminal Procedure (Act V of 1898), and no jurisdiction to try by Court-Martial is thereby conferred. Now we come to the special provision: "On April 14th, 1919"—that is four days after the riot was over—"the Governor General of India purporting to act under section 72 of the Government of India Act, 1915"—the case I have to present to the Board largely turns on considering that section and the related sections—"made the Martial Law Ordinance No. I, which came into operation at midnight on the 15th April 1919."—Then we have set it out *in extenso*, and I will read it: "Whereas the Governor-General is satisfied that a state of open rebellion against the authority of the Government exists in certain parts of the province of the Punjab." The reasons, no doubt, why that is recited is because section 72 confers certain powers upon the Governor-General to make Ordinances in cases of emergency. Again your Lordships will remember that in Regulation X of 1804 there had been a reference to cases where it might be expedient during the existence of open rebellion to make certain provisions. So it recites:—"Whereas the Governor-General is satisfied that a state of open rebellion against the authority of the Government exists in certain parts of the Province of the Punjab; And whereas the Governor-General in Council has in exercise of the powers conferred by section 2 of the Bengal State Offences Regulation, 1804,"—that is the one your Lordships have just looked at—"suspended, in respect of offences described in the said Regulation with which any person of the classes therein referred to may be charged, the functions of the ordinary Courts of Judicature within the districts of Lahore and Amritsar in the aforesaid province and has established Martial Law in the said districts"—that is the first half of section 2, which I have just read to your Lordships—"and has directed the immediate trial by Courts-Martial of all such persons charged with such offences"—those offences must necessarily be offences that you are taken in the act of committing. "And whereas an emergency has arisen which makes it expedient to provide that such trials shall be held in the manner and by the tribunals hereinafter provided? Now, therefore, the Governor-General in Council in exercise of the power conferred by section 72 of the Government of India Act, 1915, is pleased to make and promulgate the following Ordinance, Ordinance No. I of 1919. 1 (1) This Ordinance may be called the Martial Law Ordinance, 1919." If the same has anything to do with it there is no doubt what it is: "(2) It shall come into operation at midnight between the 15th and 16th April 1919. 2 (1) Every trial held under the Bengal State Offences Regulation, 1804," that is Regulation X of 1804 —"shall, instead of being held by a Court-Martial, be held by a Commission consisting of three persons appointed in this behalf by the Local Government." The President is a Military Officer, and the two others are civilians.

Sir *Erle Richards*.—May I say this? I do not think my friend knows the practice in the Punjab. It is true the President was in the army to start with, but your Lordships are probably aware that in the Punjab Civil Service they take into their employ a number of Military Officers It was an old practice that began in troubled times. This gentleman has for 25 years been a civil servant, and for a long time he has been acting as Sessions Judge.]

[VISCOUNT HALDANE.—Does he maintain his military rank?]

[Sir *Erle Richards*.—Yes, he is a Major or a Colonel. It is a question that has been much discussed, whether they ought not to abandon their military rank on going on to the Bench.]

Sir *John Simson*. —I am obliged to my friend for his explanation. I was not aware of it. "The Local Government may appoint" —that means the Government of the Punjab—"as many

Commissions for this purpose as it may deem expedient. At least two members of every such Commission shall be persons who have served as Sessions Judges, or Additional Sessions Judges, for a period of not less than three years, or persons qualified under section 101 of the Government of India Act, 1915, for appointment as Judges of a High Court. The Local Government shall nominate one of the members of the Commission to be President thereof. A Commission shall be convened by the Local Government, or by such officer as the Local Government may authorize in this behalf. A Commission shall have all the powers of a General Court Martial under the Indian Army Act, 1911." I know Lord Haldane is specially familiar with this subject matter.

[VISCOUNT HALDANE.—It is a very different thing from a District Court Martial.]

Yes There are four kinds of Courts-Martial in the Indian Army system, a General Court Martial, a Summary Court-Martial, a District Court-Martial and a Summary General Court-Martial.

[VISCOUNT HALDANE.—Is there a Judge Advocate in India who reviews the decisions of Courts-Martial?]

There is an express provision here that they are not to be reviewed.

[VISCOUNT HALDANE — A Court-Martial decision goes up for review to the Judge Advocate. That is the safeguard in Courts Martial, and here one would expect to see that there was some one who advised the Governor-General separately.]

I think it is clear by inference, from paragraph 5 of the petition—"The finding and sentence of a Commission shall not be subject to confirmation by any authority."

[Sir *Erle Richards*.—The confirmation of a Court-Martial is necessary under the Army Act. That is to take these proceedings out of the provisions of the Army Act.]

[VISCOUNT HALDANE.—Under the Indian Army Act confirmation is required; is that confirmation by the Judge Advocate?]

Sir *John Simon*. I think not: The findings and sentences of General Courts-Martial may be—I think that really means must be—confirmed by the Commander-in Chief in India or by any officer empowered in this behalf by the warrant of the Commander-in-Chief in India. I do not think there is a Judge Advocate.

[LORD BUCKMASTER.—That means confirmation is necessary and those are the people who exercise the power?]

Yes.

[Sir *Erle Richards*.—There is a Judge Advocate.]

[VISCOUNT HALDANE.—In time of war the power is handed over to the Commander-in-Chief, and it may be that in India they have taken the situation as more approximating to war than peace, and have handed it over to the Commander-in Chief, in which case it is natural that they should say that no confirmation is required.]

Sir *John Simon*.—It remains to be seen whether it cannot be reviewed by the Privy Council.

[LORD BUCKMASTER.—Does this Ordinance do more than create a Court under the provisions of the Regulation of 1804 to exercise the powers that are there conferred?]

I do not think it does, but I point out in the paragraph immediately following after I have set out in this document that this Ordinance would not have touched me at all, it is because it did not touch me that they made another Ordinance and tried to bring me in.

[LORD BUCKMASTER.—You would not be hurt by this Ordinance.]

No. Will your Lordships look at paragraph 7: "Save as provided by section 6 the provisions of this Ordinance shall apply to all persons referred to in the said Regulation." My first way of putting it is that I am not a person referred to in the Regulation.

[VISCOUNT HALDANE.—Your alleged offence was on the 10th April.]

I am not on the question of date for the moment, though it is a second reason. I am not a person who has been taken in the act of open rebellion or anything whatever. I have been dealt with by this summary procedure although any case against me is an inferential case depending upon evidence, and not upon the fact that I was seen there with arms in my hands taking part in the actual violence.

[VISCOUNT HALDANE.—Your first point is this tribunal does not suit your case.]

Yes.

[VISCOUNT HALDANE.—Your second point, I suppose, is on the dates.]

Yes, in any case my offence was an offence on the 10th April, whereas this was to be limited to persons who are charged with any of the offences therein described committed on and after the 13th April.

[VISCOUNT HALDANE.—I do not think any presumption should be made against the power of the Legislature to say that an offence really committed is to be tried, not by such and such a Court, but by such and such another.]

It is only one of the points I am going to develop in a moment.

[LORD BUCKMASTER.—The point applies to the second Ordinance as well.]

Yes. I have not read paragraph 4. Will your Lordships look at that? After providing that it is to have the power of General Court-Martial under the Indian Army Act, 1911, "and shall, subject to the provisions of this Ordinance, in all matters follow so far as may be the procedure regulating trials by such Courts-Martial prescribed by or under the said Act", it goes on: "Provided that where in the opinion of the convening authority a summary trial is necessary in the interests of public safety"—I have some difficulty is seeing how a summary trial could be necessary in my case; it appears now it was a little too summary—"such authority may direct that the Commission shall follow the procedure prescribed for a Summary General Court Martial by or under the said Act, and the Commission shall, so far as may be and subject to the provision of the Ordinance, follow such procedure accordingly." Then it says that sections 78, 80 and 82 of the Act are not to apply. I will tell your Lordships what they are. Section 78 of the Indian Army Act is the section which provides that every Court-Martial shall be attended by a Judge Advocate or somebody nominated by him, that is to say, a man who knows something about the way in which to present a case. This is explicitly removed from its application. Then section 80 is a provision which entitles the accused to be asked whether he objects to be tried by a member of the tribunal. All that right of objection by the accused is removed. Then section 82 is the provision that there is to be an oath of the President and Members before they try the prisoners.

So far I could not be hurt though, as I have pointed out in my paragraph 5, "It will be observed that this Ordinance No. I was given a retrospective effect, but it only applied to offences committed on or before the 13th April 1919. Inasmuch as the accusation against your petitioners was of offences committed on the 10th April 1919, Martial Law Ordinance No. I had no application to them. (6) As a matter of fact, perfect order had been restored in the city of Amritsar by the 15th April 1919. The civil, criminal and other Courts throughout continued to administer justice in the ordinary course without any interruption, and there was in fact no ground for having recourse to Martial Law or to exceptional tribunals on the ground that the ordinary Courts were not discharging their functions. Nevertheless your petitioners were not brought before the ordinary Courts of the country." Then in paragraph 7 we say: "On April 21st, 1919, the Governor-General of India purporting to act under section 72 of the Government of India Act, 1915, made a further Ordinance, No. IV of 1919, which is in terms following: "Simla, the 21st April, 1919. An Ordinance further to extend the application of the Martial Law Ordinance 1919. Whereas an emergency has arisen which renders it necessary to provide that Commissions appointed under the Martial Law Ordinance, 1919,"—that is No. 1, which your Lordships have just had—"shall have power to try persons and offences other than those specified in the said Ordinance: Now, therefore, in exercise of the power conferred by section 72 of the Government of India Act, 1915, the Governor-General is pleased to make and promulgate the following Ordinance:—Ordinance No. IV of 1919, 1. This Ordinance may be called the Martial Law (Further Extension) Ordinance, 1919. 2. Notwithstanding anything contained in the Martial Law Ordinance, 1919, the Local Government may, by general or special order, direct that any Commission appointed under the said Ordinance shall try any person charged with any offence committed on or after the 30th March 1919'—that is moving the date back, and it says 'any offence'; a question will arise as to what is the true construction of that—"and thereupon the provisions of the said

Ordinance shall apply to such trials accordingly and a Commission may pass in respect of any such offence any sentence authorized by law."

[LORD BUCKMASTER.—"Any offence" must be an offence as defined by the Regulation of 1804.]

I venture to think so.

[LORD BUCKMASTER.—That brings it back to the same position as the other.]

If I am right in that view, which I submit with some confidence, that is a conclusive objection to the regularity of this proceeding. It has been treated as though it has conferred upon this Special Commission the right to try a man for obtaining credit when he is a bankrupt or any other crime in the calendar, and I venture to think it does not do anything of the sort.]

[LORD BUCKMASTER.—If you once depart from the Regulation of 1804 there are no limits.]

That is what I mean. "It will be observed that this later made Ordinance does not purport to suspend the operation or sittings of the ordinary Courts." Section 2 is a thing which has two limbs. Its principal object appears to be to extend the retrospective operation of Ordinance No. 1 so as to cover offences of still earlier date. "Your petitioners were tried by a Commission presided over by a military officer,"—I quite accept what my learned friend, Sir Erle Richards, says; I call him a military officer, but I gather he will also be in the permanent civilian service.

[Sir *Erle Richards*.—He is a Sessions Judge, I think.]

Sir *John Simon*.—" With the powers of Summary General Court-Martial and sitting at Lahore on the 29th May 1919 and the following days."

Your Lordships will notice that this was more than a month after the second Ordinance: " Your petitioners were prevented by a summary order of the military authorities which prohibited all persons from entering the area in which Martial Law had been proclaimed from obtaining the assistance of Counsel. "

[VISCOUNT HALDANE.—If you are tried by Court-Martial, you are not entitled to be defended by Counsel].

I put it in the form of a dilemma. I say either I am entitled to be tried as a person who is being tried under Martial Law, in which case I have some very serious objections to raise, or else I am being tried by something which is not Martial Law in which case I am entitled to Counsel—one or the other.

[VISCOUNT HALDANE.—It may be, the true construction is this, that it is a civilian tribunal which has all the powers of a Court Martial, including the power to say the prisoners can have a prisoner's friend.]

[Sir *Erle Richards*.—I do not understand my friend to say that the prisoners were not defended by Counsel. The burden of their grievance is that they were not allowed to have certain Counsel up from Bengal. My instructions are that they were defended by Counsel. At any rate they could have got Counsel in Lahore. They wanted Counsel from Bengal and there were particular reasons why they wanted particular persons, but there was an order of the military authorities at the time that no persons from Bengal were to come into the Punjab.]

Sir *John Simon*.—I rather infer that they got some professional assistance but it was not the professional assistance they wanted.

[VISCOUNT HALDANE.—However, there is another answer, that the military authorities had made an order that nobody was to come from Bengal into the Punjab.]

Then paragraph 10: "On June 2nd, 1919, the said Commission purported to convict your petitioners of offences under section 121 of the Indian Penal Code and passed sentences of death and confiscation of your petitioners' property." I do not think your Lordships need look at the judgment for the moment. I wanted to put my points in order. Before I set them out, would your Lordships look at section 72 of the Government of India Act, 1915? There is nothing new in it but it will be convenient to look at it. The Governor-General purports to be making these Ordinances under section 72: "The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Governor-General in Legislative Council"—these are important words—"but the power

of making Ordinances under this section is subject to the like restrictions as the power of the Governor-General in Legislative Council to make laws." Therefore one asks oneself, where shall one find the restrictions on the power of the Governor-General and the Legislative Council to make laws? You will find that in section 65, sub-section 2, which contains a provision which is not by any means new, which has more than once been commented on and expounded and which is really the protection for constitutional liberty in India. It is this: "Provided that the Governor-General in Legislative Council has not, unless expressly so authorised by Act of Parliament, power to make any law repealing or affecting (i) any Act of Parliament passed after the year one thousand eight hundred and sixty and extending to British India (including the Army Act and any Act amending the same); or (ii) any Act of Parliament enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India, and has not power to make any law affecting the authority of Parliament, or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or affecting the sovereignty or dominion of the Crown over any part of British India."

I submit it has already been so construed in India that what that refers to is this: it is a principle which is as old as *Calvin's case* (1). Allegiance and protection are reciprocally due from the subject and the Crown and the constitutional laws that provide for the liberty of the subject are the *quid pro quo* for the duty of allegiance. This is precisely the constitutional proposition which in a very famous passage Chief Justice Cockburn expounded in his charge to the Jury in the Jamaica Riots Case, *Queen* v. *Nelson*. He there explains exactly the same proposition. He says that the reason why it is not constitutional to put civilians upon trial by Court-Martial is this. Your Lordships remember that Nelson and the other accused persons had sat upon the Court-Martial and sentenced somebody to death and he was shot, and they were subsequently tried for murder in this country. He points out the reason why a civilian cannot be put on trial by Court-Martial among other things is precisely because you get the allegiance of persons to the Crown in a reciprocal relation with the constitutional guarantee of a regular trial in the ordinary Courts of Law. It is rather interesting to notice that Chief Justice Cockburn anticipates or at any rate speaks in exactly the same terms as Regulation X of 1804. He says: "Nothing that I am saying applies to the case where a man is taken with arms in his hands in the midst of a violent disturbance." He points out in a case such as that it may well be that apart from any application of law the authorities, not because they are applying any law but because they are dealing with it from the necessities of the case, may have to shoot him out of hand. He is pointing out that there is this relation between allegiance on the one hand and constitutional protection on the other, and apparently that is exactly what is meant here when the Governor General is given certain extreme powers. You see how extreme they are, because Regulation X itself gives a very remarkable power, but it is not a power that can be exceeded. Those words are to be given a meaning.

[VISCOUNT HALDANE.—Is the *Queen* v. *Nelson* reported in the Law Reports?]

I have here from the Inner Temple Library Chief Justice Cockburn's charge to the Jury, with some comments by Mr. Finlayson whose book is of great interest. I rather think that your Lordship referred to it when you applied for leave to appeal in the South African case. I want to read two or three short passages

[LORD BUCKMASTER.—I am always afraid that in fixing my attention too closely upon one point I may prevent my mind from grasping the real value of the others. Up to the moment it seems to me that the real point in this petition is this: that the Governor-General exercised powers conferred by the Statute of 1804 and that he was entitled to do so.]

Certainly.

[LORD BUCKMASTER.—The Order that he issued was an Order which purported in

(1) 7 Rep. 1.

terms to relate and to relate only to those offences that were prescribed in the Regulation of 1804.]

Yes.

[LORD BUCKMASTER.—The subsequent Ordinance that was issued did nothing except that it caused the previous Ordinance to have a retrospective effect.]

Yes.

[LORD BUCKMASTER.—You say the Regulation of 1804 has no application to you because according to its true construction the man must either be taken in arms or in an overt act of rebellion or an act of openly aiding and abetting the enemies of the British Government. You say none of these circumstances apply to your clients?]

That is so. I agree I have rather moved from one point to the other. Before I submit what is really a separate ground, the ground of section 72, may I just a little expound the point which Lord Buckmaster has referred to. I want to point out that one has in these matters to be candid, just as candid when one is opposed as when one is applying *ex parte* It is a possible contention that Ordinance No. 4, the amending Ordinance, not merely increases the retrospective effect, goes back to an earlier date, but that the reference to any offence brings in any offence in the calendar of criminal law. On that I make submission that it is not so, and I point out this special reason why it could not be so.

[LORD BUCKMASTER.—It is only the offences therein described.]

Yes, and there is this further reason. It is a direction that a Commission appointed under Ordinance No. 1 is to have certain powers. You see what the Commission under Ordinance No. 1 is. It is a Commission that is appointed to exercise the same functions as a Court-Martial would exercise under Regulation X, and, therefore, the two things will not fit. You get a Commission which is not rightly described if it is really to be regarded as authorised to run over the whole body of the Indian Penal Code.

[LORD BUCKMASTER.—It is not any offence; it is any of the offences described in the previous Regulation.

Yes.

[LORD ATKINSON.—It alters the date, but not the kind of offence.]

That is what I feel. Therefore I am in this opinion, that no single one of these 21 cases, whatever may be said against the men and whatever the evidence may have been, about which I know very little, was a case of a man being taken in the act there described. It would follow, if that construction was right, that there has been here a very grave misunderstanding of the Commission's powers.

[LORD BUCKMASTER.—Is there any reference in the second Ordinance that was issued except the reference in section 2 to any offence?]

I have the advantage of having an alternative case. I am confining myself, and it is much better to do so, to the first way of putting it, which is the way Lord Buckmaster is now putting it to me. In that connection may I give your Lordships one other reference, a reference which I venture to think is of very great interest? I owe this to the researches of my friend Mr. Dube. I have here a book which I have also got from the Inner Temple Library called Hough's Practice of Courts-Martial. Captain Hough was a Deputy Judge Advocate General. This book was published at Calcutta in 1834.

[VISCOUNT HALDANE.—This is with regard to Indian Courts-Martial.]

Yes.

[VISCOUNT HALDANE.—I have never heard of this book.]

It is a book of great interest. 1834 is after Regulation X of 1804. It is pointed out by my learned friend that on page 315 of that book there is extracted an extremely interesting document which is addressed to the Secretary to the Government, Judicial Department, by the Advocate-General of that time, a gentleman named Mr. Spankie, relative to the Native Detachment Courts-Martial at Cuttack from 14th September 1817 to 4th March 1818. He extracts the report there named. What the Advocate-General is saying is this: "It appears from the documents referred to that Martial Law was put in force in Cuttack under the order of Government by virtue of Regulation X of 1804. The preamble of the Regulation states that it may be expedient in certain cases therein mention-

ed that the Governor-General in Council should declare and establish Martial Law for the safety of the British possessions, etc., by the immediate punishment of persons owing allegiance to the British Government who may be taken in arms in open hostility to the said Government or in the actual commission of any overt act of rebellion against the authority of the same or in the act of openly aiding and abetting the enemies of the British Government within any part of the territories above specified. (3). This enacting part conformably to the object developed in the preamble enacts" then he sets it out. Then he makes this comment:

"Four overt acts are enumerated and it seems to me quite clear that the word 'taken' in the first must on necessary construction be carried forward and annexed to each member of the sentence containing the description of the overt act."

[VISCOUNT HALDANE.—Which section is he quoting there?]

Section 2. He says the word "taken" is mentioned in the first of the four overt acts He says: "It must on necessary construction be carried forward and annexed to each member of the sentence containing the description of the overt act". Then he says: "Here the circumstances in which the Courts Martial are to have authority to try are clearly marked and defined. The criminal must be taken in open acts of the treasonable and rebellious description mentioned. It seems to me also liable to some doubt whether the fourth overt act specified in the Regulation does not mean an aiding and abetting of such enemies of the British Government as are contemplated both in the preamble and in section 2 - enemies with which the British Government may be engaged in war—of the rebels with arms in their hands. If there could be any doubt of the extent of the authority and jurisdiction of the Courts-Martial under Regulation X of 1804, it would be removed by the instruction of 11th April, 1805, communicated for their guidance to the authorities in Cuttack during the late disturbances. These instructions, paragraph 4, say: "If any person or persons charged with any of the overt acts of rebellion specified in Regulation XII of 1804 shall be apprehended by any Military Officer when not in the actual commission of offences of that description they are to be delivered over by the military to the civil power," etc. The Courts Martial in Cuttack do not appear to have considered themselves as at all confined to the cases of prisoners taken in *flagrante delicto* or even to traitorous and rebellious acts of the specific quality stated in the Regulation. They seem to have acted as if they had possessed an unqualified jurisdiction over all treasonable and rebellious acts without limitation of time, place or circumstance. The charge (conforming as in all limited jurisdictions it ought to the cases in which the jurisdiction is given) does not state the circumstance of the criminal being taken in the act, or that it was in some open act of the treasonable, rebellious quality which alone the Court-Martial could lawfully try." Then he proceeds to discuss the cases. I am anxious to take the same points here.

[VISCOUNT HALDANE.—To sum that up, the word 'taken' governs. Your case is that he must be taken?]

Yes.

[VISCOUNT HALDANE.—Do you say "taken in arms?"]

I think the construction is fairly clear.

[VISCOUNT HALDANE.—You say they must be taken in arms?]

There are four cases. The *first* is that they should be taken in arms; the *second* case is taken in the act of opposing by force af arms; the *third* is taken in the actual commission of any overt act of rebellion; and the *fourth* is taken in the act of openly aiding and abetting the enemy. That is not what happened here.

[LORD BUCKMASTER.—In order to be quite clear about the effect of the second Ordinance, is not this worthy of note, that either it must be strictly limited to the offences under the Regulation of 1804, or it must have an indefinite application?]

Yes.

LORD BUCKMASTER.—Under the Regulation of 1804, the powers conferred by which are the powers that the Commissioners are to exercise and nothing else, as far as I can see there is only one sentence, death.]

Yes.

[LORD BUCKMASTER.—If, therefore, this was to refer to any offence it would mean that if you caught a boy doing something silly

in the street you would have no alternative but to sentence him to death and to leave it in the power of the Viceroy to exercise the King's clemency to reprieve him from a sentence which obviously could not be executed. That seems to be a potent reason why the second Ordinance can only relate to the offences mentioned in the first.]

Sir *John Simon*.—I accept all that. It is right to point out, of course, that the second Ordinance does enact that the Commission may pass in respect of any such offence any sentence authorised by law, but the only sentence that is really authorised by law is death. That is one way I put it. Though I am not attempting to discuss the matter I want to point out that I have a second alternative, which I venture to submit is just as powerful, and it is this. I impeach the authority of the Governor-General in Council to pass such an Ordinance as No. 4, if it has any wider construction than that. Supposing against me on its true construction Ordinance No. 4 does cover an offence which is against section 121 of the Code. I think it will turn out that these men were arraigned simply on a charge of breaking section 121 of the Code, in which case they are entitled to say these whole proceedings are *coram non judice*. The three Judges are sitting there with limited jurisdiction, and they seem to have thought they could try these people for ordinary murder. That would be a conclusive answer. But it is said, on its true construction, the Governer General in Council in an emergency has power to pass an Ordinance which will empower a jurisdiction wider than Regulation X of 1804, then I say, granted that is so, there may be such cases, but it cannot take the form of a proceeding against a man for what is in effect a breach of allegiance, while at the same time refusing to give him the constitutional protection which the law provides.

The constitutional protection which the law provides is as old as the Petition of Rights. This is the very thing which our ancestors insisted upon. I have traced it back a long way and the meaning of it is that although in times of emergency the Governor-General has very important powers which no loyal British subject would in any way seek unduly to cut down, still those powers are by the express terms of the Statute limited by reference to section 65, sub-section 2, and section 65, sub section 2, is a section which says that the unwritten laws and constitution of the United Kingdom of Great Britain and Ireland whereon may depend the allegiance of any person cannot in any way be affected. This has been raised in India. Your Lordships will find an interesting discussion on that in the 6th volume of the Bengal Law Reports. It is a case of *Ameer Khan, In re* (2). Mr. Justice Norman says at page 452: "Now if it be true as laid down in *Calvin's case* (1) that *protectio trahit subjectionem at subjectio protectionem*, that allegiance and protection are reciprocally due from the subject and the sovereign, it is evident that the strict observance of the laws which provide for such liberty and security ensures the faithful and loving allegiance of subjects. The infraction of such laws may be carried to such an extent as to give rise to the right of self-defence on the part of the subject, a right which, says Sir Michael Foster, 'the law of nature giveth, and no law of society hath taken away.' No man can study the history of England or can read the great judgment passed by the High Court of Parliament by the Bill of Rights on King James II, without seeing that on the faithful observance by the sovereign of the unwritten laws and constitution of the United Kingdom, as contained in the great Charter and other Acts which I have mentioned, depend in no small degree the allegiance of the subject. It would be a startling thing to find that rights of so sacred a character could be taken away by an act of the subordinate legislature."

[Viscount Haldane.—My criticism upon that is that it is so general and vague that there is hardly a thing in our constitution that would not come against this. Does not that mean the power of the Crown with regard to naturalization and with regard to the denial to a man of his specific rights as a British subject?]

[Sir *Erle Richards*.—Your Lordships may remember that this argument was before the Board very recently in the case of *Annie Besant* v. *Advocate-General of Madras* (3).]

[Viscount Haldane.—Did Lord Phillimore in his judgment say anything about it?]

(2) 6 B. L. R. 393 at p. 452.

(3) 54 Ind. Cas. 209; 46 I. A. 176; 37 M. L. J. 139; 20 Cr. L. J. 593; 17 A. L. J. 925; 23 C. W. N. 986; 21 Bom. L. R. 867; (1919) M.W.N. 555; 10 L.W. 451 (P. C.).

[Sir *Erle Richards*.—There is a passage in 46 Indian Appeals, *Annie Besant* v. *Advocate-General of Madras* (3).]

[VISCOUNT HALDANE.—Lord Phillimore gave a very elaborate judgment.]

[Sir *Erle Richards*.—Yes. May I read one passage on this point? Mrs. Besant had raised the point in regard to the Press Act. Lord Phillimore in giving the reasons of the Board said: "It was contended in the High Court and before this Board that it was beyond the competency of the Indian Legislature to enact section 22 and possibly even to enact the Press Act. This argument, which was mainly founded upon the language of Mr. Justice Norman in the cases of *Ameer Khan, In re* (2) (6 Bengal Law Reports at page 451), received some encouragement from the Officiating Chief Justice. But their Lordships find themselves unable to appreciate it."

[VISCOUNT HALDANE.—The Press Act was an Act interfering with the liberty of the subject simply?]

[Sir *Erle Richards*.— Yes.]

[VISCOUNT HALDANE.—I want to see how allegiance comes in here. What this Act does is to set up a special tribunal.]

Sir *John Simson*.—I think it is rather more than that. I should submit that it would be strictly correct to say that it is part of the constitution and indeed part of the unwritten law of the Kingdom upon which allegiance depends, at any rate in some degree, that subjects should be tried in the ordinary course of law and that civilians should not be submitted to the tender mercies of what is in effect a Court-Martial.

[VISCOUNT HALDANE.—What connection has that with allegiance except that it may shake the allegiance?]

That is the connection.

[VISCOUNT HALDANE.—To that extent every change of law does.]

[LORD ATKINSON.—Supposing there is a Statute making a certain thing a crime that was not a crime before?]

That would be an example.

[VISCOUNT HALDANE.—It is done daily in this country. Look at the Children's Act for instance. Parents were put under restrictions with regard to their children.]

May I read one or two passages from Chief Justice Cockburn's charge, which has been referred to already? They do bear very directly on the point I am making. I am merely selecting two or three passages because your Lordships do not want the whole matter argued out now. On page 29, Chief Justice Cockburn is addressing the Jury in these terms: "But on the other hand, I think it impossible to entertain a shadow of doubt that these proceedings were utterly illegal. If it be true that you can apply Martial Law for the purpose of suppressing rebellion, it is equally certain that you cannot bring men to trial for treason under Martial Law after a rebellion has been suppressed. It is well established according to the admission of everybody, even of those who go the farthest in upholding Martial Law, that the only justification of it is founded on the assumption of an absolute necessity—a necessity paramount to all law and which, lest the commonwealth should perish, authorises this arbitrary and despotic mode of proceeding; but it never has been said or thought, except perhaps by King Henry VII, that Martial Law could be resorted to when all the evils of rebellion had passed away and order and tranquillity had been restored, for the mere purpose of trying to punish persons whom there was no longer any sufficient cause for withdrawing from the ordinary tribunals and the ordinary law."

The other passage which I have noted is on page 47, where the Chief Justice says: "I have now gone through the history of this country so far as relates to Martial Law. I believe I have mentioned every instance in which Martial Law has ever been proclaimed or been referred to. But I own that on this point I speak with considerable diffidence; for I cannot claim to have made history my special study, and my researches on this particular matter have necessarily been confined to the intervals of constant and severe judicial labour and historians may, therefore, very likely be aware of facts which have escaped me; but so far as I have been able to discover, no such thing as Martial Law has ever been put in force in this country against civilians for the purpose of putting down rebellion." There are other passages which I need not trouble about now. My other point is a good one, but I do certainly desire to have the opportunity of developing, as I think it

might be developed, the argument that supposing it could be said—

[LORD BUCKMASTER.—It is a much more serious thing than the other.]

It is, supposing it might be said that the second of those Ordinances, so far as its true construction goes, confers upon this wholly exceptional tribunal a power to sentence people to death because at some previous date it is said that there is evidence to show that they took part in a disturbance, then I do most respectfully submit that a subordinate Legislature which is given certain limited powers by the Government of India Act has no power to do any such thing.

[VISCOUNT HALDANE.—I do not know what Sir Erle Richards is going to contend. Subject to that my impression is that the second of those Ordinances merely dealt with the offences cognizable under the Commission set up by the first Ordinance and that it did not set up a new set of offences. Is it your case that it did, Sir Erle?]

[Sir *Erle Richards*.—The view that I shall present is that the first of those Ordinances did not enlarge the nature of the offences, but the second one did.]

[LORD BUCKMASTER.—Your case is that 'any offence' there means any offence of the sort or kind.]

Sir *John Simon*.—Then your Lordship appreciate I am relying upon my second string. I can see if that argument was ever likely to prevail, I should be in a strong position for saying there is plainly a limit put by the constitution of India upon the powers of the Governor-General in case of emergency to promulgate Ordinances. This is the limit. It is not competent to the Governor-General, because there is an emergency, to provide three Judges nominated by a district Government to try a small boy for stealing an apple and sentence him to death.

[VISCOUNT HALDANE.—I think you have a strong argument for saying that the construction of the second one is one which excludes it. If it was intended to give any such power as that, the second Ordinance is far from clear: "Notwithstanding anything contained in the Martial Law Ordinance, 1919, the Local Government may; by general or special order, direct that any Commission appointed under the said Ordinance shall try any person charged with any offence, committed on or after the 30th March, 1919." Are not those offences *ejusdem generis* with the offences cognizable under the other one?]

I think so. This greatly strengthens the argument that the amending Ordinance is dealing with a Commission already constituted.

[VISCOUNT HALDANE.—It may be the view of the Government of India is that they wish this question raised and argued, but if they wish to raise anything so big that a boy may be tried and sentenced to death for stealing an apple, one would have thought they would have put it in explicit terms.]

[LORD ATKINSON.—If it is not confined to the earlier offences it extends to any offence.]

Yes: I submit that at any rate it is in the circumstances not right that these very severe penalties, in the case of some of these men who, in spite of the remission in the case of others, are still under sentence of death, should be imposed and carried out. We were under the severest restriction of time. We were told if we did not get leave to appeal to-day the sentence would be carried out.

[VISCOUNT HALDANE.—Let us separate the points. The first is that the offences are limited to the offences cognizable under the first of the two Ordinances.]

Yes, and in that connection I put it when arrested these men were peaceably at their homes. They were not taken in *flagrante delicto* in any sense. Secondly, I may point out that if upon any proper construction, the Ordinance under which this alleged jurisdiction had been conferred on this tribunal is so wide as to deal with other offences, it must deal with any and every offences which by general or special order the Local Government chooses to direct the Commission to deal with. That is exactly the thing which the Petition of Rights says cannot be done. It is almost in these words. The Petition of Rights says that the Authorities, the Crown, the Executive have directed Commissions to try persons for various offences and it proceeds to set out that that was unconstitutional and contrary to law, and that if the thing which as long ago as 1628 was declared to be a breach on the part of the Executive of the duty of protection which is correlative with

allegiance, I submit on its true construction the second Ordinance merely carried the time further back. May I call attention to the other points I make? I also make this point. I submit that an exceptional tribunal cannot be substituted for the ordinary law here so that it can deal with retrospective matters, among other things, for this reason that a proclamation of Martial Law itself cannot have any retrospective effect, as Chief Justice Cockburn points out in his charge to the Jury to which I have referred. A proclamation of Martial Law may by way of warning have an operative effect from the time of the proclamation, but it cannot in itself confer jurisdiction which did not exist before to deal with matters which have already passed.

[VISCOUNT HALDANE.—Let us suppose the construction were this, that the powers are the existing powers which are simply handed to the Commission to apply; the offences are not new offences, but only the mode of trial is new and exceptional. The Viceroy sets up this Tribunal, and he says it is to try people for all offences committed since a certain date in March.]

It is a separate point, and not a point necessary for me at this stage, but it is a point I want to save, because when one reads Regulation X of 1804, a question will arise as to what is the meaning of conferring jurisdiction upon a special tribunal to deal with persons who shall be taken in arms. It may be that the meaning of it is that you are to suspend the ordinary law. There might be a proclamation warning everybody that a very exceptional situation had arisen, and then saying that anybody who is taken with arms in his hands or is in open rebellion is going to be dealt with by drum-head Court Martial. It is a very different proposition to say that a proclamation could be made saying that something that a man did three days ago was going to be dealt with by an exceptional tribunal. I have raised, I think, sufficient grounds for the purposes of to-day.

[LORD BUCKMASTER.—I suppose there will be this answer on your first point. They are going to say that the second Ordinance was issued under the Statute of 1915, and that they did not attempt to rely upon the power given by the 1804 Regulation as they did on the first, and secondly, they must have intended to cover something which the first Ordinance did not cover.]

Yes.

[LORD BUCKMASTER.—What do you say to that?]

I say first of all the amending Ordinance No. 4, the Martial Law Amending Ordinance, is in terms dealing with a Commission appointed under Martial Law Ordinance No. 1.

[VISCOUNT HALDANE.—And it is to extend its application.]

Yes. You must, therefore, say: What Commission is this about which you are speaking? You find it is a Commission which is given a jurisdiction subject to a limit of date within the ambit of Regulation X of 1804.

[LORD BUCKMASTER.—That is not quite what is in my mind. I think what can be said against you is this: If the object of this second Ordinance was merely to make the first Ordinance retrospective, it would not be necessary to invoke the powers conferred by section 72 of the Act.]

It has been done in both cases. The same thing has been done. It gets rid of that difficulty. There is no question that it is done under section 72.

Sir *Erle Richards*.—The Governor-General can only make Ordinances under that section.]

[LORD ATKINSON.—The first Ordinance comes into operation on the 15th and 16th April, and it takes cognizance of all offences committed after the 13th April.]

Sir *John Simon*.—Yes. The only other thing I wanted to mention is this: Sometimes when petitioners are able to get leave to appeal from your Lordships, they are limited to the grounds which they have indicated in their patition. I hope that your Lordships, if you are minded after hearing the argument to give leave, will not limit me in that way, because really the matter has come to our knowledge very recently, we are dealing with fragmentary materials and we should go into the matter more fully if your Lordships give leave, and put forward any further grounds which occurred to us.

BUGGA v. EMPEROR.

(Counsel and parties were ordered to withdraw and after a short time were called in again).

[VISCOUNT HALDANE.—Sir Erle, as at present advised, there is one point on which their Lordships want you to satisfy them, that there has been no miscarriage of justice, that is, that the second Ordinance enlarges the powers under the first, because if the powers under the first are not enlarged, they do not extend the time unless a person is taken in the act. Will you confine yourself to that point? Really it is a very formidable point. If we give leave to appeal here, we should not be able to confine or think it right to confine the appellants with regard to the other points which come in incidentally, although it may be that we should not have given leave on those points.

Sir *Erle Richards*, for the Secretary of State.—I am very well aware of the very great importance of this point, because these are not the only men who have been sentenced by this sort of tribunal. There was a very general rising in the Punjab and a number of Europeans were murdered. I want your Lordships to remember that it is a matter of great importance.

[VISCOUNT HALDANE.—We realise that.]

Everybody who has been convicted would then have a right of appeal to this Board.

[LORD BUCKMASTER.—No, only the people who have been convicted when they have been seized otherwise than in *flagrante delicto*.]

That is a large number.

[VISCOUNT HALDANE.—All we can do is to look at the Ordinances.]

It is really such an extremely short point that I do not want to press it if your Lordships think there is a case to argue, but the argument I shall advance if this case is to be argued in detail are these.

[LORD ATKINSON.—In its terms Ordinance No. 4 extends to everything. It can never have been intended to extend to everything. You must look for some restriction and the only place you find it, as it seems to me, is in the Regulation of 1804.]

May I put it in this way?

[LORD ATKINSON.—Where do you find the restriction? It cannot be intended to extend to every crime.]

[LORD BUCKMASTER.—What you want the Board is to avoid expressing any definite opinion if we thought it was a proper case for argument on appeal.]

Sir *Erle Richards*.—I do want to put the sort of arguments that I shall advance before your Lordships. I think the whole thing turns upon this Ordinance. We are not dealing with Martial Law but a statutory enactment.

[VISCOUNT HALDANE.—In a most significant way the Governor-General in Council has referred to the Bengal State Regulation of 1804. It would have been perfectly open to him to have said:—Under my powers of 1915 I make a new Ordinance, instead of which he says "I refer to the Bengal Regulation."]

May I read this last Ordinance because I think it turns largely upon that? It is very short. It begins in this way: "Whereas an emergency has arisen which renders it necessary to provide that Commissions appointed under the Martial Law Ordinance, 1919, shall have power to try persons and offences other than those specified in the said Ordinance."

[VISCOUNT HALDANE.—The purpose is established by the fact that the persons charged with offences were to be persons charged with offences committed after April 12.]

I submit the ordinary way to construe it would be that 'every person' means persons other than those taken in the act, and so forth.

[VISCOUNT HALDANE.—If the Governor-General made such a revolutionary change in the law, and said that everybody was to be tried for stealing a pair of boots or getting drunk in the streets before this Commission by Martial Law, would not he have said so?

I do not think the Ordinance gives that power at all. If your Lordships would look at paragraph 2, what it says is this: "Notwithstanding anything contained in the Martial Law Ordinance, 1919, the Local Government may by general or special order direct that any Commission appointed under the said Ordinance shall try any person charged with any offence committed on or after the 30th March 1919." That is the thing which is to be found all through the Indian legislation. You give the Local Government the power of sending offences for trial to this Commission.

[VISCOUNT HALDANE.—The criminal law is the same all over India: there is a general code for the criminal law which is applicable to India generally. Is it not very extraordinary, if there is to be a change in the nature of the Courts, that it should go over to the Local Government?]

No, I think not, I could find cases where there are exceptional things to be dealt with and the Local Government is given the power of deciding whether those cases should be exceptionally dealt with.

[VISCOUNT HALDANE.—This is much wider; this is saying that the Local Government shall have the power to direct that a man charged with the offence of embezzlement is to be tried by Court-Martial. I should have thought they would have said so if that was intended. It is a matter of very high policy to give that power to the Local Government. I am only referring to one of the possibilities of the system.]

It is from the point of view of the Indian statute, because the possibilities of the construction are that the change to the Local Government was meant to prevent these offences being submitted to this Special Tribunal. All through the Indian statute books you find this sort of discretion vested in the Local Government. The Local Government may authorise the trial of any person before this Commission. You may say it is a wide power, but it is not an unreasonable power, because the Lieutenant-Governor will settle whether the case is a proper one to be tried or not. That, I submit, is not an unreasonable construction.

[LORD ATKINSON. It is an authorised provision.

If it is a statute, it is authorised.—I will deal with that point in a moment. The Indian legislative body has ample power to make these provisions. I think I can satisfy your Lordships on that point.

[VISCOUNT HALDANE.—It is worded in such a way as to be susceptible of either of two constructions, and to my mind the limited construction is just as natural for the words as the wider one. That being so, the change purported to be made points to the limited construction.]

At this stage I do not want to prolong the argument.

[VISCOUNT HALDANE.—I am very anxious that this Board should not express any definite view on it, but leave it perfectly open. Do you not think under the circumstances that as there is great doubt about the matter, it had better be brought here?]

If your Lordships think there is great doubt, I shall not say anything further about it.

May I say one word upon the other aspect of the case, and only one word? That argument on the construction of the section has been advanced in many cases, but it has never received any support in India except in Mr. Justice Norman's judgment and that was upset by the Court of Appeal, although they decided the case on another point.

[VISCOUNT HALDANE.—I can understand the objection to giving leave to appeal to raise that question, and if it stood alone it would be possible that we should not have given leave on it, but if this case comes here, of course consistently with the proper administration of justice we should allow them to raise it; but we are not encouraging it.]

I am obliged to your Lordships. This is a question which does not affect only these Courts during the war. From 1915 there have been a large number of these bodies. This body is one of many such bodies which have been sitting continuously under an Act called the Defence of India Act. It would attack a great deal that has been done in India for many years past.

[VISCOUNT HALDANE.—We should not give leave upon that point.]

I am obliged to your Lordships. I derive encouragement from that expression of opinion. May I add one word? It is open to my friend to raise questions upon the facts in this sense, that he may point out that there was some mistake of law. That, of course, will be open to him. I would only ask on behalf of the Secretary of State that we have reasonable notice of the points that my friend intends to raise, because it may be necessary for us to give evidence.

[VISCOUNT HALDANE.—You will give that undertaking, Sir John?]

[Sir *John Simon*.—Certainly. I am sorry I cannot indicate more precisely now what my points will be, but my friend knows that we are acting under a severe restriction as to time.]

Sir *Erle Richards*.—I am not complaining, because I have not the record, and I know nothing about what happened below.

MAQBUL AHMAD *v.* EMPEROR.

JUDGMENT.

VISCOUNT HALDANE.—We think under the circumstances it is right that there should be leave to appeal. This Board, as we have often said, is not a Court of Criminal Appeal, but there is a class of cases which is generally defined as the class of cases which falls within the category of what the Board laid down in *Dillet, In re* (4), in which they do advise the Sovereign to interfere where there has been a miscarriage of justice referred for its meaning to the fundamental principles of justice, for instance, if there has been anything *coram non judice*', that is a case in point. If the argument that has been addressed to us here is right, the case has been *coram non judice*. There is one point, at any rate, on which we think that there is a serious point to argue, without expressing any opinion upon it, and that is that the second Ordinance has not extended the scope of the first Ordinance, and that the first Ordinance is limited to cases where the defendant is taken in *flagrante delicto*. There are other points besides that; there is the question of whether this could have retrospective action; that is quite another point. Then there is the question as to allegiance, to which reference has been made. I do not say whether we should have given leave to appeal on these points as regards the allegiance; I think we should have been reluctant to do so; but it must be open to the appellants when they come here to argue these points. We do not express any opinion except that we think that within the principles of *Dillet's case* (4) we are bound to advise the Sovereign that there should be a scrutiny of what has happened with a view to ascertaining whether there has been a miscarriage of fundamental principles of justice.

LORD BUCKMASTER.—I hope nothing I have said will be taken as expressing any considered opinion.

Sir *John Simon*.—We quite understand that.

Sir *Erle Richards*.—That will be taken as applying to anything that may have been said on the other point I have taken.

Leave granted.

Solicitors for the Appellant:—Messrs. *Barrow, Rogers* and *Nevil*.

Solicitors for the Respondent:—*Solicitor, India Office.*

(4) (1887) 12 App. Cas. 459; 56 L. T. 615; 33 W. R. 81; 16 Cox C. C. 241.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 407 OF 1919.

July 21, 1919.

Present:—Mr. Justice Shadi Lal.

MAQBUL AHMAD—ACCUSED—PETITIONER

versus

EMPEROR THROUGH RAM LABHAYA—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 202, 476—Complainant not allowed to produce his evidence—Order for prosecution based on preliminary investigation—Failure of Magistrate to record his reasons—Order, whether justified—Penal Code (Act XLV of 1860), s. 211.

It is doubtful whether an investigation under section 202 of the Criminal Procedure Code can be regarded as a judicial proceeding and may be used for supporting an order under section 476 of the Code. [p. 720, col. 1.]

Where a Magistrate did not himself give any reasons for holding that a complaint was false and did not record any evidence except the statement of the complainant, and proceeding entirely upon the result of the investigation, under section 202 of the Criminal Procedure Code, ordered the prosecution of the complainant under section 211 of the Penal Code:

Held, that the order could not be sustained. [p. 720, col. 1.]

Where a complainant is not allowed to adduce the whole of his evidence in support of his complaint, exceptionally strong reasons are required to justify an order against him under section 476, Criminal Procedure Code. [p. 720, col. 1.]

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Karnal, dated the 21st February 1919, sending the case against the petitioner under section 476, Criminal Procedure Code, to the Court of Nawab Umar Daraz Ali Khan for trial.

Mr. *Ghulam Rasul*, for the Petitioner.

JUDGMENT.—The District Magistrate's order under section 476, Criminal Procedure Code, directing the prosecution of the petitioner Maqbul Ahmad is open to several objections. In the first place, the Magistrate does not himself give any reason for holding that the complaint of the petitioner is false. Further, it appears that he did not record any evidence except the statement of the complainant, and proceeded entirely upon the result of the investigation made unde

section 202, Criminal Procedure Code, by Chaudhri Niamat Khan, a Magistrate of the 1st Class. It is doubtful whether an investigation under section 202, Criminal Procedure Code, can be regarded as a judicial proceeding and may be used for supporting an order under section 476, *vide Kachi Madar Labhai, In re* (1) and *Bapu* v. *Bapu* (2).

Mr. Ghulam Rasul also invites my attention to the fact that the complainant was not allowed to adduce the whole of his evidence in support of his complaint, and it is clear that in a case of that kind exceptionally strong reasons are required to justify an order under section 476, *vide Kachi Madar Labhai, In re* (1). It is also contended on the strength of the observations contained, in *Ali Muhammad* v. *Emperor* (3), that the District Magistrate, who was himself a Magistrate of the 1st Class, was not competent to direct another Magistrate of the 1st Class to make an investigation under section 202, Criminal Procedure Code, because the latter Magistrate was not subordinate to the former, and that the result of the investigation so made cannot be utilized for the purpose of ordering the prosecution of the petitioner. I need not pronounce any final opinion on the subject, because I am clear that the order complained of cannot be sustained.

I accordingly accept the application for revision and quash the order under section 476.

Application accepted.

(1) 10 Ind. Cas. 619; 21 M. L. J. 795; (1911) 2 M. W. N. 9; 10 M. L. T. 47; 12 Cr. L. J. 323.

(2) 14 Ind. Cas. 305; 22 M. L. J. 419; 11 M. L. T. 367; (1912) M. W. N. 499 (F. B.); 13 Cr. L. J. 209; 39 M. 750.

(3) 12 Ind. Cas. 515; 2 P. R. 1912 Cr.; 11 P. L. R 1912; 12 Cr. L. J. 539; 49 P. W. R. 1911 Cr.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 71 OF 1917.

June 13, 1917.

Present:—Mr. Batten, A. J. C.

TUKARAM KUNBI—APPLICANT

versus

PANJABRAO, STYLING HIMSELF AS GANPATRAO—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Service of process, method of—Proceedings under s. 145—One party not served with notice—Proceedings, legality of—Jurisdiction, want of—Revision—High Court, interference by.

The law for service of a summons in criminal cases is on the same lines as the rules for the service of a summons in a civil case.

In an inquiry under section 145, Criminal Procedure Code, both sides must be heard: consequently, if one of the parties to the enquiry is not served and the Magistrate proceeds with the case, there is a defect of jurisdiction, and his order is liable to be set aside in revision by the High Court.

Madho Prasad v. *Jaggansi*, 53 Ind. Cas. 615; 20 Cr L J. 775, followed.

Criminal revision of the order passed by the Sub-Divisional Magistrate, Katol, under section 145, Criminal Procedure Code, dated the 5th February 1917.

Messrs. *Gangadhar Sitaram* and *D. W. Kathale*, for the Applicant.

Mr. *P. R. Naidu*, for the Non Applicant.

ORDER.—In this case one of the parties to an enquiry under section 145, Criminal Procedure Code, was not served. The summons was attached to his house in his absence in Nagpur. No "due diligence" was used to effect personal service within the meaning of section 71, Criminal Procedure Code. The law for the service of a summons in criminal cases is on the same lines as the rules for the service of a summons in a civil case, and the remarks in *Dwarkabax* v. *Macleod* (1) are applicable here. The elementary rule of law that both sides must be heard has been disregarded, and there has been a defect of jurisdiction similar to that in *Madho Prasad* v *Jaggansi* (2). As to this Court's jurisdiction to interfere in revision, I entirely agree with the remarks of Prideaux, A. J. C., in the case last cited. It is also to be observed that the remarks as to the jurisdiction of this Court in revision when the Magistrate has acted without jurisdiction, contained in *Murat Singh* v. *Paika Bai* (3), are *obiter dicta*. As agreed to by the District Magistrate, I set aside the Magistrate's order, and direct that proceedings be taken up *de novo* and proceeded with according to law.

Order set aside.

(1) 2 N. L. R. 63.
(2) 53 Ind. Cas. 615; 20 Cr. L. J. 775.
(3) 17 C. P. L. R. 133; 1 Cr. L. J. 877.

AHMAD SHAH v. ABDUL SAMAD.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 84 OF 1919.

July 22, 1919.

Present :—Pandit Kanhaiya Lal, J. C.

AHMAD SHAH—DEFENDANT—APPELLANT

versus

ABDUL SAMAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Succession—Alienation by one heir to discharge debts of deceased, whether binding on co heirs—Co-heirs, whether bound to pay share of debt.

A voluntary alienation by some of the heirs of a deceased Muhammadan in possession of the estate, for the purpose of paying the debts of the deceased, is not binding upon the co-heirs who do not join in making the alienation, but in view of the provision of the Muhammadan Law that the payment of debts takes precedence over the inheritance, such an alienation can only be set aside on condition of the claimants paying their share of the debt due by the person through whom they claim title which has been discharged by the sale. [p. 721 col. 2; p. 722, col. 1.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 7th January 1919, modifying the decree of the Munsif, North Unao, dated the 25th May 1918.

Pandit *Harkaran Nath Misra*, for the Appellant.

Syed *Zahur Ahmad*, for Respondent No. 1.

JUDGMENT.—Hidayatullah owned a grove and certain other property which devolved on his death on his widow, *Musammat* Likhi, and on his nephews, the plaintiffs. According to the Muhammadan Law, the share to which *Musammat* Likhi was entitled was one fourth and that to which the plaintiffs were entitled was three-fourths. Hidayatullah died on the 9th December 1908 From the time of his death *Musammat* Likhi remained in possession of the entire estate left by her husband and sold different portions of it from time to time to pay the debts due by her husband.

The grove in dispute was sold by her to Ahmad on the 23rd March 1909 in lieu of Rs. 200, out of which Rs. 125 were left with the vendee for payment to Sheo Prasad in satisfaction of a debt due by her husband and Rs. 75 were left with him for payment to Imdad Ali on account of a debt taken by *Musammat* Likhi herself. The plaintiffs seek to avoid that sale-deed so far as it affects their share.

The Court of first instance allowed them a decree subject to the payment of their three-fourths share of the debt, due to Sheo Prasad, which *Musammat* Likhi had liquidated by the sale of the grove. The lower Appellate Court, however, allowed the plaintiffs to recover their share of the said grove without the payment of their share of the liability for the debt discharged by *Musammat* Likhi.

The Courts below are unanimous in finding that Rs. 125 were due to Sheo Prasad on account of a debt due by Hidayatullah. They further find that the money borrowed by *Musammat* Likhi from Imdad Ali was not taken in connection with the funeral expenses of Hidayatullah. The ground upon which the lower Appellate Court refused to charge the plaintiffs with a proportionate liability for the money paid to Sheo Prasad was that the lady had Rs. 171 in her hands as the surplus realized by the sale of some other property to the defendant on the very day on which the grove in dispute was sold and that she could have paid the debt due to Sheo Prasad out of that money. The two transactions cannot, however, be mixed up in the manner suggested. The defendant was undoubtedly a party to both the transactions, but it was not his business to see that the money, he was paying, should be applied by the lady in a particular manner. He could not go behind the contract entered into by virtue of the sale-deed. Having paid the consideration in good faith to the vendor, he cannot be ousted from the property purchased at the instance of the co heirs of the vendor, unless the latter pay their share of the debt which was discharged by the sale in question. In *Mahadeo Prasad v. Chand Bibi* (1) a voluntary alienation by the heirs of a deceased Muhammadan in possession of the estate for the purpose of paying the debts of the deceased was held to be not binding upon the heirs, who did not join in making the alienation; but in view of the provision of the Muhammadan Law that the payment of debts took precedence over inheritance, the alienation was set aside

(1) 2 Ind. Cas. 922; 12 O. C. 146.

on condition of the claimants paying their share of the debts due by the person through whom they claimed their title which had been discharged by the sale. The plaintiffs are not, therefore, entitled to have the sale set aside except on payment of their share of the debt due to Sheo Prasad by Hidayatullah, which was discharged by the sale of the grove in question. If *Musammat* Likhi did not discharge that debt out of other money which she might have had in her hands, the vendee cannot be made to suffer for it.

In regard to the debt due by *Musammat* Likhi to Imdad Ali, the finding of the Court below is conclusive.

The appeal is, therefore, allowed and the claim of the plaintiffs decreed for possession of the three fourth share of the grove in dispute subject to the payment of Rs. 93-12-0 to the defendant within six months from this date, the parties bearing their own costs throughout. In case of non payment, the suit shall stand dismissed with costs in all the Courts.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 19 OF 1916.
December 19, 1918.
Present:—Mr. Fawcett, J. C., and Mr. Kincaid, A. J. C.

NARAINDAS—PLAINTIFF—APPELLANT
versus
BUTO AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition, suit for—Prayer for demarcation and possession of share, whether includes ejectment—Ejectment, whether can be granted.

A suit in which the plaintiff asks that certain survey numbers be partitioned and possession given to him of his particular share as demarcated, includes a claim to relief by ejecting any defendant who raises the contention that the plaintiff is not entitled to partition of one of those survey numbers and that that survey number is in such defendant's possession and ownership. The mere fact of the plaintiff not specifically asking for relief by ejectment of defendants from any part of his demarcated share, of which they had possession, would not debar the Court from granting such relief if the Court thinks it just to do so. [p. 724, col. 1.]

Appeal from the decree of the Joint Judge, Sukkur.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Fatechand Assudomal*, for the Respondents.

JUDGMENT.

FAWCETT, J. C.—The plaintiff-appellant has sued for partition and separate possession of his share in Survey Nos. 149, 592 and 591, alleging that he was entitled to $\frac{2}{3}$rds share under a Court sale certificate of 1913 in his favour and that he was in joint possession of the said share. The defendants' main contention was that out of these three numbers, No. 591 belonged to them and had been in their exclusive and adverse possession to the knowledge of plaintiffs' predecessors in title, and, that accordingly the plaintiff was not entitled to any partition of this number. They also pleaded that the suit was not maintainable in the form in which it had been brought and that it was time barred. On these pleadings the following issues were raised:—

1. Whether the land in suit is the undivided property of plaintiff and the defendants in proportions of $\frac{2}{3}$rds and $\frac{1}{3}$rd as stated in the plaint?
2. Whether plaintiff is in joint possession with the defendants of the property in suit? If not, what is the consequence?
3. Whether Survey No. 591 is the divided and exclusive property of defendants as pleaded in paragraph 6 of the written statement?
4. Whether the suit is not maintainable in the form in which it has been brought?
5. Whether the suit is within time or not?
6. What should the decree be?

The Subordinate Judge who tried the suit held that the land in suit had been privately divided in about the proportions $\frac{2}{3}$rds to $\frac{1}{3}$rd, but the survey numbers as they stood did not represent the real shares and required to be partitioned. He also held that, on the documents produced in the case, the portion of the three numbers that had been conveyed to the defendants, comprised not the whole Survey No. 591 but Survey No. 149 and a small portion of No. 591 adjoining Survey No. 149. He further held that although at one time there might have been certain

boundary marks to show the respective pieces of the defendants and the plaintiff's predecessors in-title, these marks do not now exist, so that there was nothing demarcating actually the separated pieces of the parties. He also held that the defendants had not proved their exclusive possession of Survey No. 591 and that, in any case, such possession did not begin until 9 or 11 years prior to the suit. He further was of opinion that the objection to the frame of the suit was unduly technical and that the suit was maintainable. Accordingly, he directed partition to be effected by the Revenue Authorities of the three survey numbers in the manner already mentioned.

The defendants appealed to the District Court against this decision. In the memorandum of appeal objection is taken to all the findings of the lower Court but the only one which has been considered by the learned Joint Judge is the one taken in paragraph 9 of that memorandum, namely, that when a partition has once in any manner been made of a property, no second partition of that property can be made. He raised the following two issues:—

1. Whether the land in suit is undivided property?

2. Whether in the event of a finding in the negative, the plaintiff-respondent can be granted any relief in this suit?

He found both these questions in the negative. He says in his judgment that it is a fundamental principle that a suit for partition will lie only in respect of undivided land. Once a division has been made, no re-distribution through a Court is possible. In this case the original owners were a family of Muhammadans and each family had been in physical possession of a separate portion. That acquired by the appellant was either Survey No. 591 or a different portion. It followed that either they were in possession of Survey No. 591 as lawful owners, or as trespassers. The finding of the learned Subordinate Judge involved this corollary that at one time or the other, the appellants or their predecessors had trespassed on Survey No. 591, but this finding went beyond the pleadings since the respondent had not pleaded trespass, and had he done so, he would have had to prove that he or his predecessors-in-title had been in possession and enjoyment of Survey No. 591 within 12 years. No such plea had been raised, nor had evidence been proved on that point. The effect of the decision of the lower Court was to give him an ejectment decree for which he did not and could not ask. He, accordingly, reversed the decree of the lower Court with costs throughout. In this second appeal the main question is whether this view is justified. Mr. Rupchand for the appellants argues that though the plaintiff may not have substantiated his allegations that the land was undivided in the sense of there never having been any demarcation or separation, and that the plaintiff was in joint possession of the share, yet the pleadings and the issues raised in the case covered sufficiently the main points of contention between the parties as to the alleged right of the plaintiff to any part of the Survey No. 591 and that, if a formal amendment were necessary, the Court should have allowed such amendment and not rejected the plaintiff's entire claim on the ground on which this had been done. On this point the fundamental rule, as laid down by the Privy Council in *Eshenchunder Singh* v. *Shamachurn Bhutto* (1), is that the case tried must be such as is either raised in the pleadings or is consistent with the case as originally laid, and that the state of facts and equities and ground of relief originally alleged and pleaded by the plaintiff should not be departed from. On the other hand there are various rulings that though a plaintiff may fail to prove the whole case set up by him, a decree may issue on the case proved, and the mere fact of the absence of a formal issue is immaterial when the defendant has not been taken by surprise, *cf.* *Balmakund* v. *Dalu* (2), *Sayad Muhammad* v. *Fateh Muhammad* (3), *Hassanbhai* v. *Umaji* (4) and *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (5).

(1) 11 M. I. A. 7; 2 Ind. Jur. (N. S.) 7; 6 W. R. P. C. 57; 2 Sar. P C. J. 209; 20 E. R. 3.
(2) 25 A. 498; A. W. N. (1903) 112 (F. B.).
(3) 22 C. 324; 22 I. A. 4; 6 Sar. P. C. J. 515.
(4) 28 B. 153; 5 Bom. L. R. 892.
(5) 28 A. 482; 10 C. W. N 626 (P. C.); 3 A. L. J. 360; 3 C. L J. 481; 1 M. L. T. 143; 8 Bom. L. R. 397; 16 M. L. J. 269; 33 I. A. 81; 8 Sar. P. C. J. 918.

I think the present case is not, however, one in which the relief sought and granted by the Subordinate Judge can be said to be outside the pleadings or to depend on a plea which has, in any way, taken the defendants by surprise. The plaintiff has a document of title in his favour which *prima facie* gives him a right to some part of each of these three survey numbers. He comes to the Court and asks that those survey numbers should be partitioned and separate possession given to him of his particular share as demarcated. Such a claim, in my opinion, clearly includes a claim to relief by ejecting any defendant, who raises the contention that the plaintiff is not entitled to a partition of one of these survey numbers and that that number is in such defendant's exclusive possession and ownership. Therefore, it seems to me that the Joint Judge is not correct in saying that the effect of the decision of the lower Court was to give the plaintiff an ejectment decree for which he did not and could not ask. In any case the mere fact of his not specifically asking for relief by ejectment of the defendants from any part of his demarcated share, of which they had possession, would not debar the Court from granting such relief, if the Court thinks it just to do so, see Order VII, rule 7, Civil Procedure Code. It is also to be noted that there is no finding by the Subordinate Judge that there are particular demarcated portions in these three survey numbers which represent the prior partition of which he speaks. On the contrary, he finds that there are no boundary marks now in existence, showing how the survey numbers were partitioned. The only demarcation that does now exist is the splitting of the old Survey No. 132 into three separate survey numbers, on which the defendants rely in support of their case that Survey No. 591 exclusively belongs to them. But this is a demarcation by the Revenue Authorities which is not binding on the Courts, and which can be corrected if the plaintiff is able to show that he has a title to any part of these three survey numbers which is in the defendant's possession. The extracts from the Record of Rights which have been put in did not raise any presumption against the plaintiff's case, for the first extract which supports the defendants' claim to Survey No. 591 is neutralised by the later extract, which shows the plaintiff as a co-sharer in these survey numbers. It is quite clear from the issues raised and the learned Subordinate Judge's judgment that the parties were well aware of the real question in dispute, namely, the defendants' alleged exclusive right to this Survey No. 591, and that the defendants have not been taken by surprise or prejudiced by the mere fact that the plaintiff in his plaint made an unsubstantiated allegation as to there having been no prior partition and his being in joint possession of the three survey numbers.

It would, in my opinion, be very unfortunate if, after the case had been fully fought out in the lower Court, the litigation was to end in the conclusion which has been arrived at by the lower Court. Of course if an effectual and certain partition had been proved, then I quite agree with the learned Joint Judge that, whatever the documents might show to the contrary, yet the Court would not interfere with the partition already arrived at. But the Subordinate Judge has certainly not found that any such partition had been arrived at, nor has the Joint Judge discussed the evidence on this point and arrived at a conclusion to the contrary.

Accordingly, I think this is a case in which the Joint Judge has erred in law in dismissing the plaintiff's suit on the preliminary point discussed in his judgment. I would, therefore, reverse the decree and remand the appeal for re-admission on the District Judge's file and fresh hearing and decision on the other points raised in the appeal by the defendants to his Court.

Costs to abide the result.

KINCAID, A. J. C.—The facts of the case are shortly as follows: —

There was a Muhammadan family who owned a survey number, which at one time was designated as Survey No. 132. It is important to remember that the original owners were a family of Muhammadans because of the frequency with which the words "undivided" and "partition" have been used in the judgment of the lower Court. They had a separate interest in the property, but the property had never

been divided by metes and bounds. From the hands of this Muhammadan family the defendants acquired ⅓rd share and the plaintiff obtained at a Court sale a title to the remaining ⅔rds share. On the strength of his sale certificate the plaintiff went to the first Court and asked that he should be given the ⅔rds of the property to which the sale certificate entitled him. The defendants did not seriously dispute his right to the ⅔rds, but they said that a portion of Survey No. 132, since re-numbered as No. 591, had by process of time and possession become their exclusive property. The lower Court found that the plaintiff was entitled to the ⅔rds share and found also that the defendants had been in enjoyment of a certain part of the property which had belonged at one time to the Musalman family, but was unable to decide which part it was. The lower Court could find no evidence that defendants had been in exclusive possession of Survey No. 591. But looking to the papers which had been filed in the suit, the lower Court found that the defendants ought to have been in possession of Survey No. 149 and part of Survey No. 591 and it awarded to them this part of the estate; the remainder of the property the lower Court awarded to the plaintiff. Against this decision, the defendants appealed to the Court of the first appeal. The learned Judge found that the land in suit was divided property and that the plaintiff was prevented by limitation from obtaining any relief.

A second appeal has been made to this Court. It appears to me that the learned Judge of the lower Court was in error when he said that the defendants were in possession of Survey No. 591 either as lawful owners or as trespassers. The first Court never found that the defendants were in possession of Survey No. 591 at all. All the lower Court found was that the documents in the case showed that the defendants ought to be in possession of Survey No. 149 and part of No. 591.

The learned Pleader for the defendants has urged that the plaintiff on coming to the Court to eject the defendants should have proved his possession of over 12 years. But that is not, in my opinion, a correct statement of the case. The plaintiff came to the Court under the title based on the sale certificate. He claimed to have a ⅔rds share in the property, and this claim so far is not seriously denied by the defendants. When, therefore, the defendants contended in reply that they had been in exclusive and adverse possession of a particular part of this property, the burden of proof lay upon them and that burden was rightly placed on them by the learned Judge of the first Court.

As the learned Judge of the Appellate Court made an error which vitiated his entire judgment, I agree with the learned Judicial Commissioner in ordering that the case be sent back for re-admission on the file and re-hearing.

Costs to follow the result.

Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 142 OF 1916.

May 9, 1919.

Present:—Mr. Daniels, A. J. C., and Mr. Lyle, A. J. C.

KESRI KUMAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat RAM RANI—PLAINTIFF, MANGAL PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Wajib-ul-arz, *construction of—Document loosely and carelessly worded—Official record, endorsement on, made by public servant in performance of duty, value of—Custom—Succession—Daughters, exclusion of*—Sankaldipi Brahmans.

In interpreting documents like *wajib-ul-arzes*, unless there are strong reasons to the contrary, the same word should be construed in the same sense wherever it occurs in the document. [p. 727, col. 1.]

Where the whole document is on the face of it loosely and carelessly worded, it has to be interpreted by taking it as a whole and seeing what on a natural construction it clearly means to lay down [p. 727, col. 2.]

An endorsement on an official record signed by a public servant in the performance of his duties should, in the absence of any evidence to throw doubts on it, be presumed to be correct. [p. 728, col. 2.]

Among *Sankaldipi Brahmans* daughters are by custom excluded from inheritance. [p. 736, col. 2.]

KESRI KUMAR *v.* RAM RANI.

Appeal from the decree of the Subordinate Judge, Bahraich, dated the 16th September 1916.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellants.

Babu *Bisheshwar Nath Srivastava*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit by *Musammat* Ram Rani for possession of the property of her deceased father Thakur Prasad. The original defendants were two paternal uncles of Thakur Prasad, Achuta Nand and Tek Dhar. Achuta Nand subsequently died and his son Kesri Kumar and his nephew Budh Sagar were substituted in his place. Thakur Prasad died in 1910 leaving no sons but one daughter, the plaintiff. He had admittedly separated from his collateral relatives and was succeeded by his widow *Musammat* Mahesh Dei who died on 20th June 1913. On her death the defendants as the nearest collaterals obtained possession of the property. The present suit was instituted on 8th February 1914. Thakur Prasad belonged to the clan of Sankaldipi Brahmans, who migrated to Oudh from Bhojpur in Behar and who are reputed to have originally come to India from Ceylon (Sankaldip). They are mentioned on page 30 of Mr. Carnegy's Notes on the Races, Tribes and Castes of Oudh, prepared in the year 1868, in the following terms:—

"But besides all these, there are numerous other families of Brahmans, with none of whom, however, have any of the above 16 descriptions any communion of food, marriage, &c. These are:—

"(1). Sankaldipis who are said to come from Sankaldip or Ceylon, and to which tribe the great Shahjang family with its knighted chief belongs. The former influential head of the local family, in the days of his power, tried to get the restrictions regarding intermarriage, &c, removed, but without success: nor are the Sankaldipis permitted to take part in great sacrifices with other Brahmans."

The Sankaldipis of South Behar are mentioned in Bhattacharji's Hindu Castes and Sects as a distinct class of Brahmans having special customs of their own in respect of marriage.

The substantial defence to the suit was that in the family to which Thakur Prasad belonged, and indeed among the whole clan of Sankaldipi Brahmans, daughters are by custom excluded from inheritance. The learned Subordinate Judge has rejected this defence and decreed the suit, hence this appeal.

A large amount of evidence, both oral and documentary, has been adduced in support of the custom and no less than twenty-three instances of exclusion in the family of the parties are mentioned by the witnesses for the appellants. We have to see whether the reasons given by the learned Subordinate Judge for rejecting this large mass of evidence are adequate and whether the evidence itself is sufficient to establish the custom set up. We will consider, first, the documentary evidence, which consists mainly of Wajib-ul-arzes of the villages in which the property of the family is situated and other villages inhabited by Sankaldipi Brahmans, and of judgments in which the custom has been held to prevail among families belonging to this clan. The ancestral home of the family is in the village of Kursaha in the Bahraich district, and the Wajib ul-arz of this village and also of Jagtapur, where the next most valuable portion of the property of the family is situated, have been produced. It appears that no Wajib-ul-arz was prepared for the three remaining villages in which the property in suit is situated as none has been produced on either side. The defendant swears that none was prepared and he has not been contradicted. The relevant portion of the Wajib ul-arz of Kursaha, Exhibit A 189, under the head of rights of transfer and inheritance, is as follows:—

"If a co-sharer dies '*lawalad*' while in a state of union his share devolves on his real brother or nephew, and his daughter or her issue (*aulad*) will receive no share, and the person in possession of the share will be responsible for the maintenance of the widow of the deceased co-sharer and for effecting the marriage of his daughters: and if he dies '*lawalad*', in a state of separation, then his wife will continue in possession of his share for her life without power of transfer and after her death the own brother or nephew of the deceased co-sharer will be owner of the share."

The word "*la walad*" means etymologically "without issue", but is frequently used in the sense of "without male issue." In the same

way the word "*aulad*," which strictly speaking means "issue," is frequently used in Wajib-ul arzes and other documents in these provinces in the sense of "male issue." It has to be determined from the context in each case when it is so used. The first rule in interpreting a document of this kind is that unless there are strong reasons to the contrary, the same word should be construed in the same sense wherever it occurs in the document. Here it is perfectly clear that the word "*la walad*" in the first portion of the custom means "without male issue," since in the very same sentence there is a provision for the marriage of the daughters of the co-sharer so dying and a definite assertion that the daughter and her issue are not entitled to any share in the inheritance. The natural rendering of the clause requires the word to be read in the same sense in the second portion of the extract which deals with a co sharer who dies in a state of separation. Any other rendering would be a forced and unnatural construction for which there is no warrant. The use of the word "*aulad*" (issue or male issue), which is the Arabic plural of "*walad*", in the same document is entirely in accordance with the natural construction. The reference to daughters and their issue must be to male issue, since a daughter's daughter is not an heir under the Hindu Law whereas, apart from custom, a daughter's son is. The very next sentence after the portion quoted deals with the case of a separated co sharer who dies leaving two wives one of whom has a larger and another a smaller number of sons (*aulad*). It is provided that the sons of both wives shall take equal shares, *i. e.*, the distribution shall be *per capita*. Then again in describing the custom by which the eldest son receives a larger portion than his brothers the word used for son is again "*aulad.*" The inference is irresistible that the words "*aulad*" and "*la walad*" are used throughout with reference solely to male issue. The Wajib-ul-arz was verified by all the six sons of Thakur Prasad's grandfather Chandra Chur. Chandra Chur had two brothers Lachhman Prasad and Shambhu Nath, the latter of whom had one son Chet Narain. The latter, through his agent Murli Dhar, also verified it. The Wajib-ul-arz is, therefore, a very strong piece of evidence in the defendants' favour. The learned Subordinate Judge lays stress on the fact that in the portion of the custom dealing with the case of a separated co-sharer there is no express provision for the exclusion of daughters and their issue, and he argued from this that exclusion of a daughter cannot have been intended; and an argument is also based on the fact that the provision for the marriage of daughters which is contained in the first portion of the clause is not repeated in the second. The answer to this contention is that documents of this nature, prepared on information dictated by ignorant Zemindars and written down by Munsarims or other officials of the Settlement Department, were seldom drawn up with that precision which one may expect to find in a legal document. They are constantly found to be loosely and even ungrammatically worded. It is quite possible that whoever described the custom, having once mentioned definitely the exclusion of daughters, did not trouble to repeat the same thing over again as he should have done when dealing with the case of a separated member. The succession of daughters in an undivided joint family is absolutely unheard of and it would never have occurred to any one to think of mentioning it as a custom to be recorded in the Wajib ul-arz, unless the exclusion had extended to the case of a separated proprietor as well. The whole document is on the face of it very loosely and carelessly worded and what we have to do is to take it as a whole and see what on a natural construction it clearly meant to lay down. We find an instance of the loose way in which it is worded even in the earlier portion of the clause, where provision is made for the maintenance of the wife and the marriage of the daughters, but none for the maintenance of the daughters until their marriage, though such maintenance was clearly incumbent on the person in possession of the estate. The use of the words "brother and nephew" and the absence of mention of other equally near collaterals such as the uncle is another instance of the same thing. We have no doubt that these words were intended to include collaterals generally. There may have been a special reason for specifying the real brother: the word "real" taken in connection with the mention just afterwards of a man having two wives and issue by both may have been intended to indicate that relations of the whole blood

would take in preference to the relations by half blood. If the words "brother and nephew" are to be taken as exhaustive instead of illustrative, no provision whatever is made for what is to happen in case there is neither issue of either sex nor a brother or brother's son. Other instances of the use of "*bhai bhatije*" (brother and nephew) as meaning collaterals generally are to be found in Privy Council Appeal No. 17 of 1905, *Parbati Kunwar* v. *Chandrapal Kunwar* (1) *vide* page 1246 of the Privy Council Record—and in the Wajib ul arz of Rammanpur Morar (Exhibit A 46 on the present record). It is contended that the use of the word "real" (*haqiqi*) before brother excludes the construction, but it had to be admitted that grammatically the word "real" qualifies brother only and not nephew (*biradar-zada*). As we have said, there may have been a special reason for the use of the phrase "real brother" in this case

We are unable to follow the learned Subordinate Judge when he says that the Wajib-ul-arz can only be held to imply the exclusion of daughters if the word "*la walad*" is interpreted as meaning "leaving a daughter but no sons." It clearly means simply "leaving no male issue" without reference to the question whether there are any daughters or not.

The learned Subordinate Judge further discounts the value of the Wajib ul arz on the ground that it was not verified by representatives of all branches of the family and that it was not verified by Thakur Prasad's grandfather Chandra Chur. As regards the latter point we think that if Chandra Chur, who must have been an old man at the time, sent all his six sons to verify the Wajib ul-arz on his behalf, their united verification carries a weight in no way inferior to that which their father's signature would have carried. As regards the former point, the learned Subordinate Judge has fallen into at least two errors of fact. He says that it cannot be said for certain that Lachhman Prasad, the elder brother of Chandra Chur, and Murli Dhar agent of Chet Narain, the son of his younger brother, really verified it. We can find no justification for this alleged uncertainty in view of the order of the Sadar Munsarim on the Wajib ul-arz itself, which states explicitly that Lachhman Prasad and Murli Dhar general agent of Chet Narain verified all the conditions of the Wajib-ul-arz except their habits to pay *lambardari* dues and village expenses, and that it was solely on account of this objection regarding dues and expenses that they refused to sign it. This endorsement is signed by the Sadar Munsarim and is an official record made by a public officer in the performance of his duties, and in the absence of any evidence to throw doubts on it, it certainly should be presumed to be correct. The learned Subordinate Judge is also in error in stating that Gur Prasad, the grandfather of the plaintiff, did not sign the Wajib-ul arz. We have examined the document and find his signature upon it, and there is also a formal record of the fact that he verified it. One of the defendants Achuta Nand has been examined in support of the custom and has verified his signatures, and the learned Subordinate Judge's criticism that his younger brother Tek Dhar has not been examined as well and that every member of the family who is still alive has not been called to verify his signature, seems to us somewhat puerile. The Wajib ul-arz, it may be noted, was that of the first regular settlement of the year 1872. It was conceded by the respondent in this Court that the Subordinate Judge's criticism regarding the verification of the Wajib-ul-arz cannot be supported.

The learned Subordinate Judge repeats several times an observation drawn from an unreported judgment of this Court to the effect that the provisions of the Wajib ul-arz should be construed in a manner compatible as far as may be with the rules of Hindu Law. If the learned Subordinate Judge understands by this that it is permissible to put a strained construction on the custom recorded so as to make it tally with the general law of inheritance, this is not what this Court meant to convey, nor is it a true canon of construction. It is quite true that customs differing in no way from the general law are frequently found recorded, but the primary object of the Wajib ul-arz was to record the custom, whatever it might be, and there was nothing to be gained by recording the custom in detail unless some differences from the general law were to be

(1) 4 Ind. Cas. 25; 31 A. 457; 11 Bom. L. R. 890; 10 C. L. J. 216; 13 C. W. N. 1073; 6 A. L. J. 767; 12 O. C. 304; 19 M. L. J. 605; 36 I. A. 125.

found in it. In fact in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2) which was upheld by the Privy Council, the Judicial Commissioners of that time say - *vide* the report of their judgment in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (2)—

"The object of the administration papers was to record customs varying the Hindu Law, not to record the Hindu Law."

Oudh Settlement Circular No. 20 of 1863 directs Settlement Officers to record "the customs and usages of the village as affecting the rights of the proprietor" under a number of specified headings. The Circular warns the Settlement Officer against recording the custom as he thinks it should be rather than as it is, and under this very head of rights of transfer and succession lays down with special reference to pre emption cases that "it is unnecessary to record rights granted by law.....The general custom of the village in regard to succession will, of course, be noted"

The Wajib ul-arz of Jagtapur records the custom of exclusion of daughters not merely by implication but in express terms.

"On the death of a co-sharer, all his sons will inherit the estate in equal shares. A daughter gets no share by inheritance..... .....A widow has also the power of adopting a child, but the child must be the nearest relation belonging to her husband's family. She cannot adopt a stranger."

It is possible to read this, as the learned Subordinate Judge does, as limited to the exclusion of a daughter in presence of sons, but this is not the literal meaning of the text and such a declaration would be entirely superfluous. The subsequent clause debarring a widow from adopting any one except the nearest relation in her husband's family is a strong indication that total exclusion was intended. The whole object and reason of a custom excluding daughters is to keep the property from passing away to another clan, and this notion was so strongly present to the minds of those who stated the custom here recorded that according to them even in the case of an adoption by the widow no person outside the family is to be allowed to take. A similar provision was found in the Wajib-ul-arz in the well known Select Case No. 41 [*Surjan Singh* v. *Gur Parshad*] where the learned Judicial Commissioner observed :—

"It does not provide in express terms for the case of a sharer leaving daughters only, but such a case much often arise;... .....and the only reasonable interpretation of this silence that commends itself to my mind, is that the general term 'daughters do not receive a share' was intended and understood at the time to record the exclusion of daughters from inheriting a share under all circumstances."

The criticisms made by the Subordinate Judge regarding the verification of the Wajib-ul-arz have not been pressed before us. The custom is no doubt differently expressed from the manner in which it is stated in the Wajib ul-arz of Kursaha, but this is easily accounted for by the fact that it was verified by a different set of persons living in a different district and recorded by a different officer. Mauza Kursaha is in the Bahraich district, whereas Mauza Jagtapur is in Gonda. The account of the rights of inheritance being incomplete in both cases, no strong argument can be based on the fact that some incidents mentioned in the one are omitted in the other. When the respondent was pressed to point out any contradiction between the two, the only contradiction she could allege was in respect of the widow of a separated co-sharer. In Kursaha it is said that she will hold possession for life without power of transfer, but in Jagtapur that she will, of course, have the power of sale and mortgage. But these apparently contradictory provisions almost certainly mean the same thing, namely, that she will have an ordinary widow's estate with power of transfer for legal necessity but not otherwise.

Besides the Wajib-ul-arzes of the two villages Kursaha and Jagtapur in which the property in dispute is situated, the appellants have produced the Wajib-ul-arzes of twenty villages and the Riwaj i am of five Parganas inhabited by Sankaldipi Brahmans, all of which record a custom of exclusion of daughters. Of the twenty villages fifteen are situated in the Gonda district, two in the Bara Banki district and three in the Sultanpur district. In the Fyzabad district a single Riwaj i am appears to have been prepared for each Pargana. All these Wajib-ul-arzes and Riwaj-i-ams record a custom of

(2) 30 A. I; 12 C. W. N 71 (P C); 9 Bom L. R. 348; 6 C. L. J. 76 ; 3 M. L T 1; 5 A L. J. 1; 35 I. A. 1; 17 M. L. J. 605; 11 O. C 78.

exclusion of daughters. In some instances the custom is recorded in almost identical terms with that of Mauza Jagtapur, but in most cases the record is so clear that it is not possible even for the plaintiff to dispute the nature of the custom recorded. Indeed the learned Subordinate Judge does not doubt the fact that a custom such as the defendants plead is recorded in all these instances. Six of the twenty Wajib ul-arzes expressly state that the parties governed by it are Sankaldipi Brahmans. In these cases the Subordinate Judge puts aside the document on the ground that it is not proved to relate to the family of the parties or that it relates to Sankaldipi Misras or Sankaldipi Pandes whereas the parties are Sankaldipi Pathak Brahmans. This criticism entirely ignores the fact that the custom pleaded is one extending to the whole Sankaldipi clan, whether the particular family affected is classed as Misras, Pandes or Pathaks. It is common ground between the parties that Sankaldipi was originally a local appellation and this is indicated by the extract from Carnegy's Notes on the Castes of Oudh quoted in an earlier portion of this judgment. The same observation applies to the remark with which the lower Court puts aside the five Riwaj-i-ams of the Fyzabad district. He says that it is not shown that they relate to Sankaldipi Brahmans connected with the defendants' family and that no members of that family reside in Fyzabad. The defendants never alleged that these Riwaj-i-ams related to their own family. What they aimed at proving and have very thoroughly proved is that the custom exists among the Sankaldipi Brahmans wherever they are found. The other fourteen Wajib-ul-arzes are put aside as irrelevant by the lower Court, on the ground that there is nothing on the face of the documents to show that they related to Sankaldipi Brahmans and that there is either no evidence or insufficient evidence to show that they do so relate. With one exception, not a single definite criticism is made of any one of the defendants' numerous witnesses under this head. The learned Subordinate Judge dismisses the whole of this large mass of, upon the face of it, respectable evidence with such phrases as "nor has sufficient corroborative evidence been produced to show that these documents refer to Sankaldipi Brahmans," or "no satisfactory evidence worth the name has been produced to show this." In the case of the Wajib-ul-arz of Jainapur, Exhibit A34, the witness called to prove that it relates to Sankaldipi Brahmans is dismissed with the remark that he does not state an instance of the custom—a remark which has no bearing on the value of his evidence as to the class of persons whose customs the Wajib-ul-arz purports to record. The value of this large consensus of documentary evidence is enhanced by the fact that not a single Wajib-ul-arz has been produced in rebuttal. We have been taken through the evidence of the witnesses under this head and it is sufficient to say that there is evidence in every instance that Sankaldipi Brahmans have proprietary or under-proprietary right, as the case may be, in the village. In a large number of instances the witnesses called are direct descendants of one or other of the persons by whom the Wajib-ul-arz purports to have been verified. Thus Bhabhuti, D. W. No. 27, is able to give the names of all the persons who verified the Wajib-ul-arz, among whom was his own father Phargul Prasad.

The plaintiff's evidence did not commence till that of the defendants was completed. If, therefore, the defendants had falsely put forward as applicable to Sankaldipi Brahmans a Wajib-ul arz which really recorded the custom of some other tribe, it would have been the easiest thing possible to contradict them. No attempt was made to do this and except in one or two instances, it has not been seriously contended before us that these Wajib-ul-arzes are not concerned with Sankaldipis.

The Wajib-ul-arz of Lohsa, Exhibit A133, deserves special mention. While recording the general custom of exclusion of daughters, it mentions one special instance in which a daughter was allowed by the consent of all the co-sharers concerned to take a life-interest. An exception like this for which a special reason is given in the Wajib-ul-arz itself really goes to confirm the general rule and the Subordinate Judge's comment, that because of this single instance the custom cannot be said to have obtained uninterrupted, uniform and constant, is nothing short of extraordinary. The Wajib-ul-arz of Parsi Gonda, Exhibit A125, also

contains one feature of special interest in that in common with the Wajib ul arz of the principal village in suit, Kursaha, it mentions the fact that the original ancestor of the family originally came from Bhojpur in Behar.

In the case of three of the five Riwaj-i-ams of Fyzabad judgments have been produced in which the custom has been held to apply to Sankaldipis. In answer to these the respondent produced three judgments relating to Pargana Mangalsi in which the custom was not recognised. In none of these cases were the parties Sankaldipis and an examination of the judgments shows that they are of no value as evidence. In Exhibit 16 no issue of custom was raised at all. There had been arbitration and the daughter's right was admitted by the opposite party. In Exhibit 19 it was admitted by the plaintiff who pleaded the custom that the family did not belong to the Zemindari body of any village in Pargana Mangalsi and that the Riwaj-i-am did not relate to their family. In the third case, Exhibit 20, no evidence whatever was tendered on the issue of custom.

A point was attempted to be made of the fact that except in the two villages in suit no Wajib-ul-arz has been produced of any other village owned by members of the family to which Thakur Prasad belonged. It had to be admitted, however, that there is nothing to show that members of the family own Zemindari property in any of the other villages. The plaintiff, as we have shown, has not attempted to produce any Wajib-ul-arz in rebuttal of the custom.

The following witnesses among others testify to the prevalence of the custom among Sankaldipi Brahmans generally :—

Chunni C. W. No. 2, Din Bandh C. W. No. 9, Dewanand C. W. No. 10, Jagdeo C. W. No. 11, Sri Dat C. W. No. 14, Ram Padarath C. W. No. 17, Suraj Lal C. W No. 20, Sheo Ratan C. W. No. 23, Sheoambar C. W. No. 25, Bhabhuti C. W. No. 27, Lal Behari C. W. No. 28, Shiam Sundar C. W. No. 30, Ram Ratan C. W. No. 32, Ram Autar C. W. No. 35, Lalta Prasad C. W. No. 38, Bhagwat Prasad C. W. No. 39,* Sheo Nidh C. W. No. 43, Matadin C. W. No. 44, Bishambhar C. W. No. 45, Seva Datt C. W. No. 46, Kali Prasad C. W. No. 47, Jadu Nath C. W. No. 48.

All these witnesses are Sankaldipi Brahmans and many of them belong to the family of the parties. We can find nothing in the cross-examination of these witnesses, and certainly no reasons are given in the judgment of the lower Court, which would justify us in rejecting the whole of this large mass of first-hand testimony. It is remarkable that though the plaintiff called evidence, not a single one of her witnesses ventured directly to deny the existence of the custom. It is also not a little remarkable that Gaya Prasad, who has purchased a portion of the plaintiff's interest and been joined with her as a respondent in the appeal, has himself at an earlier stage in a petition, dated 4th September 1913, in the mutation Court put in a claim based on the exclusion of daughters.

We now turn to the evidence of particular instances. A feature which distinguishes this case from the unreported decisions (among which we include the case cited by the Subordinate Judge from the so-called "Indian Cases") relied on by the respondent in the lower Court, is the large number of instances of observance of the custom which the appellants have proved. No less than twenty instances have been established. The defendants attempted to prove twenty three instances but in one of these, that of Babu Ram, it turned out that there was a Will executed by him in favor of his wife and after her death of his brother Satrohan. This, therefore, is not a genuine instance and in two other instances, those of Bhagwan and Ram Nath, Nos. 21 and 22, the appellants have not printed, and apparently were not prepared to rely on, the evidence of the witnesses on whose testimony the instance rests, whom the lower Court considered unreliable. In the case of Ram Nath it was apparently discovered, while the case was proceeding, that this man had executed a registered deed of gift in favour of his daughter's husband under which the latter succeeded. They asked permission to put in a copy of this document at the time of the cross examination of one of the plaintiff's witnesses who was deposing as to her succession. This was a very reasonable request to which the learned Subordinate Judge might well have acceded. He did not, however, see fit to do so. The

*In this case his evidence is supported by a judgment upholding the custom in a case to which he himself was a party.

appellants have asked leave to file it in this Court. The document in question is now over thirty years old and we are entitled to presume its genuineness under section 90 of the Evidence Act. That the Ram Nath who executed the document was the same who was referred to by the witnesses is sufficiently established by the identity of his parentage and residence with those proved in the appellants' evidence. This case really supports the appellants. It is proved that Ram Nath was a separated Hindu and if his daughter could have succeeded as heir, there would have been no need to execute the deed of gift in favour of her husband Omitting these three cases, however, there remain twenty instances in the family to which the appellants belong which have been established by good evidence.

The learned Subordinate Judge has rejected on one ground or another all the instances which the appellants have proved. Whatever the reason may be—possibly because of the view which he took of the documentary evidence—the learned Subordinate Judge seems to have approached the oral evidence with a predisposition to find no merit in it whatever. Many of the criticisms which he makes are utterly unreasonable. When he can find no other fault with a witness, he remarks that the witness did not know the pedigree of his own family. This would be a perfectly good criticism if the witness professed to recite the pedigree of some other family, but when a witness merely deposes to instances of exclusion of daughters which occurred within his own knowledge, his accurate acquaintance with the family tree of the family to which he belongs is entirely irrelevant to the value of his evidence.

While dealing with the oral evidence, it may be well to mention that the defendants put in an old pedigree alleged to have been prepared by their father. The defendant Achuta Nand has sworn that it was so prepared and there is nothing in his cross-examination or in the pedigree itself to lead us to doubt its genuineness.

Part of it is corroborated by documentary evidence, and in respect of the remainder there is a large amount of respectable oral evidence some of which the learned Subordinate Judge has criticised severely and, as it seems to us, most unfairly. This pedigree, having been prepared a long while ago, naturally does not bring down the various branches of the family to the date of the suit. It is, therefore, most unfair to cast doubt on the accuracy of recent instances of exclusion of daughters stated by witnesses on the ground that the persons concerned were not shown in this pedigree. Where the persons concerned are not shown, the names of their fathers and other relatives appear. If the names of all the persons concerned had been shown, it would have been conclusive proof that the document was not genuine. The parties are Brahmans, among whom pedigrees often are preserved with considerable care and for long periods.

Besides Exhibit A7 the defendants prepared for the assistance of the Court a complete pedigree, Exhibit A8, containing the result of all the information they had, or could collect. It was avowedly prepared to assist the Court in understanding the evidence and it is, therefore, a misuse of language for the learned Subordinate Judge to attack this document, as he does in one passage of his judgment (o. p. 449), as having been "deliberately manufactured to meet the requirements of the case."

An important part of the pedigree, namely the line of Kuliman Pandit, is corroborated by a pedigree filed in the year 1881 by another member of the family in a case against the defendants and others and admitted by all parties to that suit to be correct. This is a corroboration of very high value. The pedigree in question is over thirty years old and it cannot possibly be suggested that there was anything collusive about its preparation. The pedigree is also supported by a number of witnesses, three of whom speak to Kuliman's line (*vide* Exhibit 8), two to Hariman's line, one to Rudra's line and one to Pitambar's line. The witnesses mostly testify to the branch to which they themselves belong. Where the witnesses only know part of the pedigree, as in the case of Ram Het and Sheo Kumar, the Subordinate Judge dismisses their evidence as too meagre and vague to be useful. Where a witness gives a full pedigree as in the case of Ram Shankar, he says that he has learnt it by heart. It may be that Ram Shankar's evidence is not entirely satisfactory and that possibly he

may have learnt up some details for the purpose of the case, but even if his evidence is discarded, there is ample oral and documentary evidence to establish the genuineness of the pedigree. The learned Subordinate Judge remarks regarding the evidence of the defendant himself that it only needs to be read once to be disbelieved. We have read it more than once and we do not think that the small contradictions pointed out in it are at all sufficient to destroy its general credibility. The defendant, having sworn to the old pedigree prepared by his father, stated that he was not acquainted with the details himself, though a good many details which he knew he had already given. The learned Subordinate Judge would apparently have had him swear to matters of which he was ignorant in order that the plaintiff might be able to cross examine him upon them.

The defendants' second instance is that of Bhagwan Dat, who left a widow and daughter and whose property was inherited by his nephews on the death of the widow. The evidence in support of this instance is strong, but there is against it a judgment of the Subordinate Judge (not, of course *inter partes*) in which he held that Bhagwan Dat had not separated from his brother Chitai. There are two facts which prevent this judgment being decisive. The first is that it did not become final. It was appealed against and in appeal the parties arrived at a compromise by which they divided the property between them in the proportion of one fourth and threefourths. The second point is that there is in the judgment itself a patent error of law which may have vitiated the conclusion. There were three brothers Bhagwan Dat, Sarju and Chitai. Bhagwan Dat and Sarju had admittedly separated. Notwithstanding this the Subordinate Judge who tried the case considered that he could presume that Bhagwan Dat and Chitai remained joint. There was other evidence but in forming his conclusion he called in aid this supposed presumption of Hindu Law. In criticising the defendants' evidence on this point the Subordinate Judge lays stress on a supposed unguarded admission of Ram Het, D. W. No. 8. The supposed contradiction in the witness's evidence turns out to be no contradiction at all. Bhagwan Dat, Sarju and Chitai were originally joint, as they naturally would be, but they had separated before the witness attained years of discretion. This is a covenient place to notice two comments which are made by the Subordinate Judge regarding this instance and are repeated in several other places in his judgment. He says, first, that the defendants did not call Bhagwan Dat's daughters or daughters' sons and, secondly, that the instance occurred only 13 years ago and, therefore, can be of no value. As regards the first point, so long as the defendants produced good and satisfactory evidence on a matter regarding which a number of witnesses might be available, it is not a fair ground of attack that they should not have called a particular witness. As regards the daughters in particular, Indians tend naturally to avoid calling a woman as a witness unless it is absolutely necessary. As a matter of fact one of the defendants' witnesses Sheo Kumar is a son of the very man who took the property. No more direct evidence than this need be desired. As regards the second point the Subordinate Judge is very hard to please. Where the instances range from ten to thirty years old, he says that they are too recent to be of value; when the defendants produced an instance fifty years old, as in that of Nidhan, he says that the witnesses are not old enough for their evidence to be of any value, and this although the witnesses who depose to the instance expressly state that they heard of it from their progenitors.

Of the witnesses who prove the instance and who prove that Bhagwan Dat had separated from his brothers, Sheo Kumar and the defendant have already been mentioned. Putting aside Ram Shankar whose evidence the lower Court for other reasons regards as unreliable, there remain Sheo Narain, Ram Het, Ramai and Ram Dat, all of whom are members of the family and have personal knowledge of the parties concerned. There was very little cross-examination on this point and there is nothing in it to suggest that their evidence is untrue.

The third instance is that of Gokul, who left a widow and daughters but whose property was inherited by his nephews on the death of the widow. Here again the defendants have produced the most direct

evidence possible, as one of their witnesses is the son and another grandson of one of the very persons who inherited the property. It is difficult to see what better evidence could have been called. The learned Subordinate Judge makes much of the fact that there is a discrepancy between their evidence and that of another witness, Dhanpat, as the latter was under the impression that Gokul's brothers were alive and took the property. This witness very much more remotely connected with Gokul than are the other two, and the fact that he makes mistakes is not a sufficient reason for rejecting the evidence of the persons immediately concerned in the transaction.

The fourth instance is that of Sheo Ratan who left a widow and daughter. After the death of the widow the estate was taken by collaterals to the exclusion of the daughter. This is a particularly strong instance. Apart from the defendants' witnesses it is supported by the plaintiff's first witness, the Patwari. It was not suggested in the Court below that this witness was in any way hostile to the plaintiff. It is also supported by the Khewats of the village, which show that on Sheo Ratan's death his widow succeeded and on the death of the latter the collaterals. It is not disputed that Sheo Ratan had a daughter and the evidence clearly proves that he was a separated Hindu. This instance is further supported by certain proceedings which took place in the Civil Court. After the death of the widow the reversioners sued to recover the property from a creditor to whom the widow had mortgaged it. They admitted in their plaint the existence of a daughter and daughter's son, but pleaded that these persons were excluded from inheritance by family and local custom. At the instance of the defendants the daughter and daughter's son were made parties. They filed a written statement which is on record, admitting that by family custom they had no right to the property and asking to be discharged from the suit. They were accordingly discharged. The learned Subordinate Judge seems to have been hard put to it to find a reason for rejecting this instance. He suggests without a shadow of evidence that the written statement may have been filed with some ulterior object. The written statement was put in more than a year before the filing of the present suit between parties who, though descended from the same common ancestor, are very remotely connected with the parties to this case.

It would take too long to review the other instances with the same particularity, though we have for our own satisfaction examined the evidence on which they rest. A few remarks may be made to show how unsatisfactory is the manner in which these instances have been dealt with by the lower Court. Much is made of the discrepancies which will naturally occur, especially in the older instances, as to the length of time that has elapsed since the party concerned died or as to when the witness first heard of the instance. A great point is also made against the defendant as to his not having mentioned certain instances in giving evidence in the mutation proceedings. Mutation cases are decided on the basis of possession, and any one who has the smallest acquaintance with the manner in which such cases are decided must know that witnesses are not examined on points of custom with the same minuteness with which they are examined in the Civil Court, even where such questions are entered into at all. In other cases a point is made of the fact that the names of the parties do not appear in the old pedigree, Exhibit A 7. As has already been pointed out, it was impossible, having regard to the date when that pedigree was prepared, that all the names should have been shown in it. In commenting on the fact that instances 19 and 20, Chhedi and Sheo Charan, rest on the evidence of a single witness Beni, the Subordinate Judge appears to attach no importance to the fact that one of the persons concerned, namely, Sheo Charan, was Beni's own uncle and that it was Beni himself who inherited the property. The learned Subordinate Judge remarks that Beni is contradicted by Sita Ram, P. W. No. 33, the son-in-law of Chhedi, who says that his son Sudama inherited Chhedi's property. The learned Subordinate Judge does not say whether he himself believes this witness, and we ourselves should not be at all prepared to do so. If the learned Subordinate Judge had been disposed to apply to him the same standard of cri-

ticism as he applies to the appellants' evidence the witness would have been a very good mark, for he contradicts himself repeatedly and very badly as to the age of his son and the date when his wife died. That portion of Beni's evidence in which he deposes that he himself inherited the property of his uncle Sheo Charan is absolutely uncontradicted. The defendants examined altogether nineteen witnesses belonging to the family; the plaintiff examined only one Mohan Lal, P. W. No. 4, and his evidence has not been relied on by the lower Court. Apart from special instances these witnesses almost without exception depose to the custom of exclusion of daughters which prevails in the family.

The argument on which the respondent has placed most reliance in explanation of these instances is that in most (though not in all) cases the property involved was small and, therefore, it is suggested that the daughters or daughters' sons may not have wished to claim it. This might explain one or two of the instances, but it is hopelessly inadequate to cover the large number of cases which the appellants have proved. The plaintiff attempted to prove four instances of daughters' succession in the family. These instances were apparently not believed by the learned Subordinate Judge, as he does not refer to them in his judgment. The first is the case of Chhedi, already referred to as the appellants' 19th instance. The learned Subordinate Judge deals with it as one of the defendants' instances and merely says that the defendants' witness is contradicted by Sita Ram. The second case is that of Ram Nath, which was also one of the defendants' instances and has already been discussed. It now appears that Ram Nath had executed a registered deed of gift in favour of his daughter's husband. The third is that of Kedar, who is said to have been succeeded by his daughter Jasoda. The witnesses to this are Mohan Lal P. W. No. 4, and Sita Ram P. W. No. 33. As the latter witness admits that Kedar left no Zemindari or tenancy land, this instance cannot be considered to be of any value. Mohan Lal asserted at first that Kedar left moveable and immoveable property of the value of Rs. 2,000. When further pressed, he had to admit that the immoveable property consisted of twenty *bighas* of tenancy land which he had relinquished at the time of his death. Mohan Lal was a witness originally summoned by the appellants. He seems to have gone over to the side of the plaintiff and was tendered as a witness by the latter. He is now put forward by her as her most valuable witness, deposing to no less than two cases of succession by daughters. The fourth instance, that of Ram Dhan, said to have been succeeded first by his widow and then by his daughter Kishan Dei, is deposed to by the same unreliable witness Mohan Lal and by no one else. We are unable to place any reliance on these alleged instances.

In addition to these twenty instances inside the family, the appellants adduce evidence of forty-nine witnesses outside the family but within the Sankaldipi clan. We have not been taken in detail through them all, but we have been through a selection of them including all those which are supported by documentary evidence apart from the Wajib-ul-arz. The only one of these forty-nine instances which is noticed in the lower Court's judgment is that of Acchhebar (o. p. 400), which the learned Subordinate Judge dismisses with the remark that it is very recent and cannot be of much use. The only comment he makes on the remaining forty-eight instances is that they are not connected by blood-relationship with the defendants and that most of the instances are supported only by a single witness. The latter remark is not altogether correct, but even if it were, the record is bulky enough as it is. We tremble to think of the bulk it would have attained if half a dozen witnesses had been called in support of each instance cited. Most of the instances are in corroboration of Wajib-ul-arzes which have been produced recording the custom, and several of them are supported by extracts from the Khewat showing that the alleged collateral succession did take place. Instances of this are too numerous to specify. In some cases such as Uttri, C. W. No. 22, the witness examined is the person who himself succeeded to the property. In this case the widow of the deceased Har Narain made a gift in favour of her daughter and the witness had to go into Court to get it set aside. The question of exclusion of

daughters was the principal issue in the case (Exhibit A136) and was decided in favour of the plaintiff, and this judgment was upheld by the District Judge in appeal (Exhibit A137). Similarly in the instance of Sheo Dat of Mauza Gahraula, the witness called Jagdeo is the man who succeeded to the property. In three of the Fyzabad instances the matter was brought to the test of a suit. In one of these cases Sheo Balak, the collateral who succeeded in preference to the daughter's son, was five generations removed from the deceased. He had to file a suit against the daughter's son and the Munsif in an elaborate judgment found the custom proved. It does not appear that there was any appeal. This suit was brought after the death of the widow. Apparently there had been an earlier declaratory suit in the life of the latter brought by Sheo Balak's father and uncles, for we have on the record a judgment of the Subordinate Judge, Exhibit A18, dated the 7th January 1901, in which they sued as reversioners of Har Gobind to set aside an alienation made by his widow. The Munsif's finding is recorded in these terms:—

"I find that a daughter and her son do not inherit in face of a collateral among Sankaldipi Brahmans in this part of the Province."

This judgment was upheld by the District Judge in appeal (Exhibit A 20).

In answer to these intances the learned Advocate for the plaintiff has given a list of forty-five instances among Sankaldipis outside the family to which his witnesses depose. Six of these instances are said to be deposed to by two witnesses; the remainder rest on the uncorroborated evidence of a single witness. We have not been taken through this evidence which is not touched on in the judgment of the lower Court, but the plaintiff's Advocate has selected two instances which he considered as the strongest to lay before us. These two instances were selected on the ground that they were corroborated by the defendants' evidence. The supposed corroboration by the defendants' witness Sheo Narain consists merely of a statement that some of the tenancy land which belonged to the deceased Uma Dat is now cultivated by Uma Dat's daughter's son. This, of course, proves nothing. There is nothing to prevent a landlord letting land to the grandson of a former tenant. The witness on the plaintiff's side who proves this instance, Bhai Lal, P. W. No. 15, is a man who was once on the side of the defendants but has turned round and is now in close association with the respondent Gaya Prasad, on whose behalf he deposed in the mutation case. The second supposed instance, that of Ganesh's daughter *Musammat* Sundra, is one which required some boldness on the part of the plaintiff to rely on. It is quite true, as appears from the evidence of Bhagwat Prasad one of the witnesses examined by the defendants on Commission, that *Musammat* Sundra is at the present time in possession of her father's property. It appears, however, that Tirbeni, the nephew of the deceased Ganesh, brought a suit to recover it from her but unfortunately for himself allowed the suit to be dismissed by default. He appealed from this decision unsuccessfully and proceedings in revision are now pending. If these are the strongest instances which the respondent's Advocate can produce, he has certainly acted wisely in not attempting to press the remainder.

We have examined the evidence at perhaps unnecessary length, because we are differing from the lower Court on what is largely a question of fact. But for this a much briefer judgment would have sufficed. The evidence in support of the appellant's case is simply overwhelming. If this evidence is not sufficient to prove the custom, it is difficult to understand what evidence could ever be accepted as adequate.

We allow the appeal, set aside the judgment of the lower Court and dismiss the plaintiff's suit with costs in both Courts. Costs in this Court will be against all the respondents, including those who have been added in appeal.

Appeal allowed.

MAHAMMAD FAIZ v. SANDYS.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 179 OF 1899.

July 25, 1902.

Present:—Mr. Justice Ghose and Mr. Justice Geidt.

MAHAMMAD FAIZ CHOWDHURY—APPELLANT

versus

E. F. SANDYS—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss 95, 98, 100—Rules framed by Calcutta High Court under s. 100, r. 4—Suit by common manager against ex-manager for account and recovery of balance due, whether maintainable—Sanction of District Judge, whether necessary—Failure to obtain sanction, effect of.

A suit by the common manager of an estate against an ex-manager for account and for recovery of such sums of money as may upon account being taken be found due by the latter, is for the purposes of management of the estate as contemplated by clause 3 of section 98 of the Bengal Tenancy Act, and is maintainable. [p. 739, col. 2.]

Per *Ghose, J.*—But such a suit is not maintainable without the sanction of the District Judge as required by rule 4 of the rules framed by the High Court under section 100 of the Bengal Tenancy Act. [p. 738, col. 2.]

Where the District Judge is cognizant of the steps being taken by a common manager for the purpose of recovering what he considers to be due to the estate, and passes orders practically allowing the common manager to go on with a suit he has instituted, this is a sufficient compliance with the requirements of section 98 of the Bengal Tenancy Act and of the rules of the High Court under section 100. [p. 739, col. 1.]

Geidt, J.—Rule 4 of the rules framed by the High Court under section 100 of the Bengal Tenancy Act does not lay down that a suit which requires the sanction of the District Judge must be dismissed if instituted without such sanction [p. 740, col. 2.]

This rule is a check on expenditure and the only necessary consequence of the infringement of the rule is to make the manager liable for all expenses improperly incurred. The check contemplated by the rule is fully met by imposing this penalty on the manager and the penalty is applicable to all breaches of it. [p. 740, col. 1.]

Appeal against the decree of the Subordinate Judge, Tipperah, dated the 27th February 1899.

Moulvi *Serajul Islam* and Babu *Akshay Kumar Banerjee*, for the Appellant.

Babu *Dwarka Nath Chuckerbutty*, for the Respondent.

JUDGMENT.

GHOSE, J.—This appeal arises out of a suit for account and for the delivery of account papers, instituted by a common manager, Mahammad Faiz Chowdhury, appointed as such by the District Judge of Tipperah under section 95 of the Bengal Tenancy Act, against Mr. E. F. Sandys, an ex-common manager. The defendant was discharged from the office of common manager and Mahammad Faiz, the plaintiff, was appointed in his place as the common manager.

The suit has been dismissed by the Subordinate Judge on the ground that the right to sue for accounts was in the owners of the estate and not in the common manager, and that, at any rate, the common manager could not maintain a suit such as was brought without the express sanction of the District Judge, and that such sanction had not been obtained. The suit, we may here mention, was a suit not only for account, but also for recovery of such sums of money which, upon the account being taken, might be found due by the defendant to the estate; and the plaintiff valued the claim at Rs. 5,452-15-0 odd.

Section 98 of the Bengal Tenancy Act provides in clause (3): "He" that is to say, the manager, "shall, subject to the control of the District Judge, have, for the purpose of management, the same powers as the co-owners jointly might but for his appointment have exercised, and the co-owners shall not exercise any such power."

And the question which in the first place demands our consideration is whether a suit for account and for recovery of such sums of money as may upon account being taken be found due by an ex manager, is for the purposes of management of the estate as contemplated by clause (3) of section 98 of the Act. The matter is not altogether free from doubt, but after the best consideration that we have been able to give to it, it seems to us that it is for the purposes of management. Under section 98 a common manager is entitled for the purposes of management to exercise, though under the control of the District Judge, all the powers which the co-owners jointly might exercise. He could for the purposes of such management realise rents from tenants: he could, if necessary, take such proceedings in Court for the purpose of realising rents: he could, so far as we can see, recover or take proceedings to recover moneys due to the estate from debtors—all this, no doubt, subject to the

control of the District Judge, but still as regards the recovery of such dues, whether they be rents or other moneys, it would, we think, be for the purposes of the management of the estate in the hands of the common manager. As bearing upon the question whether the common manager is entitled to bring such a suit, or whether the right is in the owners of the estate, the Subordinate Judge in his judgment has relied upon clauses (5) and (7) of section 98 and section 103 of the Act. Clause (5) simply declares that the common manager shall keep regular accounts and that the co-owners or any one of them is entitled to inspect or take copies of the accounts kept by the manager. A proprietor is certainly entitled to inspect the accounts in order to keep himself informed as to what is going on; but it does not follow from this, as the Subordinate Judge thinks, that the right to bring a suit for account against an ex-manager is in the proprietors, and not in the common manager. Clause (7) of the section simply says that the manager may make any application which the proprietors could make under section 103. That section, as it stood in the Act of 1885, declared that "on the application of proprietors or tenure-holders, and on depositing or giving security for the required amount for expenses, a Revenue Officer may, subject to and in accordance with the rules made in this behalf by the Local Government, ascertain and record the particulars specified in section 102 with respect to the estate or tenure or any part thereof." Section 188 of the Act, however, provides: "Where two or more persons are joint landlords, anything which the landlord is under this Act required or authorised to do must be done either by both or all those persons acting together, or by an agent authorised to act on behalf of both or all of them." Reading these two sections together, it would seem that one of the co-owners of an estate could not apply for the Record of Rights, and in view of this disability of one of the co-owners of an estate section 98 of the Act provided in clause (7) that a common manager might make any application which the proprietors could make under section 103, so as to empower him as the agent of the whole body of owners to make an application for the purpose of the Record of Rights. Section 103 has, however, been modified by the Amending Act so as to empower one or more of the proprietors to apply for a Record of Rights. But, however that may be, it seems to us that the Subordinate Judge is in error in thinking that the existence of clause (7) in section 98 is a strong ground in support of the view that it was not the intention of the Legislature to confer upon a common manager the right to bring a suit of this kind, or any suit whatever.

The next question that demands our consideration is whether the common manager could institute the suit without the sanction of the District Judge. As bearing upon this question we have to refer to section 100 of the Act, and the rules which the High Court has framed in accordance with that section. It provides: "The High Court may, from time to time, make rules defining the powers and duties of managers under the foregoing section." Rule 3 of the rules framed by the High Court lays down that "No manager shall have power to sell or mortgage any property, nor shall he grant or renew a lease for any period exceeding three years, without the express sanction of the District Judge," and so forth. Then comes rule 4—"The manager shall apply for the sanction of the District Judge to any act which may involve extraordinary expense." Rule 5 provides that "No manager shall have power to compromise any suit or relinquish any claim without the express sanction of the District Judge."

These rules have the force of law and it seems to us, having regard to rule 4, that the manager was bound to have applied to the District Judge for sanction before bringing a suit for account and recovery of moneys that may be found due from the defendant, because the bringing of such a suit would certainly involve extraordinary expense, and so the manager did apply to the Judge for such sanction. We find that on the 7th January 1898 an application was made by Mr. Sandys, the ex-manager, for return of the security that he had deposited. Upon that, the then District Judge ordered as follows:

"I will put this matter off till 2nd February. If no suit is instituted by that

date I will order the security to be returned." On the 31st January 1898 the following application was made by the plaintiff, the common manager, to the District Judge:—"That as it is necessary to bring a suit against Mr. E. F. Sandys, late manager of Durgacharan Taluk, on behalf of the proprietors of the said Taluk, for accounts and money and as the plaint has already been drawn up, the proprietors wish your petitioner to bring the suit and defray the cost of the said suit from the estate fund, but he is unable to do so unless ordered by your Honour. Therefore, respectfully the petitioner solicits your permission to bring the suit and to defray the costs of the same from the estate fund. The valuation of the suit is at present put down as Rs. 5,982-15-0. Your petitioner as in duty bound shall ever pray." Upon this petition the following order was recorded by the then District Judge: "It does not appear that my sanction is necessary; the manager can act on his own initiative." The manager then instituted this suit.

Later on we find that the District Judge recorded the following order:—"I am informed to-day that a suit has been instituted against Mr. Sandys for recovery of moneys received by him as manager; till the suit is decided, it would not be proper to return the security (that is, the security deposited by the ex-manager). Let this application be struck off the file." So that the District Judge was fully cognizant of the steps that were being taken by the common manager for the purpose of recovering what he considered to be due to the estate. The learned Judge did not say to him: "You must not bring, or go on with the suit and I do not authorise you to incur the expenses for bringing such a suit." On the contrary he passed orders practically allowing the plaintiff to go on with the suit, though under a mistaken notion. If that is the correct view to take, it would seem that the requirements of section 98 and the rules framed by the High Court under section 100 were substantially complied with. The section 98, as already mentioned, provides that a common manager, subject only to the control of the District Judge, may, for the purpose of management, do all acts which the co-owners jointly might perform. It was quite open to the Judge to disallow the application that was made by the plaintiff on the 31st January 1898, or to prohibit him from continuing that suit when the matter was distinctly brought to his notice; but, as I have already said, he practically acquiesced in the suit being brought, and in allowing it to go on. It may, no doubt, be said that the Judge did not exercise, or rather declined to exercise, any control in the matter which was brought to his notice. Yet it seems to me that it does not really affect the question in the present case, because the law allows the common manager to do every act in connection with the management, only subject to the control of the District Judge, if he chooses to exercise such control—and the common manager, so far as he was concerned, complied with what Rule 4 directs. I am of opinion, as already indicated, that the requirements of the law and rules framed by the High Court were substantially complied with in this case and that the suit was maintainable.

For these reasons we are of opinion that the decree of the Court below dismissing the suit should be set aside, and the case sent back to the Subordinate Judge for trial upon the merits.

Costs will abide the result.

GEIDT, J.—I concur with my learned brother in the order to be passed in this case, and generally in the reasons stated by him for passing that order. I only wish to add that though I agree with him in thinking that section 98 of the Bengal Tenancy Act confers on a common manager the power to bring against an ex-manager a suit for papers and accounts, I am doubtful whether the effect of rule 4 framed by the High Court under section 100 of the Act is to withdraw that power unless the common manager first obtains the sanction of the District Judge.

The rule runs as follows: "The manager shall apply for the sanction of the District Judge to any act which may involve extraordinary expense." It is not framed in the negative like the rule which immediately precedes and the rule which immediately follows it. Rule 3 lays down that: "No manager shall have power to

KANCHAN *v.* SARABJIT.

sell or mortgage any property nor shall he grant or renew a lease for any period exceeding three years without the express sanction of the District Judge, etc." Rule 5 lays down that "No manager shall have power to compromise any suit or relinquish any claim without the express sanction of the District Judge." The effect of these two rules is clear and unmistakable; the acts forbidden by these rules are null and void *ab initio*, and the parties to such transactions are in the same position as though the transaction had never taken place. Can we attribute the same effect to rule 4?

It is obvious, I think, that a similar result does not necessarily follow on all infringements of rule 4. If a manager spends extraordinary sums without the sanction of the District Judge, I take it that those sums could not be recovered from the person to whom they have been paid on the ground that this sanction had not been obtained. Rule 4 is a check on expenditure and the only necessary consequence of the infringement of the rule could, in my opinion, be to make the manager liable for all expenses improperly incurred. Take for instance a concrete case, where a manager without the District Judge's sanction brings up at great expense from Calcutta Counsel to conduct a suit. Counsel would be entitled to his fees from the manager, but the manager, if the District Judge disapproved of his act, would be personally liable for those fees. In the same way a manager, who, without the sanction of the District Judge, institutes a suit which requires that sanction on the ground of its involving extraordinary expense, would be liable personally for all sums thus improperly spent The check contemplated by the rule is fully met by imposing this penalty on the manager, and the penalty is applicable to all breaches of it. But if you go further and say that a suit instituted by a manager without the sanction of the District Judge is not maintainable and must be dismissed, you add a second consequence which can only be imposed on a few breaches of the rule, you do not subject the manager to any penalty but you may subject to a severe penalty the proprietors who may be no way concerned with the breach.

For the reasons above given I am inclined to hold that rule 4 does not even by implication lay down that a suit which requires the sanction of the District Judge, must be dismissed if instituted without such sanction. When powers conferred by law are defined by rules, the rules, in my opinion, should not be interpreted as imposing any restriction on those powers, except such as is in terms expressed or can be clearly inferred from the wording used.

Appeal allowed; Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 75 OF 1919.

July 17, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

KANCHAN—DEFENDANT No. 2—APPELLANT

versus

SARABJIT—PLAINTIFF—RESPONDENT.

Custom opposed to personal law, proof of—Wajib-ul-arz, *entry in, value of*—*Instances, absence of, effect of.*

The record of a custom in a *wajib-ul-arz* that a childless widow has a full estate in the property of her husband is of no value in the absence of any proof of instances showing that effect was given to such custom. [p. 741, col. 2.]

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 13th January 1919, upholding the decree of the Munsif, Ram Sanehighat, dated the 7th June 1918.

Messrs. *Haidar Husain* and *S. P. Kain*, for the Appellant.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—The dispute in this case relates to certain property which belonged to Debidin, who died leaving two widows,

Musammat Radha and *Musammat* Bilasa. *Musammat* Radha died first. *Musammat* Bilasa then got into possession of the entire estate left by her husband. On the 13th June 1891 she mortgaged a half of what was left by her husband in Mauza Gange with Gangadin, Mannu and Matadin, the predecessors-in-title of the defendants. *Musammat* Bilasa subsequently died. The plaintiff claims to be the nearest reversionary heir of her husband and sues for possession of the property which is held by the mortgagees. His contention is that the mortgage in question was made without legal necessity. The Courts below have accepted that contention.

The only point for determination in this appeal is whether by virtue of a family custom *Musammat* Bilasa had an absolute interest in the property which she inherited from her husband. The Court of first instance found that no such custom was established. The lower Appellate Court similarly held that *Musammat* Bilasa had only a life-estate.

The *wajib-ul-arz* of the village in which Debidin resided and held a share has been produced. It states that the custom relating to the division of inheritance is that if a co sharer had more wives than one with sons by each, the property left by him would be divided according to the number of his wives; and that if any of the wives was childless, that wife would remain in possession of her share according to the number of wives left by her husband for her lifetime without any power of alienation; but if there was only one wife and she was childless, she would have full power of alienation in case her husband was separate but only a life-interest without any power of alienation, in case her husband was joint. It is difficult to say whether this *wajib ul-arz* records a local or a tribal custom.

The village was originally populated by a man of the Kurmi caste and the *wajib-ul arz* was dictated probably by the persons who were his descendants. Its terms do not accord with the ordinary rules of Hindu Law and in some respects leave the existence of the alleged custom in a state of considerable uncertainty. It purports to give a childless widow a life-estate if there are more widows than one, but a full estate, if there is no other widow, provided her husband lived separately. But where he lived jointly, it purports to give her a life estate and allows the reversion to go after her to the collateral relations of her husband without any restriction as to their jointness or otherwise. It restricts the power of a childless widow to adopt.

The evidence adduced to prove the custom was disbelieved and in view of the extraordinary nature of some of the conditions entered in the *wajib ul-arz*, it is difficult to attach much value to that portion of it which gives a childless widow a full estate in the absence of any proof of instances showing that effect was given to it. There is no reason, therefore, for interfering with the decision arrived at by the lower Appellate Court. The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1245 OF 1919.

August 28, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton

SHYAM CHAND BASAK—

APPELLANT

versus

CHAIRMAN OF THE DACCA MUNICIPALITY AND OTHERS—RESPONDENTS.

Bengal Municipal Act (III B. C. of 1884), ss. 15, 69, rules framed under—R. 17, infringement of, effect of—Election, whether void—Burden of proof—Costs, by whom to be borne.

Rule 17 of the rules framed by the Local Government under the Bengal Municipal Act to regulate Municipal elections is not a mandatory rule, and an election is not necessarily void because of an infringement of that rule. But the burden rests upon those who maintain the validity of an election, notwithstanding an infraction of the rule, to show that the result was not affected by the infringement. [p. 745, col. 2.]

Where owing to a transgression of the rule more than one-half of the constituency did not vote at an election and it was not shown that the result of the election had not in fact been affected, the election was set aside as contrary to law [p 745, col. 2; p. 746, col. 1.]

SHYAM CHAND v. CHAIRMAN OF THE DACCA MUNICIPALITY.

The ordinary rule is that costs are borne by the unsuccessful party, but when an election suit is caused by the conduct of the returning officer, each party may, in the discretion of the Court, be ordered to pay his own costs. [p. 746, cols. 1 & 2.]

Appeal against the decree of the District Judge, Dacca, dated the 8th June 1919, reversing that of the Munsif, Dacca, dated the 31st March, 1919.

Mr. *L. Pugh*, Babus *Sasadhar Ray* (*Sr.*) and *Pramatha Nath Banerjee*, for the Appellant.

Mr. *S. R. Das* and Babu *Upendra Lal Ray*, for Defendants Nos. 2 and 3, Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration of the invalidity of a Municipal election and for a permanent injunction to restrain the successful candidates from acting as Municipal Commissioners.

The plaintiff Shyam Chand Basak, the second defendant Bhagabat Prasanna Saha and the third defendant Nabendra Nath Basak were candidates for election as Commissioners for a period of three years for Ward No. 3 at the Dacca Municipal Election, held on the 31st July 1918. The first defendant is the Chairman of the Municipal Commissioners of Dacca. The election was held on the day prescribed and Mr. Dwijendra Nath Sen of the Provincial Executive Service acted as presiding officer. The total number of registered voters was 1287, each of whom had two votes. 686 persons recorded 1372 votes. The result of the election was announced as follows:—

Bhagabat Prasanna Saha	...	627 votes.
Nabendra Nath Basak	...	509 "
Shyam Chand Basak	...	236 "

The two defendants were thereupon declared duly elected as Municipal Commissioners for the Ward. On the 7th September 1918 the plaintiff, who had been unsuccessful at the election, instituted the present suit and attacked the legality of the election on a number of grounds. The defendants filed separate written statements, denying all the material allegations. Seventeen issues were thereupon raised, and the Court, after a protracted trial, came to the conclusion that the election had been held in contravention of the rules and was consequently illegal and void. The suit was decreed and a perpetual injunction granted against the candidate defendants restraining them from sitting on the Municipal Board and exercising the functions of a Municipal Commissioner. The two defendants lodged separate appeals against the decree. The District Judge has allowed the appeals and dismissed the suit. In the view we take of the matter, it is necessary for us to deal with only one of the objections urged against the legality of the election.

Sections 15 and 69 of the Bengal Municipal Act, 1884, authorise the Local Government to frame rules for Municipal elections. The rules in force at the time of the disputed election contained the following provisions relating to the manner of holding elections:

"17. The poll shall be held at such time and place as the Commissioners in meeting or the Chairman may determine, and the place at which and the hours between which votes will be recorded shall be notified, by beat of drum and by the publication of notices, at the same time as the list of candidates is published under rule 14.

"17A. After the second hour mentioned in the notice referred to in the last preceding rule, no elector shall be admitted within the building or inclosure within which the election proceedings are being held, but the votes of all duly registered voters who are already within the building or inclosure shall be recorded."

In accordance with rule 17, the Chairman determined the hours between which votes would be recorded as follows:

7-30 A. M.	...	11-30 A. M.
3 30 P. M.	...	6-30 P. M.

It has been found that the presiding officer did not arrive at the place of election till 7-45 A. M. and that the hours between which votes were recorded were as follows:

8-30 A. M.	...	12-40 P. M.
3 P. M.	...	6 30 P. M.

The gates were shut at 6-30 P. M., but all voters who had entered the premises before 6-30 P. M. were allowed to record their votes under rule 17A; this in fact went on till late at night. There is no controversy now that the hours between which the votes were actually recorded were not exactly identical with the hours as deter-

mined under rule 17: the recording commenced later, went on later during the first half of the day, and commenced earlier during the second half of the day. The question thus arises, whether the validity of the election has been affected by this circumstance. The Courts below have arrived at divergent conclusions upon the matter. The primary Court held that the election was vitiated, as the rule had been substantially infringed. The lower Appellate Court has held that the election cannot be successfully impeached on the ground mentioned, as the plaintiff had not satisfied the Court that the election has been affected by the infringement of the rule. We are of opinion that neither of these views can be supported.

The principles applicable to questions of the invalidity of elections by reason of the infringement of election rules were lucidly stated by Kennedy and Darling, JJ., in the *Islington case* (1):—

"An election ought not to be held void by reason of transgressions of the law, committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the Court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, that is, the success of the one candidate over the other, was not, and could not have been, affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the Court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether those transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the Court is then bound to declare the election void." It appears to us that this is the view which has generally been recognised and acted upon by the tribunals which have dealt with election matters. We may refer, in regard to cases heard by Parliamentary Committees, to the *Warwick case* (2) and the *Roxburgh case* (3), and, in regard to the more important authority of Courts of law and the Election Judges, to the considered judgment of the Court of Common Pleas in *Woodward* v. *Sarsons* (4), which cites a number of authorities and contains an express approval of the answer of Baron Martin before a Committee of the House of Commons. We may also refer to the much more recent judgment of O'Brien and Johnson, JJ., in the *East Clare case* (5). And it is to be borne in mind by the tribunal which has to consider the validity of elections that it ought to act with great caution. "I adhere," said Baron Martin in the *Warrington case* (6) "to what Mr. Justice Willes said at *Lichfield* (7), that a Judge, to upset an election, ought to be satisfied beyond all doubt, that the election was altogether void, and that the return of a member is a serious matter and not to be lightly set aside."

The Court, after this general exposition of the law, expressed its approval of the decision in *Gribbin* v. *Kirker* (8), where Monahan, C. J., set aside an election at which polling was allowed to go on for an hour after the doors were closed by people inside the room and there were no means of finding out how many voted after the time. The Court then proceeded to consider whether the respondent had discharged the burden of proving that the result of the election, that is, the success of the one candidate over the other, was not and could not be affected. It was found that ballot papers had been given out after 8 P. M. in contravention of the rule that the doors at each polling station were to be shut at 8 P. M. and only voters who had had ballot papers, delivered to them before that hour, should be allowed to mark them and deposit them in the ballot box. But it was also proved that only 14 ballot papers were given out after 8 P. M.; if all of these were assumed to

(1) (1901) 5 O'M. & H. 125.

(2) (1833) Per & K. 355.
(3) (1838) Falc. & Fity. 467.
(4) (1875) 10 C. P. 733; 44 L. J. C. P. 293; 32 L. T. 867.
(5) (1892) 4 O'M. & H. 162.
(6) (1869) 1 O'M. & H. 44.
(7) (1869) 1 O'M. & H. 24.
(8) (1873) I. R. 7 C. L. 30.

have been given for the respondent and were excluded, he would still have a majority of five. It was consequently ruled that the election could not be impeached on the ground alleged, as the respondent had proved that the result of the election had not been affected by the irregularity. Rogers in his work on Elections (1918, Volume 2, pages 109, 257, states on the authority of this case that the onus rests on the respondent to prove that the result of the election, that is, the success of the one candidate over the other, was not and could not be affected by the infringement of the rule. This view receives support from other decisions. Thus, in the *Drogheda case* (9), where the validity of the election was questioned on the ground that the polling stations were not opened till 8 45 A. M., instead of 8 A. M., the objection failed, because the irregularity was shown to have had no effect on the election at which nearly the whole constituency voted. Again, in the *East Clare case* (10), where two of the presiding officers closed the poll while they adjourned for lunch, the election was not avoided, as the respondent had such a large majority that it could not have been affected by the irregularity. To the same effect are the decisions in the *East Kerry case* (10), where the booths were not quite ready at 8 A. M., and the *Worcester case* (11), where the polling was suspended by the presiding officer for a few minutes owing to his having the room cleared in consequence of a rush of voters. On the other hand, in *Wilson* v. *Ingham* (12) the Court invalidated the election, as there was only a difference of three votes between the last two candidates declared elected and the petitioner. It is not quite clear that the earlier decisions in the *Limerick case* (13) and the *Harwich case* (14) lay down a different rule on the question of burden of proof.

We have seen that Kennedy and Darling, JJ., in the *Islington case* (1) refer to the judgment of the Court of Common Pleas in *Woodward* v. *Sarsons* (4). In that case, a question was raised as to the effect of section 13 of the Ballot Act, 1872: —

"13. No election shall be declared invalid by reason of a non compliance with the rules contained in the First Schedule to this Act, or any mistake in the use of the forms in the Second Schedule to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

Lord Coleridge, C. J., held that the section was inserted *ex abundanti cautelâ* and that the same rule would have applied by virtue of the Common Law even if the section had not existed. It was pointed out that, at Common Law, an election ought not to be held void by reason of transgressions of the law, committed without any corrupt motive, by the returning officer or his subordinates in the conduct of an election, where the Court is satisfied that the election was in substance conducted under the existing law and that the result was not and could not have been affected by those transgressions. This, according to the Lord Chief Justice, is the result of comparing the judgments of Grove, J., at *Hackney* (15) and *Dudley* (16) with the judgment of Martin, B. at *Salford* (17), and of Mellor, J., at *Bolton* (18), all of which judgments are in accordance with, but express more accurately the grounds of, the decisions in Parliament in the older cases of *Norfolk* (19), *Morpeth* (20), *Pontefract* (21), *Coventry* (22), *New Ross* (23) and *Drogheda* (24). The substance of the matter, consequently, is that the infringement of the rule does not necessarily invalidate the election, as it would have done if the rule had been deemed mandatory in character. The party who maintains the validity of the election, notwithstanding the infringe-

(9) (1874) 2 O'M. & H. 201.
(10) (1910) 6 O'M. & H. 85.
(11) (1880) 3 O'M. & H. 184.
(12) (1895) 64 L. J. Q. B. 775; 72 L. T. 796; 15 R. 488; 43 W. R. 621; 59 J. P. 614
(13) (1838) P. & K. 373; C. & R. 548.
(14) (1851) 1 P. R. & D. 314.
(15) (1874) 2 O'M. & H. 77 at p. 81.
(16) (1874) 2 O'M & H. 115 at p. 121.
(17) (1869) 1 O'M. & H 133 at p. 140.
(18) (1874) 2 O'M. & H. 138 at p. 142.
(19) (1626) 9 Journal H C. 631; Heywood Co. 555.
(20) (1774) Douglas E C. 147.
(21) (1774) Douglas E. C. 577.
(22) (1833) Per & Kn. 338; C. & R. 276.
(23) (1853) 2 P. R. & D. 188.
(24) (1874) W. & D. 206; 1 O'M. & H. 252 at p. 257.

ment of the rule, may satisfy the Court that the result of the election has not been affected by the error or irregularity. The Court has to be satisfied upon this point. The election would be avoided, even if the tribunal should be satisfied that, in the words of Lord Coleridge, there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred.

The principles deducible from the cases mentioned above have been adopted in leading decisions in the United States. They recognise the distinction between mandatory and directory provisions. A provision as to the time of opening and closing the polls is considered directory, on the general principle that a statutory provision is to be regarded as directory, if the directions given to accomplish a particular end may be violated and yet the given end be in fact accomplished and the merits of the case unaffected: *People* v. *Cook* (25), *Patton* v. *Watkins* (26), *Oleland* v. *Porter* (27), *Lane* v. *Fern* (28). On this principle it has been ruled that where the law fixes the opening and closing of the polls at sunrise and sunset, the election should not be invalidated, merely because the polls were closed a few minutes before or were kept open a few minutes after sundown, not thereby affecting the result in any manner. But this rule is applied only to what are called unsubstantial departures from the law. Where polls were opened from 1 P. M. until 6 P. M., instead of from one hour after sunrise to sunset, as required by law, the election was held invalid: *Tebbe* v. *Smith* (29), *Gores* v. *Cahill* (30). But an election will not be declared invalid, where it is apparent that the votes cast while the polls were not properly opened are not sufficient to change the result of the election: *Lane* v. *Fern* (28), *Oleland* v. *Porter* (27).

We do not refer to the decisions in England or in the United States as in any way binding upon us. But, as was pointed out by Sadasiva Aiyar, J., in *Ramanujulu Naidu* v. *Parthasarathy Aiyangar* (31), though the Common Law of England relating to Parliamentary Elections cannot control our decisions, "wherever the rules of that law are in conformity with justice, equity and good conscience, they may be referred to for the mental satisfaction of the Judge in India who finds that his decision, based on justice, equity and good conscience happens to be also in accordance with those Parliamentary Common Law Rules."

On the grounds explained above, we have arrived at the conclusion that rule 17 of the Election Rules is not mandatory, as the trial Court held; an election is not necessarily void because that rule has been infringed. The Court will uphold the election, if it is satisfied that the result has been affected by the infringement which actually took place. The burden rests upon the defendants to establish this, as they maintain the validity of the election notwithstanding the infraction of the rule. We do not agree with the District Judge that the burden lay upon the plaintiff to establish that the result has been affected by the transgression of the rule. If that view were maintained, the consequence would in effect be to encourage a violation of the rule. It is, we think, important to emphasise the aspect that rules are made to be obeyed and that violation of the rules may imperil the election, throwing a heavy burden upon those who, notwithstanding the breach of the rules, wish to support the election and to satisfy the Court that the purpose of the election has been in fact achieved.

When we test the present case from this point of view, it becomes clear that the decree of the District Judge cannot be supported. On the facts stated, it is impossible to affirm that the result has not been in fact affected by the irregularity. Nearly one half of the constituency did not vote, namely, 601 voters out of 1257. If less than a quarter of these voters had voted for the plaintiff alone, he would have been successful. The truth is that the suit has been tried on a wrong basis;

(25) (1853) 8 N. Y. 67; 59 Am. Dec. 451.
(26) (1901) 90 Am. St. Rep 48; 131 Ala 387
(27) (1874) 24 Am. Rep. 274; 74 Illinois 76.
(28) (1910) Ann. Cas 1913 B 155; 20 Hawaii 290.
(29) (1895) 49 Am. St Rep. 63, 29 L R. A. 678; 108 California 101.
(30) Ann. Cas. 1911 D 510 35 Okla 42; 128 Pac. 124.

(31) 28 Ind Cas. 6 2; 17 M. L. T. 331; (1915) M. W. N. 290; 2 L. W. 393.

as soon as the irregularity was established, the burden should have been thrown upon the defendants to establish that the result of the election had not in fact been affected; if this had been done, they might have found it extremely difficult successfully to discharge the onus. In these circumstances, we have anxiously considered what direction should now be given. We are of opinion that we should not remit the case to the Court of first instance and direct a fresh trial; but a fresh election would be in the best interest of the Municipality and of the candidates. We can only express the hope that at such election, some endeavour will be made to conform to the rules and the directions issued thereunder.

We find from the proceedings in the Court below that the suggestion was made that the plaintiff may have been estopped by reason of his knowledge of and acquiescence in the irregularity at the time. We are of opinion that there is no foundation for this contention. A protest by the plaintiff could have been of no avail. Besides, an estoppel cannot be pleaded where statutory requirements are disobeyed with full knowledge by the officers entrusted with the discharge of public duties. The question was raised in the *East Clare case* (5), but was not decided. The *Seaford case* (32), on the other hand, shows that the estoppel of the petitioner would in effect estop the constituency from raising the question whether the result of the election had been affected by the irregularity, and their rights should not be taken away by his acts.

The result is that this appeal is allowed and the decree of the District Judge reversed. The suit is decreed; the election is declared contrary to law and is set aside; the second and third defendants are restrained by a perpetual injunction from sitting on the Municipal Board and exercising the functions of a Municipal Commissioner by virtue of the election hereby cancelled. Each party will pay his own costs in all the Courts. No doubt, the ordinary rule is that the costs are borne by the unsuccessful party, but where the suit has been caused by the conduct of the returning officer, each party may, in the discretion of the Court, be ordered to pay his own costs; Monahar, C J., observed in the *Athlone case* (33) that as the election was set aside for what was no misconduct on the part of either party, each party must abide his own costs, although it was a misfortune: *Hackney case* (34).

Appeal allowed;
Suit decreed.

(32) (1675) 3 Luder 24.

(33) (1874) 8 C. L. 240.
(34) (1874) 2 O'M. & H. 87.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 377 OF 1918.
July 23, 1919.

Present:—Mr. Lyle, A. J. C.

Thakurain ANNAPURNA KUAR—
PLAINTIFF—APPELLANT

versus

SHAMBHU NATH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Landlord and tenant—Declaration that defendants are not under-proprietors, suit for—Possessory title, whether sufficient.

A mere possessory title is not sufficient for the maintenance of a suit against tenants, for a declaration that they are not under-proprietors, nor is the possibility of some danger arising in the future to the exercise of possessory rights sufficient for this purpose. [p. 747, cols. 1 & 2.]

An application by tenants to the Revenue Court to be recorded as under-proprietors does not amount to an invasion of, or interference with, the rights of a person whose only right is merely to remain in possession. [p. 747, col. 1]

Appeal from the decree of the District Judge, Fyzabad, dated the 5th June 1918, reversing that of the Subordinate Judge, Sultanpur, dated the 30th October 1917.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellant.

Messrs. *Niamatullah* and *Ram Prasad*, for Respondents Nos. 2 and 3.

JUDGMENT.—This was a suit for a declaration that the defendants were not under proprietors of certain plots of land. The plaintiff came into Court alleging that she was proprietor of the land in

suit and that the Revenue Court had wrongly declared the defendants to be under-proprietors.

The defendants pleaded that they were under-proprietors and that the plaintiff was not entitled to bring the suit as she had no proprietary interest in the village.

The learned Subordinate Judge found that by a private arrangement between the plaintiff and her husband the latter had given the village together with other villages to the plaintiff and had executed a *dastbardarinama* (Exhibit 1) in her favour. He held that the plaintiff was the owner of the village in which the lands in suit are situate and as such she was entitled to maintain the suit. He found that the defendants were not under-proprietors and he gave the plaintiff the declaratory decree which she sought.

In appeal the learned District Judge has held that the plaintiff is not the proprietor of the village in suit, that the *dastbardarinama* cannot be treated as a conveyance and that it did not create any title in the plaintiff. For this reason he allowed the appeal and dismissed the suit.

The plaintiff has come to this Court in second appeal. The learned Advocate who has argued the appeal on her behalf has admitted that he cannot establish his client's claim to full proprietary title, but has argued that as his client is lawfully in possession of the village she is entitled to maintain the suit for the declaration which she seeks. It is to be noted that in both the lower Courts the plaintiff claimed that she was full owner of the village and that the defendants were her tenants, and the question whether on a mere possessory title she could maintain the suit was not considered. It may be conceded that the plaintiff is in possession of the village, as her name has been entered in the revenue record, and though the *dastbardarinama* does not convey any title, it is in evidence that her husband has allowed her to take possession of the village. I do not think, however, that on a mere possessory title she can maintain the present suit for a declaration that the defendants are not under-proprietors. The application made by them in the Revenue Court to be recorded as under-proprietors did not in any way invade or interfere with her present rights; nor did the defendants by their application in any way deny the existing right of the plaintiff, which merely is to remain in possession. It is urged that the plaintiff, if still in possession, might be entitled to eject the defendants after the statutory period if they were mere tenants; but even if this were so, the possibility of some danger arising in the future to the exercise of her possessory rights is not sufficient to entitle her to a declaratory decree.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 200 OF 1917.

August 21, 1919.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

BENI MADHAB SUKUL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UPENDRA CHANDRA SINGHA AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 95—Civil Procedure Code (Act V of 1908), ss. 2 (17) (d), 80—Common manager, whether public officer—Suit against common manager—Sanction of Court, whether necessary—Notice to common manager, whether necessary—Officer de facto, acts of, validity of.

A common manager appointed under section 95 of the Bengal Tenancy Act is a public officer within the meaning of section 2 (17) (*d*) of the Civil Procedure Code and a suit against him for accounts cannot be maintained without service of the notice contemplated by section 80 of the Code, and without leave obtained from the Court which appointed him. [p. 751, col. 2.]

Acts of officers *de facto*, performed by them within the scope of their assumed official authority, in the interests of the public or third persons and not for their own benefit, are generally as valid and binding as if they were acts of officers *de jure* and cannot be collaterally impeached. [p. 752, col. 2.]

Appeal against the decree of the Subordinate Judge, Tipperah, dated the 7th May, 1917.

Mr. *T. C. P. Gibbons* (Advocate-General) and Babu *Girija Prasanna Ray Chaudhuri*, for the Plaintiffs-Appellants.

BENI MADHAB v. UPENDA CHANDRA SINGHA.

Mr. *L. Pugh*, Dr. *Sarat Chandra Basak*, Babus *Sasadhar Ray* (*Sr.*) and *Pramatha Nath Banerjee*, for the Defendants-Respondents.

Babu *Sib Chunder Palit* for the Co-sharers-Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for settlement of accounts. They allege that on the 23rd December 1901 the 1st defendant was appointed by the District Judge of Tipperah to be common manager of their *taluk* under the provisions of the Bengal Tenancy Act and that he continued to act in that capacity till the 28th February 1914. The plaintiffs further allege that on the 14th December 1912 the District Judge released one third share of the *taluk* from the management of the defendant. The plaintiffs accordingly pray (*a*) for a direction upon the 1st defendant to submit regular accounts for the entire period of his management; (*b*) for an examination of the accounts that are submitted; (*c*) for recovery of the amount that may, upon an examination of the accounts, be found due in respect of their shares; (*d*) for recovery of Rs. 500 as costs of preparation of the papers, should the defendant fail to submit regular accounts within the time allowed by the Court; and (*e*) for recovery of the decretal amount by sale of the immoveable properties of the 1st and 2nd defendants mentioned in the security bond executed by them. The 2nd defendant is the surety and the remaining defendants are persons interested in the *taluk* who have not joined as plaintiffs in the suit. The first two defendants in their written statement denied all the material allegations in the plaint. Fourteen issues were thereupon framed, but only four of them were taken up for disposal as of a preliminary character: (2) Is the suit maintainable without the consent of the District Judge; (3) Is the suit maintainable without notice under section 80, Civil Procedure Code; (4) Is the suit barred by *res judicata*; (10) Is the 1st defendant liable to render any accounts other than the quarterly accounts he submitted to the District Judge. The Subordinate Judge has answered the issues (2), (3) and (10) against the plaintiffs and issue (4) in their favour; in this view he has dismissed the suit. Upon the present appeal, the decision of the Subordinate Judge upon issues (2), (3) and (10) has been assailed as erroneous. The answer to the questions raised depends upon the view we take of the position of a common manager appointed under the Bengal Tenancy Act.

The provisions for the appointment of common managers are contained in sections 93—100 of the Bengal Tenancy Act. Section 93 invests the District Judge with authority to call upon co-owners to show cause why they should not appoint a common manager, when the District Judge is moved by the Collector or a person having an interest in the estate or tenure. Section 94 empowers the District Judge to make an order directing the co-owners of the estate or the tenure to appoint a common manager. Section 95 deals with cases where the order is not obeyed; the District Judge may, in such an event, direct that the estate or tenure be managed by the Court of Wards, if the Court of Wards consents to undertake the management, or to appoint a manager. Section 96 restricts the choice of the District Judge in the selection of a common manager in a local area where the Local Government has nominated a person to act as common manager. Section 97 makes the provisions of the Court of Wards Act for the management of immoveable property applicable to cases where the Court of Wards undertakes the management of an estate or tenure. Section 98 embodies the provisions applicable to common managers which are set out in the following terms:—

"(1) A manager appointed under section 95 may, if the District Judge thinks fit, be remunerated by a fixed salary or percentage of the money collected by him as manager, or partly in one way, and partly in the other, as the District Judge from time to time directs.

(2) He shall give such security for the proper discharge of his duties as the District Judge directs.

(3) He shall, subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners jointly might, but for his appointment, have exercised and the co-owners shall not exercise any such power.

(4) He shall deal with and distribute the profits in accordance with the orders of the District Judge.

(5) He shall keep regular accounts and allow the co owners or any of them to inspect and take copies of those accounts.

(6) He shall pass his accounts at such period, and in such form, as the District Judge may direct.

(7) He may make any application which the proprietors could make under section 103.

(8) He shall be removable by the order of the District Judge, and not otherwise."

Section 99 empowers the District Judge to restore the management of the estate or tenure to the co-owners at any time, when he may be satisfied that the management will be conducted by them without inconvenience to the public or injury to private rights. Section 100 authorises the High Court to make rules defining the powers and duties of managers under the foregoing sections.

The first question which requires consideration is that raised in the second issue, namely, is a suit for accounts against a common manager appointed under section 95, Bengal Tenancy Act, maintainable without the sanction of the District Judge. The defendants have contended that this question should be answered in the negative. A parallel has been drawn between a common manager appointed under section 95, and a Receiver who is an officer of the Court, acting under its direction and in all cases subject to its authority. In the case of a Receiver, it is contrary to the established doctrines of Courts of Equity to permit him to be made a party defendant to a litigation, unless by sanction of the Court appointing him; it is regarded in all cases as essential that a person desiring to bring a suit against him in his official capacity should first obtain leave of the Court by which he was appointed, since the Courts will not permit the possession of their Receivers to be disturbed by a suit or otherwise without their consent and permission. The rule is established for the protection of Receivers against unnecessary and expensive litigation; besides, in most instances, a party aggrieved may have ample relief by application to the Court which appointed the Receiver. Indeed, the rule is so stringent that when an action has been instituted against a Receiver in his official capacity without leave of the Court, the plaintiff is deemed guilty of contempt of Court and liable to be punished. The rule that a Receiver appointed by judicial authority cannot be subjected to suit without the leave of the Court whose officer he is, finds recognition in cases of high authority. In *Angel* v. *Smith* (1) Lord Eldon, L. C., affirmed the rule on the ground that the possession of the Receiver is the possession of the Court and observed that though there might be inconvenience from the application of the rule, the inconvenience the other way if the rule did not exist would be enormous. He then added the very important statement that if it is necessary to ask leave, "the Court must have credit for never refusing it, where it ought to be granted; and, if so, very great purposes of convenience may be answered by putting the party to ask it." See also *Johnes* v. *Olaughton* (2), *Hawkins* v. *Gathercole* (3), *Randfield* v. *Randfield* (4), *Searle* v. *Choat* (5). The same principle has been recognised and applied in our Courts: *Miller* v. *Ram Ranjan* (6), *Dunne* v. *Kumar Chandra Kisore* (7), *Fink* v. *Calcutta Municipal Corporation* (8). Accordingly, we have been invited to apply this principle to the case of a common manager. In our opinion, there is in many respects a close analogy between the position of a common manager and that of a Receiver. A Receiver is appointed, amongst other purposes, for the realisation, management, protection, preservation and improvement of the subject matter of litigation, the collection of rents and profits thereof, the application and disposal of such rents and profits and the execution of documents such as the owner himself is competent to execute. A common manager is appointed where inconvenience to the public or injury to private rights is likely to ensue from a

(1) (1804) 9 Ves. 335; 7 R. R. 214; 32 E. R. 632.
(2) (1822) Jac. 573.
(3) (1852) 1 Drew. 12; 21 L. J. Ch. 617; 16 Jur. 650, 61 E. R. 355 94 R. R. 571.
(4) (1860) 1 Drew. & Sm. 310; 62 E. R. 398; 127 K. R. 121.
(5) (1884) 25 Ch D. 723; 53 L. J. Ch. 506; 50 L. T. 470; 32 W. R. 397.
(6) 10 C. 1014; 5 Ind. Dec. (N. S.) 677.
(7) 30 C. 593; 7 C. W. N. 390.
(8) 30 C. 721; 7 C. W. N. 706.

dispute between co-owners of an estate or tenure. When the manager is appointed, he is invested, for the purposes of management and subject to the control of the District Judge, with the same powers as the co-owners might, but for his appointment, have exercised, and so long as the common manager continues in office, such powers cannot be exercised by the co-owners themselves. A common manager is consequently appointed by the District Judge, performs his duties under the control of the District Judge and is removable by the order of the District Judge, but not otherwise. His salary or remuneration is fixed by the District Judge. He gives such security for the proper discharge of his duties as the District Judge directs. He deals with and distributes the profits in accordance with the orders of the District Judge. He keeps regular accounts and is required to pass his accounts at such period and in such form as the District Judge may direct. A common manager may consequently be regarded as an officer of the Court. If the rule which has been established for the protection of Receivers be extended to the case of a common manager, no inconvenience is likely to result. Indeed, a rule that permission of the Court is necessary to warrant many classes of actions against a common manager in his official capacity, is essential for the protection of common managers from needless and oppressive litigation. The fund or property in the hands of the common manager is in a sense in the custody of the Court. The Court may administer justice to claimants against the common manager in many instances without the expense and delay inseparable from a regular suit, and relief in that mode is commended by considerations of economy. It has been argued, however, that there are instances where a person holding an office analogous to that of a Receiver is allowed to be sued without the leave of the Court, and amongst such cases have been mentioned those of a Receiver appointed under section 18 of the Provincial Insolvency Act and an administrator *pendente lite* appointed under section 34 of the Probate Act. There is, however, no real analogy between a common manager and persons in the position named. An examination of the provisions of section 98 of the Bengal Tenancy Act makes it manifest that there is such an intimate relation between the common manager and the Court that he must be regarded as an officer of the Court who should not be permitted to be attacked without the leave of the Court. The adoption of the contrary view might lead to great confusion. To take one illustration: a common manager who is bound to pass his account at such period and in such form as the District Judge may direct may, even while his accounts are under examination by the District Judge, be simultaneously harassed by one or more of the co-owners by the institution of suits for accounts against him. The common manager, though an officer of one Court, may, in this manner, be made subject, in the matter of his official duties, to the orders of another tribunal. The inconvenience likely to follow, if the contention of the plaintiffs were to prevail, is well illustrated by what has happened in the case before us. The plaintiffs applied to the District Judge for leave to institute the present suit. He appointed an auditor, examined the accounts, and came to the conclusion that it would be undesirable to sanction the institution of a suit for account against the common manager without a more thorough enquiry. The District Judge is entitled to examine the accounts further under section 98, clause (*b*). The plaintiffs meanwhile insist upon an enquiry into the accounts in the present litigation. If we hold that the suit has been rightly instituted without the sanction of the District Judge, there is no escape from the position that there may be two independent enquiries into the accounts and possibly two conflicting conclusions—one by the District Judge, another by the Subordinate Judge. We are not prepared to take a view which may lead to consequences of this character. We hold accordingly that assuming a suit for account is maintainable against a common manager appointed under section 95 of the Bengal Tenancy Act, such suit cannot be maintained without leave obtained from the Court which appointed the common manager. This conclusion is in conformity with the opinion expressed in *Nabi Kishore Mandal* v *Atul Chandra Chatterjee* (9).

(9) 16 Ind. Cas. 193; 40 C. 150; 17 C. W. N. 846.

But it has been argued that this principle has no application to the present litigation, because the suit is for recovery of specific sums alleged to have been misappropriated or improperly retained by the common manager, so that the suit cannot be deemed to have been brought against the common manager as an officer of the Court. There is no foundation for this contention. To afford relief to the plaintiffs, the accounts must first be examined, and such accounts are and can be demanded from the common manager, only because of the obligations inseparably associated with his official position. It has further been argued that even if this be conceded, the defendant had ceased to be common manager at the date of the institution of the suit and was consequently no longer entitled to the protection he would have enjoyed if he had still continued in office. We are not prepared to accept this contention as well founded. A common manager, like a Receiver, is bound to account to the Court which placed him in a position of trust and responsibility. He must account to the Court, whether required to do so by the Court of its own motion or at the instance of parties interested in the estate. The fact that he has ceased to be common manager, has not terminated his liability to render accounts. No doubt his liability is official, but though his official character has ceased in so far as management of the property is concerned, his official liability to render accounts, has not ended with his official existence. Indeed, the accounts can be claimed from him only in his capacity as common manager; he is consequently, for this purpose, entitled to the same protection as if he had still been a common manager: *Nabi Kishore Mandal* v. *Atul Chandra Chatterjee* (9). The true position is that, in the matter of accounts he has not been finally discharged; he is still subject to the orders of the Court, and it is only just and fair that his privilege should be commensurate with his liability. We must hold that the sanction of the District Judge was necessary, and as such sanction has been refused, this suit cannot be maintained.

The second question which requires examination is that covered by the third issue, namely, whether a suit for accounts against a common manager appointed under section 95 of the Bengal Tenancy Act is maintainable without service of the notice contemplated by section 80 of the Civil Procedure Code. That section provides that no suit shall be instituted against the Secretary of State for India in Council or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after the prescribed notice in writing has been served in the manner indicated. We have already held that a common manager appointed under section 95 of the Bengal Tenancy Act is an officer of the Court. He is plainly a public officer within the meaning of the very comprehensive definition contained in section 2 (17) (*d*); he may rightly be regarded as an officer of a Court of Justice whose duty it is, as such officer, to take charge of property; he is, in any event, a person specially authorised by a Court of Justice to perform such duty. The only question is, whether the present suit for account is a suit in respect of any act purporting to be done by the common manager in his official capacity. The answer must be in the affirmative. The receipts and disbursements by the common manager purported unquestionably to be acts done in his official capacity; he is now called upon by the plaintiffs to account for the monies which passed through his hands, and after his accounts have been adjusted, to pay the effects in his hands into Court for the benefit of the parties entitled to them. To a suit of this description section 80 is applicable. We hold accordingly that the suit cannot be maintained in contravention of section 80 of the Civil Procedure Code: *Samanthala Koti Reddi* v. *Pothuri Subbiah* (10).

The third question, covered by the tenth issue, refers to the liability of the common manager to render any accounts other than the quarterly accounts he submitted to the District Judge. The materials requisite for the decision of this question are not on the record. We have not adequate information as to what accounts were from time to time submitted by the common manager to the District Judge, what steps

(10) 46 Ind. Cas. 86; 41 M. 792; 7 L. W. 586; 34 M. L. J. 494; 28 M. L. T. 357; (1918) M.W.N. 414 (F.B.).

were taken to notify them to the persons interested, what directions were given to audit them and what orders were passed thereon on each occasion by the District Judge. In the absence of such information we cannot give a decision upon the question raised. But we may observe that if the same rule is applied to common managers as has been held applicable to Receivers, the District Judge would seem to possess the requisite authority (even though he may not have the necessary machinery at his disposal) to investigate the accounts and to enforce payment of any sums which may be found due from the common manager: *Mohini Mohan Patra* v. *Baroda Kanta* (11), *Baroda Kanta* v. *Rashmani Dasi* (12), *Rashmani Dasi* v. *Baroda Kant* (13). *Thurl w* v. *Thurlow* (14), *R.* v. *Bayly* (15). An account may, even though previously passed, be reviewed by him at a later date for sufficient reasons: *Mohini Mohan Patra* v. *Baroda Kanta* (11), *Wildridge* v. *M'Kane* (16), *McOan* v. *O'Ferrall* (17), and the penalties for non payment of balance due may be enforced even after the manager has been discharged: *Harrison* v. *Boydell* (18). In the present case, as appears from the order of the District Judge refusing leave, he intends to enquire further into the accounts. We need not consequently consider the question raised in *Nobi Kishore Mandal* v. *Atul Chandra Chatterjee* (9), namely, whether an enquiry into accounts by the District Judge is, under all circumstances, the only remedy available to the co owners, or whether there is an alternative remedy by way of a regular suit instituted with the sanction of the District Judge and after notice given to the common manager under section 30 of the Civil Procedure Code.

It has finally been argued that under the Bengal Tenancy Act, a common manager can be appointed only in respect of an entire estate, that the order of release of one-third share on the 28th February 1914 to take effect retrospectively from the 2nd February 1914 was illegal, and that consequently from that date the possession of the manager in respect of the remaining two-thirds share became wrongful, rendering him liable to be sued as a wrongdoer. We are of opinion that there is no substance in this contention. It may be conceded that the Bengal Tenancy Act contemplates a common manager for an entire estate and that the order for release should not have been made in respect of an one-third share: *Mohini Lal Pakrasi* v. *Nogenda Nath Pakrasi* (19), *Indu Bhusan* v. *Annapurna* (20), *Kanai Lal Ghose* v. *Basir Pramanik* (21). But the fact remains that in this case the 1st defendant continued in possession of the two-thirds share in his character as common manager. He was *de facto* common manager and is bound to render an account as such; the co-owners are bound by the order of partial release made in their presence and they cannot be permitted any more than the 1st defendant himself to deny that he is under an obligation to account. The principle applicable to cases of this character was fully explained in the case of *Pulin Behary Das* v. *Emperor* (22), where it was pointed out that there is weighty authority for the proposition that acts of officers *de facto*, performed by them within the scope of their assumed official authority, in the interests of the public or third persons and not for their own benefit, are generally as valid and binding as if they were the acts of officers *de jure* and cannot be collaterally impeached. The plaint in the present suit, indeed, proceeds on this assumption; the claim is for recovery of such sum as may be found due on adjustment of accounts to be rendered by the 1st defendant as common manager, and not for recovery of damages from him as a wrongdoer.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(11) 12 Ind. Cas. 780; 14 C. L. J. 445.
(12) 28 Ind. Cas. 25; 20 C. L. J. 113.
(13) 28 Ind. Cas. 31; 20 C. L. J. 123.
(14) (1840) 4 Jurist 982.
(15) (1841) 1 Dr. & War. 213; 4 Ir. Eq. R. 142.
(16) (1827) 2 Moll. 545.
(17) (1841) 8 Cl. & F. 30; 8 E. R. 12.
(18) (1833) 6 Sim. 211; 51 E. R. 573.
(19) 53 Ind. Cas. 672; 30 C. L. J. 261.
(20) 6 C. L. J. 216.
(21) 26 Ind. Cas. 438.
(22) 16 Ind. Cas. 257; 15 C. L. J. 517 at p. 573; 16 C. W. N. 1105; 13 Cr. L. J. 609.

OUDH JUDICIAL COMMISSIONER'S COURT

SECOND CIVIL APPEAL No. 9 OF 1918.

August 21, 1919.

Present:—Mr. Lyle, A. J. C.

GUR PRASAD—PLAINTIFF—APPELLANT

versus

CHHUTKU LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XXXIV, r. 1—Mortgages, two, in favour of same person—Suit on prior mortgage without disclosing subsequent mortgage—Suit on subsequent mortgage, whether maintainable.

A person holding two mortgages on the same property and suing on the first mortgage alone is, in espect of the second mortgage, a party to the suit under Order XXXIV, rule 1, Civil Procedure Code, and if he omits to mention his second mortgage in that suit and obtains a decree on the basis of his first mortgage, he cannot afterwards sue to enforce his second mortgage against such property. [p. 756, col. 2]

Het Ram v. *Shadi Ram*, 45 Ind. Cas. 798; 16 A. L. J. 607; 5 P. L. W. 88; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 40 A. 407; 9 L. W. 550; 12 Bur. L. T. 73; 45 I. A. 130 (P. C.); *Murlidhar* v. *Sher Singh*, 3 A. L. J. 238; A. W. N. (1906) 11?, considered.

Sundar Singh v. *Bholu*, 20 A. 322 (F. B.); A. W. N. (1898) 58; 9 Ind. Dec. (N. s.) 566, *Jagernath Singh* v. *Mohra Kuvar*, 39 Ind. Cas. 76; 2 P. L. J. 118; 1 P. L. W. 653, (1917) Pat 194, dissented from

Dorasami v. *Venkataseshayyar*, 25 M. 138; 11 M. L. J. 373, *Nattu Krishnama Chariar* v. *Annangara Chariar*, 30 M. 353; 2 M. L. T. 350, 17 M. L. J. 301, *Keshavram Dulavram* v. *Ranchhod Fakira*, 30 B. 156; 7 Bom. L. R. 811, *Dhondo Ramchandra Kulkarni* v. *Bhikoji Gopal*, 27 Ind. Cas. 1005; 39 B. 138; 17 Bom. L. R. 144, followed.

Appeal from the decree of the District Judge, Gonda, dated the 23rd November 1917, reversing that of the Munsif, Utraula (Gonda), dated the 31st July 1917.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for Respondents Nos. 1, 2, 4 and 5.

JUDGMENT.—The suit out of which this appeal has arisen was brought on the basis of a mortgage-deed dated the 15th of April 1911, by which a share in Mauza Mahtanian was mortgaged with possession to the plaintiff by the 1st defendant for a sum of Rs. 400. Out of this sum Rs. 100 was left with the mortgagee to pay off a prior usufructuary mortgage held by one Lotawan over a portion of the mortgaged property. On the 15th of June 1908 a simple mortgage of the same property along with other property had been executed by the 1st defendant in favour of the plaintiff.

In 1914 the plaintiff brought a suit on the basis of the mortgage of 1908 and in that suit he made no mention of his own subsequent mortgage of 1911 but impleaded Lotawan as a subsequent mortgagee. It was found that Lotawan's mortgage was prior to the plaintiff's mortgage of 1908, and on the 23rd of May 1914 the plaintiff obtained a preliminary decree for sale of the property mortgaged to him in 1908 subject to the prior charge of Lotawan. In the present suit based on the mortgage of 1911 the plaintiff, alleging that he had not been given possession of the mortgaged property, brought his suit to recover Rs. 300 with interest by sale of the mortgaged property or, in the alternative, to be given possession of the mortgaged property.

The Court of first instance held that the plaintiff was not entitled to a decree for sale but granted him a decree for possession.

An appeal was preferred to the District Judge on the ground that as the plaintiff in his suit for sale on the prior mortgage of 1908 had made no mention of the existence of the later mortgage of 1911 in his own favour, he was not entitled to institute the present suit based on the later mortgage. The learned District Judge has held that in view of the provisions of Order XXXIV, rule 1, and of section 11, Explanation IV, of the Code of Civil Procedure, the plaintiff was debarred from instituting the present suit. The plaintiff has preferred this appeal against the finding of the learned District Judge.

The question involved in this case is one with regard to which there is considerable conflict of authority; but so far as I am aware, there is no reported case of this Court in which the question has been discussed. It is to be noted that no sale has yet taken place under the decree obtained by the plaintiff on the basis of his simple mortgage of 1908 and that the suit which he has now brought is one for possession on the basis of his mortgage of 1911. Rule 1 of Order XXXIV of the Code of Civil Procedure provides that subject to the provisions of the Code all persons having an interest either in the

mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. This provision must be read with rule 9 of Order I, which provides that no suit shall be defeated by reason of non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights of the parties actually before it. It is now settled law that if a puisne mortgagee is not impleaded in a suit brought by a prior mortgagee for sale he is not bound by any order for sale, that may be obtained in such a suit [*Het Ram* v. *Shadi Ram* (1)]. It would follow, therefore, that had the mortgage of 1911 been in favour of any one other than the plaintiff, that person would have been in no way debarred, by reason of the suit on the former mortgage of 1908, from instituting the present suit; and the question, therefore, is whether the plaintiff can be debarred merely because he is the same person in whose favour the prior mortgage was executed and who instituted the suit and obtained a decree on that mortgage.

In the case of *Sundar Singh* v. *Bholu* (2) it was held that there is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit. In that case the learned Judge remarked that it was difficult to see what benefit the plaintiff could obtain by their two decrees, except that they might attach any surplus arising from the sale under one decree in execution of the other decree. That was a case in which both the mortgages held by the plaintiff were simple mortgages. In the present case the second mortgage executed in 1911 was a usufructuary mortgage and the present suit brought by the plaintiff is for possession of the property under that mortgage. If he be granted a decree in the present suit, he will certainly be entitled to obtain and remain in possession of the mortgaged property until it is put to sale in execution of the former decree passed on the mortgage of 1908 (the judgment-debtor not having redeemed the mortgage of 1908 within the period allowed by the decree) or until his mortgage of 1911 be redeemed.

The decision in *Sundar Singh* v. *Bholu* (2) was dissented from in the case *Dorasami* v. *Venkataseshayyar* (3). In the case the learned Judges remarked: "The principle of the Transfer of Property Act is that any person instituting a suit for foreclosure, sale or redemption of the mortgaged property should include in that suit the interest of all persons in such property of which he has notice, whether such interest be prior or subsequent to his own, and if he obtains an order for sale, the sale will not be made subject to subsequent incumbrances, and the sale-proceeds, after deducting therefrom the expenses incident to the sale, will be distributed between himself and the subsequent incumbrancers according to their priorities. In the hands of the purchaser, however, the property will be subject to prior mortgages, unless the sale has been made free from the same with the consent of the prior mortgagees, in which case they acquire the right of priority over the sale-proceeds.

"If, however, a person having an interest in the mortgaged property is not made a party to the suit, by reason of the party suing having no notice of such interest, the rights of such person will remain unaffected by the decree and the proceedings in execution thereof, and complicated questions frequently arise when such persons sue subsequently upon such mortgage. But a party suing upon one of his mortgages can have no excuse for his not including in the suit his rights under his other mortgages, for he must necessarily have notice of the same."

The learned Judges relied on the substantive provisions enacted in sections 86 and 88 of the Transfer of Property Act.

(1) 45 Ind. Cas. 798; 16 A. L. J. 607; 5 P. L. W. 88; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 40 A. 407; 9 L. W. 550; 12 Bur. L. T. 73; 45 I. A. 130 (P. C.).

(2) 20 A. 322 (F. B.); A. W. N. (1898) 58; 9 Ind. Dec. (N. s.) 566.

(3) 25 M. 108; 11 M. L. J 373.

Sections 86 and 88 have been repealed and have been re-enacted in rules 2 and 4 of Order XXXIV of the Code of Civil Procedure. They also relied on the form of a decree for sale, No. 128, Schedule IV, of the old Code of Civil Procedure, for which form No. 4 in Appendix D of Schedule I of the present Code of Civil Procedure has been substituted. The rules and the form referred to require that the plaintiff shall deliver up to the defendant or to such person as he appoints all documents in his possession or power relating to the mortgaged property and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. The argument is that these provisions of law requiring the plaintiff in certain circumstances to deliver up all documents in his possession or power relating to the mortgaged property clearly indicate that the mortgagee is not entitled to reserve any rights to himself over the property in respect of which he has obtained a decree for sale. This ruling was referred to in *Nattu Krishnama Chariar* v. *Annangara Chariar* (4), where it was held that a party holding two mortgages on the same property and suing on the first mortgage alone is, in respect of the second mortgage, a party to the suit under section 85 of the Transfer of Property Act, and if he omits to mention his second mortgage and the property is ordered to be sold free of such mortgage, he cannot afterwards sue to enforce his second mortgage against such property. It was held that the neglect to mention his second mortgage in his suit on the first mortgage and to have all his claims against the mortgaged property adjudicated upon amounted to a waiver of his rights under the second mortgage. The learned Advocate for the appellant argues that as in the present case the second mortgage is usufructuary, he could not get a decree for sale on it and he was not bound to mention it in the former suit and that had he mentioned it in the former suit, nothing would have resulted from his doing so. But this argument does not appear to be correct. Had he mentioned his subsequent mortgage, his rights under that mortgage would have been determined and if the property was put to sale, any balance of the proceeds after paying off the amount due on Lotawan's mortgage and under the decree would have been applied towards the payment of the plaintiff's second mortgage.

In *Keshavram Dulavram* v. *Ranchhod Fakira* (5) it was held that where a mortgagee holds two mortgages on the same property executed by the same person, he cannot maintain a suit to recover the sum due on the latter mortgage only by sale of the property subject to the prior mortgage. In that case the learned Judges remarked that it was difficult to see any answer to the argument derived from the form of a decree for sale in No. 128, Schedule IV to the Code of Civil Procedure. That ruling was, however, dissented from by Mr. Justice Chamier in the case *Jagernath Singh* v. *Mohra Kuvar* (6). In the course of his judgment Mr. Justice Chamier remarks:—

"It is now clear that a puisne mortgagee is entitled to bring the mortgaged property to sale subject to the prior mortgage of another person, and I see no reason why he should not bring it to sale subject to a prior mortgage held by himself, at all events where he is unable to sue upon the prior mortgage, as is the case here. It has been held that a person holding two mortgages on the same property is not bound to put both mortgages in suit together. In practice he usually sues upon both mortgages, for he cannot bring the property to sale subject to a later mortgage than the one in suit, whether the later mortgage is held by himself or by any one else; and there is not generally much to be gained by bringing the property to sale subject to a prior mortgage held by the decree-holder himself."

The last case to which reference was made is *Murlidhar* v. *Sher Singh* (7). In that case the property in dispute was mortgaged first to Mahtab Singh, then to

(4) 30 M. 353; 2 M. L. T. 330; 17 M. L. J. 301.

(5) 30 B. 156; 7 Bom. L. R. 811.

(6) 39 Ind. Cas. 76; 2 P. L. J. 118; 1 P. L. W. 623; (1917) Pat. 194.

(7) 3 A. L. J. 238; A. W. N. (1906) 112.

Mahtab Singh and Sher Singh and thirdly to one Murli Dhar. Mahtab Singh brought a suit for sale upon the first mortgage, obtained a decree, had the property sold and purchased it himself. Mahtab Singh and Sher Singh then brought a suit upon the second mortgage and made Murli Dhar a party to that suit, and obtained a decree. They then applied for an order absolute for sale of the property mortgaged. On objection made by Murli Dhar it was held by Knox, J., that Mahtab Singh and Sher Singh could again sell the property which was sold in execution of the decree on the first mortgage, inasmuch as Mahtab Singh by his purchase did not become full owner, as the property was subject to the second and third mortgages. It is to be noted that Sher Singh and Mahtab Singh, the mortgagees under the second mortgage, were members of a joint Hindu family living jointly and that, therefore, practically the first and second mortgages were in favour of the same person. The question as to whether Mahtab Singh and Sher Singh were entitled to bring a suit on the second mortgage, no mention of that mortgage having been made in the first suit brought by Mahtab Singh, was not discussed in that case and the ruling does not, therefore, appear to be in point.

It seems to me quite clear that the plaintiff's suit on his second mortgage cannot be maintained. If the second mortgage had been held by a person other than the plaintiff and that person, having been made a party, had failed to claim the right to redeem the prior mortgage or to make any defence, he would clearly have been debarred from bringing any subsequent suit to enforce his mortgage debt. It cannot possibly be argued that the plaintiff was not a party to the suit on the prior mortgage, and he was certainly in a position to assert any rights which he might have under his subsequent mortgage. Having made no mention of those rights, he is in the same position in respect of the second mortgage as a puisne mortgagee would be, if having been duly impleaded he did not attempt to assert those rights. *Vide Dhondo Ramchandra Kulkarni* v. *Bhikoji Gopal* (8). Had he in the suit on his prior mortgage mentioned and proved his subsequent mortgage, any balance of the sale proceeds left over after satisfying Lotawan's mortgage and his own prior mortgage would have gone first towards the satisfaction of his subsequent mortgage and anything left over would have been paid to the mortgagor. Order XXXIV, rule 1, with the object of avoiding multiplicity of suits, provides that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. Under this provision the plaintiff, if he did not wish to abandon his subsequent mortgage, ought to have disclosed it in his suit on the prior mortgage and had he done so, his claim on his subsequent mortgage would have been adjudicated upon and he could not have brought another suit on that mortgage. He cannot now, by taking advantage of his own wrong doing in not disclosing the subsequent mortgage, be allowed to bring a suit on that mortgage.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(8) 27 Ind. Cas. 1005; 39 B. 138; 17 Bom. L. R. 144.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1791 OF 1918.

August 27, 1918.

Present:—Mr. Justice Kumaraswami Sastri.

V. S. SANTHANAM AIYANGAR —RESPONDENT—PETITIONER

versus

SRINIVASARAGHAVAN MINOR, BY HIS MOTHER AND NEXT FRIEND PONNAMMAL, AND OTHERS—APPELLANTS - RESPONDENTS

Civil Procedure Code (Act V of 1908), *O. XLIA, r.* 2 (2)—*Madras High Court (Appellate Side) Rules, r.* 42—*Party not served with notice of appeal, right of, to apply to set aside* ex parte *order.*

Rule 42 of the Appellate Side Rules of the Madras High Court does not prevent a party who has not been served with notice of appeal, from applying to set aside any order passed *ex parte* in the appeal on the ground that he

has not entered appearance. He cannot be penalised for not entering appearance by losing his right to receive notice of interlocutory applications, when such applications are made within the time limited for his entering appearance.

Petition, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to set aside the order, dated the 12th July 1918, in Civil Miscellaneous Petition No. 1307 of 1918, granting leave to file a memorandum of additional grounds and to amend the memorandum of valuation in Appeal Suit No. 317 of 1917, preferred to the High Court against the decree of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 71 of 1917.

Mr. *K. S. Jayarama Aiyar*, for the Petitioner.

Messrs. *T. R. Ramachandra Aiyar*, *P. R. Ramakrishna Aiyar* and *K. Bhashyam*, for the Respondents.

JUDGMENT.—This is an application to set aside the order passed by me on the 12th July 1918, allowing the appellants to file an additional ground of appeal and to amend the valuation of the appeal. Notice of the application to amend was not given to the 6th respondent and the order was passed without hearing him. Order XLIA, rule 2, clause 2, of the Code of Civil Procedure provides that, unless otherwise ordered, the period for respondent to enter appearance shall be 25 days from the service of notice upon him, and that, if he wants to appear and defend the appeal, he should enter appearance within that period. Rule 42 of the Appellate Side Rules provides that notice of an application to amend a memorandum of appeal should be given to all parties who have entered appearance. I do not think that rule 42 prevents a party, who has not been served with the notice on the ground that he has not entered appearance, from applying to set aside the order passed *ex parte*. If any penalty is attached for his not entering appearance within the time limited, that penalty can only arise when the period fixed for entering appearance has expired. It will be against all principles of equity to hold that a person should be punished for not entering appearance by losing his rights to receive notice of all interlocutory applications, when such applications are made within the time limited for his entering appearance. In the present case the applicant was declared a major on the 27th March 1913 and he got notice of appeal in the usual course entitling him to enter appearance on the 8th July. The petition to amend the memorandum of appeal was filed on the 25th April and no notice was sent to him, the appellant relying on rule 42 referred to above.

I am of opinion that the 6th respondent ought to have had notice of the application and that he is entitled to have the *ex parte* order set aside so far as he is concerned and to be heard on the merits. I accordingly set aside the order of the 12th July.

As the pleadings and grounds of appeal have been printed, I think the best thing to do will be to direct that the application for leave to file additional grounds and amend the valuation be posted before the Bench hearing the appeal. The additional ground need no additional printing, as the ground raises a pure question of law, and, as the appeal is filed *in forma pauperis*, no delay need be caused by the amendment of the valuation.

There will be thus no necessity for any adjournment of the appeal by reason of the petition being posted for hearing with it. Leave is granted to all the parties to file such additional affidavits as they may consider necessary in one month.

I make no order as to costs.

M. C. P.

Petition allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 86 OF 1917.

June 25, 1919.

Present:—Mr. Lyle, A.J.C., and Mr. Ashworth, A.J.C.

JAGATPAL SINGH AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

Thakur CHANDRAPAL SINGH—PLAINTIFF

Thakur DARBARI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by father—

JAGATPAL SINGH *v.* CHANDRAPAL SINGH.

Interest, high rate of, when justified—Court, interference by.

Where in the case of a mortgage by a Hindu father the security offered is inadequate, the contractual rate of interest, although high, ought not to be interfered with. Each case, however, should be considered on its own merits. [p. 759, col. 2; p. 760, col. 1.]

Appeal from the decree of the Subordinate Judge, Unao, dated the 30th March 1917.

Messrs. *A. P. Sen* and *Hyder Husain*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra*, for Respondent No. 1.

JUDGMENT.—This was a suit for foreclosure of a mortgage by conditional sale executed by the 1st defendant Thakur Darbari Singh in favour of the 4th defendant Nandan Prasad on the 22nd of December 1913 for a sum of Rs. 32,638-4 1. Nandan Prasad has sold his rights and interests as mortgagee to the plaintiff Thakur Chandrapal Singh. The two sons of Thakur Darbari Singh were impleaded as defendants and one *Musammat* Bismillah Begam, a prior mortgagee, was also impleaded. The plaintiff has been given a decree by the learned Subordinate Judge and the two sons of Thakur Darbari Singh, the executant of the mortgage, have appealed to this Court.

The consideration for the mortgage-deed in suit consists of the following items:—

(1) Rs. 21,500; advanced by Nandan Prasad to Thakur Darbari Singh for the purpose of paying off a decree for foreclosure obtained by the present plaintiff Thakur Chandrapal Singh against Darbari Singh and his son Surajpal Singh.

(2) Rs. 8,519-9 9; to pay off a simple money decree obtained by Nandan Prasad against Thakur Darbari Singh and his brother Lal Singh.

(3) Rs. 2,369-10 7; to pay off *bahi-khata* debts.

(4) Rs. 250; the costs of stamp and execution of the document.

At the time of the execution of the document the following debts were due by the two brothers Darbari Singh and Lal Singh to Nandan Prasad:—

(1) Rs. 29,313; due on a mortgage deed dated the 18th December 1911 which had been executed by the two brothers jointly in favour of Nandan Prasad.

(2) *Bahi-khata* debts amounting to Rs. 4,739-5-3,

(3) Rs. 8,519-9-6 due on a decree obtained by Nandan Prasad on the basis of certain *hundis* against the two brothers jointly.

At the time of the execution of the mortgage-deed in suit the brothers Darbari Singh and Lal Singh agreed with the consent of Nandan Prasad to divide the responsibility for the payment of these debts. Lal Singh undertook to pay the whole of the first debt and half of the second, while Darbari Singh agreed to pay the other half of the second debt and the whole of the third debt, and on the same date as the deed in suit was executed Lal Singh also executed a mortgage deed in favour of Nandan Prasad to secure the payment of his share in these debts.

Grounds Nos. 4, 5 and 6 of the petition of appeal relate to the mutal arrangement between Darbari Singh and Lal Singh, but these grounds have not been pressed by the learned Counsel for the appellants as he admits that he is unable to show that the agreement entered into between Darbari Singh and Lal Singh by which the debts were divided was not in the interest of his clients. The only grounds taken on behalf of the appellants are that it has not been shown that the item of Rs. 21,500 was borrowed for legal necessity or antecedent debts, and that the interest charged in the mortgage-deed and allowed by the learned Subordinate Judge is excessive.

Out of the item of Rs. 21,500, Rs. 21,189 were actually paid into Court in satisfaction of the decree for foreclosure obtained by Thakur Chandrapal Singh against Thakur Darbari Singh and his son Surajpal Singh. It is to be noted that at the time this decree was obtained Jagatpal Singh, the other son of Thakur Darbari Singh, had not been born. The balance of the first item consisting of Rs. 250 and Rs. 61 was paid in cash by Nandan Prasad to Thakur Darbari Singh (see receipt Exhibit 7 on the file). The history of the debt of Rs. 21,189 is as follows. On the 12th of June 1902 Darbari Singh executed a mortgage deed in which he hypothecated joint family property in favour of one Shambhu Ratan for the sum of Rs. 9,139 8-0. Out of this sum Rs 6,312-8-0 were for paying off an earlier mortgage dated the 3rd of June 1898 and Rs. 2,827 were for payment of *bahi khata* debts. There is nothing to show how the debt to secure

which the mortgage of 1898 was given had originally been incurred. On the basis of his mortgage of 1902 Shambhu Ratan obtained a decree in 1906 against Darbari Singh and Surajpal, the only son of Darbari Singh who was then alive and who was impleaded under the guardianship of his uncle Lal Singh. The decree was for the sum of Rs. 13,592. On the 30th of December 1909 Darbari Singh executed another mortgage-deed in favour of Thakur Chandrapal Singh for the sum of Rs. 16,000, out of which the decree held by Shambhu Ratan was fully paid and the balance was appropriated towards payment of *bahi khata* debts. It was on the basis of this mortgage deed of the 30th of December 1909 that Thakur Chandrapal Singh on the 27th of June 1912 obtained the decree for foreclosure, the mortgage-debt having then amounted up to Rs. 21,189. That decree was obtained not only against Darbari Singh but against his son Surajpal under the guardianship of Lal Singh. The other appellant Jagatpal Singh was born after that decree had been obtained. The learned Counsel for the appellants would argue that though the decrees both of 1906 and 1912 were obtained not only against Thakur Darbari Singh but also against the only son of Thakur Darbari Singh who was then alive, the sons can in the present case challenge the validity of these decrees, but he can give no authority for this proposition. Even if we were to concede that in the present proceedings the validity of these decrees can be challenged, we are of opinion that the burden would be on the appellants to give at least *prima facie* evidence that the decrees were not binding upon them, and not a particle of such evidence has been produced. We are of opinion, therefore, that the learned Subordinate Judge was right in holding that the appellants cannot repudiate this debt.

The only question that remains is that of interest In the mortgage deed interest at the rate of 1·8 per mensem with yearly rests has been fixed and the learned Subordinate Judge has allowed interest at this rate. It is urged that there was no necessity to borrow it at such an excessive rate of interest and reliance is placed on the rulings in *Hurro Nath Pal Chowdhuri* v. *Randhir Singh* (1) and *Sarabjit Singh* v. *Gur Bakhsh Singh* (2). In our opinion there is no force in this argument. It is specially to be noted that the defendants appellants did not take this plea in their written statement and Darbari Singh pleaded that it had been agreed that though the rate of 1·8 per mensem should be entered in the deed, yet interest at the rate of 8 annas would be charged. We have no hesitation whatsoever in rejecting this plea of Darbari Singh as altogether false. It is in evidence that Darbari Singh had all along been borrowing money from Nandan Prasad at the rate of 1·8 per mensem and it is absurd to suppose that Nandan Prasad a money-lender, would be willing, when the debt had mounted up to such a large amount, to reduce his rate of interest to 8 annas. It is specially to be noted that no fraud or undue influence has even been alleged. The last date fixed for payment of the foreclosure decree was the 23rd December 1913. Darbari Singh himself admits that he vainly attempted to obtain a loan from many other persons and at the last moment applied to Nandan Prasad. Looking at the income of the property, even if we take that income to be the amount stated by the appellants themselves, the security offered by the property for such a large loan was inadequate. It is pointed out by the learned Counsel for the appellants that Darbari Singh had obtained previous loans from Shambhu Ratan at 6 annas per cent. per mensem and from the plaintiff Chandrapal Singh at 8 anras per cent. per mensem, but these loans were granted as far back as 1902 and 1909 when Darbari Singh was not nearly so heavily involved in debt and the mortgagees had ample security. There was further urgent need of obtaining the loan as had it not been obtained, the property would have been lost altogether to Darbari Singh and the appellants. Darbari Singh, though according to his own statement he made efforts to obtain a loan elsewhere, failed altogether to do so and as a last resort he approached Nandan Prasad, whose ordinary rate of interest not only for cash loans but also on mortgages was 1·8 per cent. per mensem, and Nandan Prasad advanced the money necessary on very poor security. Each case of this kind has to be considered on its own

(1) 18 C. 311; 18 I. A. 1; 15 Ind. Jur. 34; 5 Sar. P. C. J. 642; 9 Ind. Dec. (N. S.) 207.

(2) 36 Ind. Cas. 916; 19 O. C. 159.

merits, and we are of of opinion that in the present case we would not be justified in interfering with the contractual rate of interest.

The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1201 OF 1917.

September 10, 1919.

Present:—Mr. Justice Odgers.

GURUSWAMI PANDIYAN—APPELLANT—PETITIONER

versus

SENDATHI KALAI PANDIA CHINNA THAMBIRAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 1, 2, O. XL, r. 1—Temporary injunction, when to be granted—Receiver, appointment of, grounds for—Waste, proof of.

Proof of waste is a ground for the appointment of a Receiver. [p. 761, col. 1.]

In order to obtain an injunction or the appointment of a Receiver the applicant has to show that the property is in danger of being wasted or alienated and should be preserved from waste or alienation; but while in order to secure an injunction it is enough to show that the applicant has a fair question to raise as to the existence of the right alleged, the Court will not ordinarily appoint a Receiver while one party is actually in possession and an irreparable wrong may be done to him by the Court taking interim possession of the property. [p. 761, col. 1.]

Petition, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to appoint a Receiver for the suit properties pending disposal of Appeal No. 324 of 1918, preferred to the High Court against the decree of the Court of the Subordinate Judge, Tuticorin, in Original Suit No. 27 of 1914.

Messrs. *K. Rajah Ayyar* and *T. M. Ramasami Ayyar*, for the Petitioner.

Mr. *A. Krishnaswami Aiyar*, Mr. *C. A. Seshagiri Sastriar* for Mr. *A. S. Visuranatha Ayyar*, and Mr. *K. C. Gopala Desikan*, for the Respondents.

ORDER.—In this petition the appellant in Appeal No. 324 of 1918 on the file of this Court moves for the appointment of a Receiver for the properties of the Sivagiri Zamin, which are in the hands of the 1st respondent to the appeal as he has succeeded in the suit to establish his right to the Zamindary properties. The motion is based on three allegations of waste: (*i*) alienation of 114 *kotahs* of land at a gross undervalue, about 1/3th of their real worth, (*ii*) indiscriminate cutting of timber trees and (*iii*) removal of Melvaram paddy by the ryots. The matter was before their Lordships, the Chief Justice and Napier, J., in March of this year and they then decided that the appointment of a Receiver was, as things then stood, unnecessary and directed that 1st respondent should have possession of the plaint properties on furnishing security in 1½ (one and a half) lakhs of rupees, representing two years' income of the properties, the subject of the appeal. It was brought to the notice of their Lordships that the 1st respondent had entered into an agreement (Exhibit 45 in the case) to alienate 100 *kotahs* of land to various persons who were financing him in his litigation. The learned Chief Justice, however, remarked that the conveyance of the property had not then been carried out and might never take place. It is undisputed before me that not only has the conveyance of the 100 *kotahs* taken place but an additional 14 *kotahs* have also since been transferred. The 1st respondent only entered into possession of the property in March last in execution of the decree passed in his favour. Mr. A. Krishnaswami Aiyar, for the 1st respondent, offers to submit to a temporary injunction restraining the respondent from further alienating the corpus of the property pending the appeal, and the question is whether this is sufficient in the circumstances of this case.

As to the cutting and selling of timber, it is objected by the 1st respondent that the evidence of this is furnished largely by the very ryots who are responsible for the removal of the Melvaram crops. I am satisfied, however, on the affidavits that there is some ground for thinking that some timber may have been improperly cut and sold and the ordinary cutting of leased crops has been exceeded. As to the crops, any damage is amply covered by the security already furnished by the 1st respondent, and this point need not be considered,

Assuming that acts of waste have been proved by the alienations referred to and by the cutting and selling of timber trees, the question arises whether I ought in these circumstances to appoint a Receiver. Proof of waste is certainly a ground for such appointment. [Compare *Sivagnana-thammal* v. *Arunachalam Pillai* (1).] On the other hand, the distinction laid down in *Chandidat Jha* v. *Padmanand Singh Bahadur* (2) between the cases in which an injunction will issue and a Receiver be appointed is as as follows: "The distinction seems to be that while in either case it must be shown that the property should be preserved from waste or alienation, in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case a good *prima facie* title has to be made out." Here of course the respondent is in possession and his title has been established. In the leading case of *Owen* v. *Homan* (3) it is said "that where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant, in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation." In this case it is of course impossible to say that the petitioner (appellant) has a better *prima facie* title than the 1st respondent. See *Sivaji Raja Sahib* v. *Aiswariyanandaji Sahib* (4). I have, therefore, come to the conclusion that a Receiver should be refused, but a temporary injunction will be granted restraining the 1st respondent from making any further permanent alienation of the immoveable property belonging to the Zamin during the pendency of the appeal or until further orders. In my opinion the injunction should be extended to prevent him also from cutting or selling any trees except in the ordinary way by leasing crops or in the usual course of husbandry, for which, of course, the 1st respondent will continue to maintain accounts.

The petition is dismissed but without costs.

M. C. P.

Petition dismissed.

(1) 11 Ind. Cas. 870; 21 M. L. J. 821; 10 M. L. T. 420; (1911) 2 M. W. N. 75.

(2) 22 C. 459; 11 Ind. Dec. (N. S.) 307.

(3) (1853) 4 H. L. C. 997 at p. 1032; 17 Jur. 861; 1 Eq. Rep. 870; 10 E. R. 752; 91 R. R. 5 6.

(4) 29 Ind. Cas. 185; 29 M. L. J. 209; 18 M. L. T. 155.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 133 OF 1919.

July 4, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

BAIJ NATH—DEFENDANT—APPELLANT

versus

SHEORAJ SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow, mortgage by—Mortgagee, position of—Interest, high rate of—Reversioner, whether bound to pay stipulated rate of interest—Adverse interest, widow whether can set up—Widow, whether represents estate—Reversioner, whether bound by decree against widow.

A person who takes a mortgage from a Hindu widow ought to know that he is dealing with an individual who has ordinarily only a limited interest in the property which she proposes to mortgage, and if he charges a high rate of interest in consideration of the risk he incurs, that covenant cannot be enforced against the persons to whom the property ultimately goes after the death of the widow, even with regard to that portion of the consideration which may be found to be supported by legal necessity, unless the circumstances, attending the loan, indicate that the rate of interest charged was reasonable Ordinarily, 1 per cent. per mensem is a reasonable rate of interest in such cases. [p 763 col. 1.]

A Hindu widow cannot set up an adverse title against herself or do anything prejudicial to the interest of the reversionary heirs of her husband, so long as she remains in possession in succession to her husband. [p. 763, col. 1.]

A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to anything which she may have done herself to the prejudice of these reversionary heirs She represents the estate as against strangers for the purpose of protecting or preserving it Anything done by her for a purpose unconnected with the protection or preservation of the estate or without any legal necessity cannot bind the reversionary heirs of her husband. [p. 762, col. 2.]

BAIJ NATH *v.* SHEORAJ SINGH.

A decree obtained by a mortgagee against a Hindu widow alone, on the basis of a mortgage which is found not to have been made by her for legal necessity, cannot bind the reversioners. [p. 763, col. 2.]

Where a decree is obtained against a Hindu widow alone on the foot of a mortgage which is found to have been made by her partially for legal necessity, it is not equitable to make the reversioners of her husband liable to pay the costs of the mortgage suit to the extent of that amount of the mortgage money which was taken for legal necessity. [p. 763, col. 2.]

Appeal from the decree of the 2nd Additional District Judge, Lucknow, dated the 17th February 1919, modifying that of the Subordinate Judge, Unao, dated the 7th November 1918.

Pandit *Jagmohan Nath Ohak*, for the Appellant.

Syed *Ali Mohammad*, for Respondents Nos. 1 to 3.

JUDGMENT.—The dispute in this case relates to certain property which belonged to Debidin, who died some time in 1900, leaving a widow, *Musammat* Maharana. On the 31st July 1906 *Musammat* Maharana made a mortgage of 31 *bighas* 8 *biswas* of *sir* land in the village of Korari Kalan in favour of Jairam, the predecessor in-title of the defendant-appellant. The amount secured by the mortgage was Rs. 622, carrying interest at 2 per cent. per mensem compoundable half-yearly. On the death of Jairam there was a partition between the members of his family by virtue of which the mortgage bond in question was allotted to the share of Ganga Prasad. Ganga Prasad filed a suit for foreclosure on foot of the said bond and obtained a decree against *Musammat* Maharana on the 8th March 1912 (Exhibit A1). Subsequently Ganga Prasad sold his decree to the defendant appellant, who got it made absolute on the 17th January 1915.

In pursuance of that decree the defendant-appellant got possession of 9 *bighas* 5 *biswas* of land out of the entire property mortgaged, but by some inadvertence he was not given possession over the remainder of the property. *Musammat* Maharana died on the 20th March 1917. After her death the defendant appellant applied for the possession of the remaining property as against the plaintiffs-respondents, who are the reversionary heirs of her husband. The Court of first instance allowed the execution to proceed, but the lower Appellate Court postponed the decision till the determination of the present suit, which had meanwhile been filed by the plaintiffs-respondents for the recovery of possession of the said property over which the defendant-appellant was awarded possession.

The main question for determination in this suit was whether the mortgage effected by *Musammat* Maharana was made for legal necessity and, if so, to what extent. The Court of first instance found that the mortgage was made for legal necessity to the extent of Rs. 250-4-6 and that there was no necessity for borrowing the said money at a rate of interest higher than 2 per cent. per mensem. It allowed the plaintiffs-respondents a decree for possession accordingly, subject to the payment of Rs. 250 4-6 with simple interest thereon at 2 per cent. per mensem from the date of the mortgage till the 20th April 19 8, the date of the institution of the suit. The lower Appellate Court similarly came to the conclusion that Rs. 250-4-6 were taken for legal necessity, but it refused to allow the defendant appellant interest at a higher rate than 1 per cent. per mensem. The defendant has appealed and the plaintiffs have filed cross objections.

There is no reason, however, for interfering with the finding arrived at by the Court below as to the extent to which the mortgage was justified by legal necessity. One of the items allowed was taken for celebrating the fourth anniversary in connection with the death of Debidin. The other item allowed related to certain debts due by Debidin. The lower Appellate Court observes that the performance of the fourth death anniversary is considered to be of some importance in the caste to which the deceased belonged. The plaintiffs respondents cannot, therefore, escape responsibility from the payment of the said amounts.

The next question relates to the interest to which the defendant appellant is entitled. In view of the decision of their Lordships of the Privy Council in *Nawab Nazir Begam* v. *Rao Raghunath Singh* (1), where

(1) 50 Ind. Cas. 434; 17 A. L. J. 591; 36 M. L. J. 521; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. M. 498; 1 U. P. L. R. 49 (P. C.).

simple interest was allowed at 1 per cent. per mensem, there is no sufficient reason for interfering with the discretion which the lower Appellate Court has exercised. A person who takes a mortgage from a Hindu widow ought to know that he is dealing with an individual who has ordinarily only a limited interest in the property which she proposes to mortgage; and if he charges a high rate of interest in consideration of the risk he incurs, that covenant cannot be enforced against the persons to whom the property ultimately goes after the death of the widow, even with regard to that portion of the consideration which may be found to be supported by legal necessity, unless the circumstances, attending the loan, indicate that the rate of interest charged was reasonable. Between the 14th June 1905 to the 31st July 1906 Jairam advanced not less than three loans to *Musammat* Maharana on interest varying from 2 per cent. to 3·2 per cent. per mensem. He was apparently trying to use the situation to his best advantage and the plaintiffs-respondents cannot be reasonably expected to carry out a hard bargain, which he had succeeded in exacting from the lady.

It is urged on behalf of the defendant appellant that *Musammat* Maharana was in possession of 7 *bighas* 16 *biswas* of *sir* land under an oral gift said to have been made by Debidin in her favour. It appears that mutation of names was made in her favour in pursuance of the alleged oral gift on the 10th July 1895 (Exhibit A3). The possession of *Musammat* Maharana could not, however, be adverse, even if it existed, to the reversionary heirs, because Debidin died within 5 years of the date on which the mutation of names was effected and no registered document was executed to convey a title to the donee. On the death of Debidin the right of the heirs of Debidin to obtain possession vested for the time being in *Musammat* Maharana, who could not set up an adverse title against herself or do anything prejudicial to the interest of the reversionary heirs of her husband, so long as she remained in possession in succession to her husband. The defendant-appellant cannot, therefore, be allowed to justify the mortgage so far as it related to 7 *bighas* 16 *biswas* of *sir* land on the ground of an adverse title.

It is also urged on behalf of the defendant-appellant that the suit for foreclosure brought by Ganga Prasad against *Musammat* Maharana was practically a suit against the person who then represented the estate of Ganga Prasad, and a decree passed therein was binding on the plaintiffs respondents. But the widow cannot be deemed to represent the estate so as to bind the reversionary heirs of her husband in relation to anything which she may have done herself to the prejudice of the said reversionary heirs. She represents the estate as against the strangers for the purpose of protecting or preserving it. Anything done by her for a purpose unconnected with the protection or preservation of the estate or without any legal necessity cannot bind the reversionary heirs of her husband. The decree for foreclosure obtained by the defendant-appellant does not, therefore, bind the present plaintiffs respondents.

It is further urged on behalf of the defendant appellant that the costs of the suit for foreclosure ought to have been added to the amount for which the legal necessity was established. But as the legal necessity was only partial, it would not be equitable to add those costs to the mortgage money, particularly as the parties to the present case were not made parties to the suit for foreclosure and were given no opportunity of redeeming the mortgage.

The learned Counsel for the plaintiffs-respondents states that he does not press any cross objections other than those which have already been dealt with, but he wants that the interest should be further reduced. There is, however, no sufficient reason to justify a further reduction.

The appeal and the cross-objections are, therefore, dismissed with costs.

Appeal dismissed.

HABIBULLAH *v.* SOLEMAN QUADER.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 190 OF 1917.

June 6, 1919.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justite Walmsley.

Nawab Khajeh HABIBULLAH SAHEB AND OTHERS—DEFENDANTS—APPELLANTS

versus

Khajeh SOLEMAN QUADER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Wakf—*Family settlement by way of* wakf, *validity of*—*Test determining validity*—*Maintenance*—*Successive allowances in favour of unborn persons, validity of*—*Parties, whether can validate invalid* wakf—*Construction of document*—*Mussalman Wakf Validating Act* (*VI of* 1913), *whether retrospective.*

A *wakf* created before the passing of the Mussalman Wakf Validating Act, in which the gift to charity is illusory and in which the chief, if not the sole object of the settlor, appears to have been to create a settlement in perpetuity for the aggrandisement of the family, is invalid in law. The test to be applied in determining the validity of such a *wakf* is whether there is a substantial dedication of the property to charitable uses at some period of time or other. [p 766, col 2.]

Statutes which are properly of a merely declaratory character have a retrospective effect. But the nature of a Statute must be determined from its provisions, and the mere fact that the expression "it is declared" has been used is by no means conclusive as to the true character of the legislation. [p. 767, col 1.]

The Mussalman Wakf Validating Act is not a purely declaratory Statute and is not retrospective in operation. The language used in sections 3 and 4 of the Act leaves no room for doubt that the Legislature intended to make its provisions applicable only to *wakfs* created after the date of the enactment. [p. 767, col. 2.]

A scheme for the grant of maintenance allowances to the members of a family which is founded on and is intimately associated with *wakfs* that are invalid in law, cannot take effect. The assertion of the parties or their representatives cannot validate an illegal *wakf*, and the Court cannot be utilised for the enforcement of a scheme elaborately devised to carry out a plan of family aggrandisement under the colour of a *wakf* in contravention of the whole policy of the law. [p. 769, col. 1.]

Whenever a *wakf* is created, the ownership of the appropriator in the thing dedicated is extinguished and there is a detention of the thing in the implied ownership of God in such a manner that its profits may revert to or be applied for the benefit of mankind. Consequently it would be wrong to assume that a person creating a *wakf*, in which there is a provision for the maintenance of the members of his family, could ever have intended that such maintenance would be a charge upon the dedicated estate. [p. 769, col. 2.]

The creation of a succession of allowances for maintenance from generation to generation in favour of unborn persons, which are not charged upon an estate apart from a scheme of valid *wakf*, does not appear to be recognised by Muhammadan Law. [p. 770, col. 1.]

A well-known rule of construction of a document which offends against the rule against perpetuities is that the document is first to be construed without reference to the rule against perpetuities and then the validity of the disposition made by it is to be tested by the application of the rule. [p. 768, col. 1.]

Appeal against the decree of the Subordinate Judge, Dacca, dated the 16th April 1917.

Messrs. *B. Chakrabarti*, *Myers* and Babu *Surendra Nath Guha*, for the Appellants.

Sir *B C. Mitter*, Babus *Braja Lal Chakrabarti* and *Jatindra Nath Bose*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for recovery of money claimed for arrears of maintenance allowance and for the cost of construction of a house. The claim for allowance has been decreed by the trial Court, while the claim for cost of erection of the house has been dismissed. The plaintiffs have not preferred a cross-appeal with regard to the portion of the claim disallowed by the Court below, and we are consequently concerned in this appeal solely with the question of the validity of the claim for arrears of maintenance allowance. That claim is based on a document called a "deed of agreement" executed by the late Nawab Sir Asanulla of Dacca, father of the 1st defendant. A brief recital of the family history of the defendants and of the events which led up to the agreement in question is necessary for the appreciation of the questions in controversy between the parties.

Khaja Abdulla, who came from Cashmere, set up an extensive trading business in the town of Dacca, and settled there towards the end of the eighteenth century. He left four sons, Khaja Asanulla, Hafizulla, Khaja Abdul Azim and Khaja Abdul Karim. Hafizulla, after the death of his father, became the head of the family and died about the year 1831. He was succeeded by his son Abdul Gaffur who was followed by his cousin Alimulla, the son of Asanulla. On the 28th September 1835 this Alimulla made a gift of a sum of two lacs of rupees in favour of his son Abdul Gani, followed, on the

26th December 1845, by a deed of gift of valuable immovable properties. On the 8th May 1846 the other members of the family created a *wakf* of which Abdul Gani was made the *mutwalli*. This document recited that the custom of the family had been to appoint one of the members as the head, who granted allowances to the others and was accepted by them as the leader of the family; it was stated explicitly that the object of the *wakf* was the maintenance of the members of the family. It was also provided that the *mutwalli* would not be liable to be removed and would have authority to appoint his successor. On the 11th September 1868 Abdul Gani executed a *tuliatnama*, whereby he transferred the *mutwalliship* to his son Asanulla and also executed a deed of *wakf* whereof he appointed his son Asanulla as a *mutwalli*. The *wakf* was created "in favour of all his sons, offspring and all the members and relatives descended from his grandfather, and was descendible to children in the male and female lines, and on their failure, in favour of the *fakirs* and the poor indigent of Dacca." There can be no doubt as to the purpose of the *wakf*, because it was expressly recited that the *wakf* was created for the maintenance of the members of the family, generation after generation. To remove the possibility of all doubt on this point, the founder added:

"The object of the *wakf* of the properties is this, that they be protected from injury and ruin and that the name and dignity of the family be maintained and that the profits of the estate be, according to the practice and usage of the family, spent for the improvement of the position and dignity of the family, for the comfort and benefit of the persons in whose favour the *wakf* is made, and for the performance of worldly and religious affairs and of charitable acts."

Rules were laid down for the management of the *wakf* properties, for succession to the office of *mutwalli* and for other like matters, and there was a somewhat remarkable provision that none of the beneficiaries would be competent to demand accounts from the *mutwalli*. The *mutwalli* appears to have carried out the directions of the founder for many years. But harmony could not well be maintained for all time to come in an ever growing family, and on the 2nd September 1880 a suit was instituted by some of the members against Nawab Sir Abdul Gani and Nawab Asanulla. The plaintiffs repudiated the *tauliatnama* of 11th September 1868, and claimed to recover more than two lacs of rupees on settlement of accounts. Nawab Asanulla filed his written statement on the 1st December 1880, wherein he relied upon the *tauliatnama* and repudiated the claim for accounts as inconsistent with the rights created thereunder. The trial of the suit extended over many months, and judgment was reserved on the 11th August 1881. The friends and well wishers of the family (including the then Lieutenant-Governor and the District Judge), however, intervened with a view to bring about a settlement of the disputes. Their endeavours were successful, and on the 26th August 1881 an application was presented to the Subordinate Judge by the plaintiffs for leave to withdraw the suit without right reserved to institute a fresh suit on any cause of action which formed the subject-matter of the suit. This application was based on a memorandum of agreement executed on the same date (Exhibit 12), which was followed on the 17th September 1881 by a supplementary deed of agreement (Exhibit 11) specifying the amount of monthly allowance payable to each member of the family out of the income of the *wakfs* of 8th May 1846 and 11th September 1868, respectively. The application for withdrawal of the suit was accepted by the Subordinate Judge and the order for withdrawal was made on the 21st September 1881. The claim for arrears of maintenance allowance in the present litigation is based on the two documents just mentioned, dated 26th August 1881 and 17th September 1881.

The anticipations of the friends and well-wishers of the family for final settlement of all controversy were, however, not realised. In 1889 the decision of the Judicial Committee in *Mahomed Ahsanulla* v. *Amarchand Kundu* (1) negatived the validity of *wakfs* made in favour of the family

(1) 17 C. 498 (P. C.); 17 I. A. 28; 5 Sar. P. C. J. 476; 8 Ind. Dec. (N. S.) 871.

and descendants of a settlor without an ultimate substantial trust for the poor or for other religious or charitable purposes. The true position was made still clearer by subsequent judicial pronouncements, specially those in *Bikani Mia* v. *Shuk Lal* (2) and *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhury* (3). In these circumstances, legal advice was not difficult to obtain, and on the 2nd April 1894 Nawab Sir Abdul Gani instituted a suit against his son Nawab Asanulla and the other members of the family to test the validity of the *wakf* of 11th September 1868 and of the agreements of the 26th August and 17th September, 1881. The father of the present plaintiffs, who was one of the defendants in that litigation, repudiated the agreement as fraudulent. During the pendency of this suit, some of the other members of the family instituted a suit on the 17th September 1894 against Nawab Sir Abdul Gani, Nawab Asanulla and others for declaration of the invalidity of the *wakfs* of 1846 and 1868 and of the agreements of 1881, for accounts and possession, and for other incidental reliefs. Throughout these two litigations, questions were raised as to the title to the properties covered by the *wakfs*, and the suggestion was made that should the *wakfs* be pronounced invalid, the properties must be divided amongst the persons found entitled thereto. But neither of the two suits mentioned led to a decision on the merits. The suit instituted by Nawab Sir Abdul Gani was withdrawn on the 20th March 1895. The suit instituted by the members of the family abated by reason of the death of some of the numerous parties, and an order to that effect made by the lower Court on the 9th September 1907 was confirmed by this Court on the 4th August 1914. On the 19th November 1895 some of the members of the family instituted a suit against Nawab Sir Abdul Gani and Nawab Asanulla for partition and possession of all the family properties on the assumption that no valid *wakf* was in existence. On the 29th September 1896 Nawab Asanulla filed his written statement wherein he did not repudiate the challenge thrown against the *wakfs*, but claimed to be in possession of the properties comprised therein, subject to the true meaning and legal effect of the agreement for grant of maintenance. The issues were settled on the 3rd July 1899. But we are informed that the suit has never come on for trial by reason of the successive deaths of the numerous parties enrolled as plaintiffs and defendants. Meanwhile, as the plaintiffs allege, the Nawab has discontinued the maintenance, and they have instituted this suit for enforcement of their rights under the agreements to which they themselves were not parties. In fact, the plaintiffs were infants at the date of the institution of this suit and attained majority on the 21st September 1912 and 11th October 1913 during the pendency of the trial in the Court below; this shows that they were born sometime after the agreements of 1881, which is the foundation of their claim. The substantial matter in controversy thus is, whether there is a valid agreement enforceable at the instance of the plaintiffs. For the determination of this question, it is necessary to investigate two preliminary points, namely, *first*, are the *wakfs* valid in law? and *secondly*, if not valid in their inception, have they been validated by the Mussalman Wakf Validating Act, 1913.

As regards the first question, there has been no serious controversy between the parties in this Court that according to the decisions of the Judicial Committee the *wakfs* were invalid. The gift to charity was illusory and the chief if not the sole object of the settlor was to create a settlement in perpetuity for the aggrandisement of the family: *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhury* (3), *Mujibunnissa* v. *Abdur Rahim* (4), *Muhammad Munawar Ali* v. *Razia Bibi* (5). The test to be applied in cases of this character is, whether there is a substantial dedication of the property to charitable uses at some period of time or other [*Mahomed Ahsanulla* v. *Amarchand Kundu* (1)]; or as Lord Robertson put it in *Mujib-un-nissa* v. *Abdur Rahim* (4) the deed is a valid *wakf*, if

(2) 20 C. 116 (F. B.); 10 Ind. Dec. (N. S.) 79.

(3) 22 C. 619 (P. C.); 22 I. A. 76; 6 Sar. P. C. J. 572; 11 Ind. Dec. (N. S.) 412.

(4) 23 A. 233 (P. C.); 5 C. W. N. 177; 28 I. A. 15; 11 M. L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829.

(5) 27 A. 320 9 C. W. W. 625 (P. C.); 2 A. L. J. 513; 2 C. L. J. 179; 15 M. L. J. 261; 32 I. A. 86; 8 Sar. P. C. J. 788.

its effect is to give the property in substance to charitable uses; it is not so, if the effect is to give the property in substance to the testators's family: *Ramanadan Chettiar* v. *Vava Levvai Marakayar* (6). The first point must consequently be decided in the sense that the *wakfs* were not valid according to the rule laid down by the Judicial Committee.

As regards the second question, it has been contended on behalf of the plaintiffs-respondents that the Mussalman Wakf Validating Act, 1913, which received the assent of the Governor-General on the 7th March 1913, is a declaratory Act and is consequently retrospective in operation. It need not be disputed that Statutes which are properly of a merely declaratory character have a retrospective effect, because if the Statute is in its nature declaratory, the argument that it must not be so construed as to take away pre existing rights, ceases to be applicable: *Attorney-General* v. *Theobald* (7). But as was pointed out by Lord Halsbury, L. C., in the case of *Harding* v. *Commissioners of Stamps for Queensland* (8), the nature of the Statute must be determined from its provisions and the mere fact that the expression "it is declared" has been used is by no means conclusive as to the true character of the legislation. Tested in the light of this principle, what is the position in the case before us? The preamble states the object of the legislation, namely, that as doubts have arisen regarding the validity of *wakfs* created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes, it is expedient to remove such doubts. This, read by itself, is ambiguous, and may be taken either to include *wakfs* to be created in the future as also *wakfs* created in the past or to be limited only to future *wakfs*. These are the alternative constructions which can be applied to the preamble. Section 1 states that the Act may be called the Mussalman Wakf Validating Act, 1913. Section 3 then provides as follows:—"It *shall* be lawful for any person professing the Mussalman faith to create a *wakf*" (which fulfils certain specified conditions). Section 4 finally provides that "no such *wakf shall* be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purposes of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the *wakf*." The language used in sections 3 and 4 leaves no room for doubt that the Legislature intended to make the provisions applicable only to *wakfs* created after the date of the enactment. If the intention had been otherwise, language suitable for the purpose might easily have been used In the absence of clear provision to that effect, we cannot possibly hold that the Legislature intended to affect numerous titles which might have been accepted on the faith of the correctness of the law as expounded by the highest judicial tribunal in the Empire. The legislation in fact is not even in terms a purely declaratory Statute; in reality, it effects a vital alteration in the law. We are consequently unable to accept the contention that the Mussalman Wakf Validating Act, 1913, is retrospective in operation, and our conclusion is in harmony with that adopted in *Rahim-un-nissa Bibi* v. *Manik Jan* (9), *Muhammad Bukth Majumdar Ajmon Raja* (10), *Amir Bibi* v. *Aziza Bibi* (11), *Ramanadan Chettiar* v. *Vava Levvai Marakayar* (6). We hold accordingly that the *wakfs* under consideration, which were invalid in their inception, have not been validated by retrospective operation of the new legislation. This brings us to the fundamental point in the case, namely, the construction and legal effect of the agreements embodied in the deeds of 26th August and 17th September 1881.

As regards these agreements, we may state that in view of the invalidity of the *wakfs* which constitute the foundation of the entire transaction, an ingenious endeavour has been made on behalf of the res-

(6) 39 Ind. Cas. 235; 25 C. L J. 224; 40 M. 116; 32 M. L. J. 10; 15 A. L J. 139; 5 L. W 293; (1917 M. W. N. 190; 2 M. L. T. 2 5; 21 C. W. N. 521; 1 P. L. W. 394 19 Bom. L. R. 401; 44 I. A 21 P. C.)

(7) (1890 24 Q B. D 557; 62 L. T. 768; 28 W. R. 527.

(8) (1898) A. C. 769 at p. 775; 67 L. J. P. C. 144; 79 L. T. 42; 14 T. L. R. 438.

(9) 27 Ind. Cas. 93; 19 C. W. N. 76.

(10) 32 Ind. Cas. 701; 43 C. 559; 19 C. W. N 967.

(11) 26 Ind. Cas. 906; 16 Bom. L. R. 977; 39 B. 563.

pondents to put a forced construction on them not justified by the plain language of the documents. It is consequently useful to bear in mind a well known rule of construction of documents which offend against the rule against perpetuities, namely, that the instrument is to be construed without reference to the rule and then the validity of the disposition is to be tested by the application of the rule. See the observations of Baron Parke and of Patteson and Maule, JJ., in *Daungannon* v. *Smith* (12). Lord Selborne, L. C., emphasised the principle in *Pearks* v. *Moseley* (13) in the following terms: "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered or wrested to something different, for the purpose of escaping from the consequences of that law. So understanding the rule, the first question in every case of this kind is that of pure and simple construction - what is the meaning of the words ...used? What would their effect be if there was no law of remoteness?"

Let us now analyse the agreement which forms the foundation of the claim. The fundamental document of the 26th August 1881 consists of twenty paragraphs. The first paragraph provides for the re constitution of the suit then pending. The second paragraph provides that in the suit as reconstituted, all charges of fraud against the Nawabs and their ancestors shall be withdrawn. The third, fourth and fifth paragraphs provide that the signatories admit that the *wakfs* of 1846 and 1868 are valid and binding, that they have no interest in the properties in the possession of the Nawabs and that the lists appended to the document contain a complete enumeration of the properties included in the *wakfs*. The sixth paragraph recites that Nawab Asanulla as *mutwalli* under the two *wakfs* has increased the allowances of the various members of the family mentioned in the schedules, which give an exhaustive enumeration of all persons entitled to receive maintenance. The paragraph further states that the parties had agreed to the appointment of a committee of family members for the determination of the exact amount payable to each person. The seventh paragraph makes it obligatory upon Nawab Asanulla to execute a formal deed when the amount of allowances has been fixed by the committee. The eighth paragraph makes the debts of each member of the family payable by himself or recoverable in instalments from the allowance fixed for him. The ninth paragraph makes the allowances invarible for a period of twenty years from the 3rd September 1880 (the date of institution of the suit); on the termination of this period, the allowances would be revised by a committee of the family. The tenth paragraph provides for the payment of arrears of allowance. The eleventh paragraph is in these terms: "On the death of any member of the family in receipt of an allowance his or her allowance shall be distributed amongst his or her heirs and residuaries in proportions to be determined by the family Panchayet." The twelfth paragraph provides for expenditure by the *mutwalli* on occasions of family rejoicings and mournings, the amount to be fixed by the family Panchayet. The thirteenth paragraph relates to expenditure by the *mutwalli* for repairs to dwelling houses and for increased accommodation for members of the family, when deemed necessary by the family Panchayet. The fourteenth paragraph imposes on the *mutwalli* the obligation to provide medicines and medical attendance for members of the family, such as may be deemed necessary by the family Panchayet. The fifteenth paragraph provides that no *mutwalli*, present or future, shall stop the allowances fixed under clause (6) without "just cause" to be declared as such by the family Panchayet. The sixteenth paragraph pro-

(12) (1846) 12 Cl. & F. 546 at p. 578; 10 Jur. 721; 8 E. R. 1523; 69 R. R. 137.

(13) (1880) 5 App. Cas. 714 at p. 719; 50 L. J. Ch. 57; 43 L. T. 449; 29 W. R. 1.

vides for cases where the allowance of a member may be stopped for just cause, leaving it open to the *mutwalli* to grant a compassionate allowance to the offender and to pay the balance of allowance to members of the family dependent on the latter. The seventeenth paragraph provides that when the family Panchayet so determines, an allowance which has been stopped by the *mutwalli* shall be restored. The eighteenth paragraph defines the mode of constitution of the family Panchayet previously mentioned. The nineteenth and twentieth paragraphs provide for the withdrawal of the suit and for the payment of a sum of money by Nawab Asanulla to Ramkissen. The supplementary document was executed on the 17th September 1881 pursuant to the sixth paragraph of the memorandum of the 26th August 1881. It recites that a committee of family members had been constituted on the 30th August 1881, who had determined the allowance payable to each member of the family out of the *wakfs* of 1846 and 1868 respectively. Nawab Asanulla undertook to pay these sums within seven days from the beginning of each month, subject to the conditions set out in the original document which were briefly recited.

Such then is the substance of the scheme for the grant of maintenance allowance to members of the family. It is manifest that the scheme is founded on and is inseparably associated with the *wakfs* of 1846 and 1868; consequently, as soon as these *wakfs* are pronounced to be invalid and inoperative in law, the entire scheme must of necessity be shattered to pieces. The assertion of the parties or of their representatives cannot validate illegal *wakfs*, and the Court cannot be utilised for the enforcement of a scheme elaborately devised to carry out a plan of family aggrandisement in contravention of the whole policy of the law. In this view, a desperate effort has been made on behalf of the respondents to support the scheme as if it were not based on the *wakfs* of 1846 and 1868; but plainly it is not the function of the Court to reconstruct for the parties a plan of maintenance allowance out of the wreckage of the scheme they themselves had ingeniously but unsuccessfully devised. Besides, even if such an attempt were made, it could not possibly succeed, as the Court would have to support what was in disguise a scheme of family settlement which had failed because it was based on the illegal *wakfs*. In our opinion, there is good ground for the contention of the appellant that a scheme for family allowances so framed would itself be contrary to law. They have supported this argument by reference to the decision of the Judicial Committee in *Chandi Churn Birua* v. *Sidheswari Debi* (14), where a promise to make a future grant in favour of persons yet unborn was held to be an unenforceable contract. The same view was indicated by the Judicial Committee in *Raja Rajeswara Dorai* v. *Sundara Pandiyasami Tevar* (15), which affirmed the decision of the Madras High Court in *Rajaraieswara Dorai* v. *Sundarapandiyaswami Thevar* (16). In that case, the scheme for grant of maintenance in perpetuity was upheld, only because the maintenance was charged on the estate, and this accords with the earlier decisions of the Judicial Committee in *Narayana Ananga Garu* v. *Madhawa Deo Garu* (17) and *Mahomed Hossain Khan* v. *Mahamed Nehaluddin Khan* (18). In the case before us, however, the allowance payable to each member is not charged upon the estate; indeed, it could not be so charged, as the founders had made a permanent dedication of their properties for what, in their judgment, constituted purposes religious, pious or charitable. Whenever a *wakf* is created, the ownership of the appropriator in the thing dedicated is extinguished and there is a detention of the thing in the implied ownership of God in such a manner that its profits may revert to or be applied for the benefit of mankind. Consequently, it would be wrong to assume that the persons who created these *wakfs*, in the belief that the dedications were lawful, could ever have intended that a charge should be created on the dedicated estate for a purpose which was not religious, pious or charitable. We cannot hold accordingly that the eleventh paragraph of the memorandum of the 26th August 1881 created heritable

(14) 16 C. 71 (P. C.); 15 I. A. 149; 12 Ind. Jur. 329; 5 Sar. P. C. J. 231; 18 Ind. Dec. (N. S.) 47.

(15) 49 Ind. Cas. 704; 29 C. L. J. 551; 23 C. W. N. 549; 17 A. L. J. 153; 36 M. L. J. 164; 25 M. L. T. 400; 21 Bom. L. R. 885; (1919) M. W. N. 511; 42 M. 581; 10 L. W. 322 (P. C.).

(16) 27 Ind. Cas. 233; 27 M. L. J. 604.

(17) 16 M. 238 (P. C.); 21 I. A. 9; 17 Ind. Jur. 106; 6 Sar. P. C. J. 270; 5 Ind. Dec. (N. S.) 893.

(18) 13 C. L. R. 330; 10 I. A. 45; 4 Sar. P. C. J. 442; 9 C. 945 (P. C.).

interest ; on the other hand, it merely made provision for the grant of money allowances from generation to generation, the amount whereof could be varied by what was called the family Panchayet, and this appears to have been the view adoped by Petheram, C. J., and Ghose, J., in *Khaja Abdul Ahed* v. *Rajanikanta Chaudhri* (A. O O. No. 298 of 1891, decided on the 28th August 1892 unreported). But the creation of a succession of such allowances from generation to generation in favour of unborn persons, apart from a scheme of valid *wakfs*, does not appear to be recognised by Muhammadan Law [*Amtul Nissa Begam* v. *Mir Nurudin Hussein Khan* (19), *Moosbhai* v. *Yacoobbhai* (20), *Jainabai* v. *Sethna* (21), *Mahomed Ibrahim* v. *Abdul Latif* (22), *Mahomed Shah* v. *Official Trustee of Bengal* (23), *Humeeda* v. *Budlin* (24), *Nizam ud din* v. *Abdul Gafur* (25), *Tavakalbhai Sultanbhai* v. *Imtiyajbegum Mirbaresaheb* (26) *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (27)]. It follows that in 1881 the parties intended to make such arrangements alone as would be consistent with the theory of the existence of valid *wakfs* created in 1846 and 1868. The framers of the scheme could not have contemplated the creation of permanent charges on what they deemed to be endowed properties, and the respondents have been driven to take up that position, only by reason of the inextricable difficulty in which they have been placed by reason of the illusory nature of the *wakfs* themselves. In our opinion there is no escape possible from the position that as the *wakfs* have failed, the entire scheme for grant of maintenance allowances by the *mutwalli* from the income of *wakf* properties has been completely demolished.

The result is that the appeal is allowed and the suit dismissed with costs throughout.

Appeal allowed.

(19) 22 B. 489; 11 Ind. Dec. (N. s) 908.
(20) 29 B. 267; 7 Bom. L. R. 45.
(21) 6 Ind. Cas. 513; 34 B. 604; 12 Bom. L. R. 341.
(22) 17 Ind. Cas. 689; 37 B. 447; 14 Bom. L. R. 987.
(23) 2 Ind. Cas. 292; 36 C. 431.
(24) 17 W. R. 525.
(25) 13 B. 264; 13 Ind. Jur. 342; 7 Ind. Dec. (N. s.) 175.
(26) 39 Ind. Cas. 96; 41 B. 372; 19 Bom. L. R. 97.
(27) 11 M. I. A. 517; 10 W. R. P. C. 25; 2 Suth. P. C. J. 68; 2 Sar. P. C. J. 315; 20 E. R. 195.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 269 OF 1917.

July 3, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

MATHURA PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARAKH NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption, postponement of, effect of—Covenant to pay double the principal sum on redemption—Clog on equity of redemption—Court, power of, to give relief.

A covenant postponing the redemption of a mortgage till the lapse of a certain period is not by itself illegal, but where along with other circumstances its effect is to create an unreasonable and oppressive fetter on the right to redeem, a Court may allow redemption irrespective of that term on such conditions as it may deem fit to impose. [p. 770, col. 1.]

Where a usufructuary mortgage-deed contained a covenant, postponing redemption for 99 years and further requiring the mortgagor to pay double the amount of the principal money at the time of redemption, and it was found that the profits of the mortgaged property were very small:

Held, that the covenant operated as an unreasonable clog on the equity of redemption and could not be enforced except in so far as it allowed the mortgagee reasonable interest to make up the deficiency in the profits from the date of the mortgage till the date of redemption. [p. 771, col. 1.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 2nd April 1917, modifying that of the Subordinate Judge, Partabgarh, dated the 11th December 1916.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Syed *Ali Mohammad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption of a usufructuary mortgage effected by the plaintiffs in favour of Mathura Prasad on the 18th August 1914. The deed of mortgage provided that redemption shall take place after 99 years in the month of Jeth in the fallow season on payment of double the amount of the principal money secured by the mortgage irrespective of the profits realizable from the mortgaged property. The explanation for the covenant, entered in the deed, was that the profits of the mortgaged property were small.

The Courts below found that the covenant, by which the redemption of the mortgage was postponed for 99 years and the mort-

gagors were required to pay double the amount of the principal money, operated as an unreasonable clog on the equity of redemption and could not be enforced. A suggestion was made on behalf of the plaintiffs that the covenant had been obtained by undue influence, but the finding of the Courts below was that no exercise of undue influence was established. The only question for consideration in this appeal is whether the covenant, postponing redemption for 99 years and requiring the mortgagors to pay double the amount of the principal money, can be treated as valid and enforceable.

A covenant postponing the redemption of a mortgage till the lapse of a certain period is not by itself illegal, but where along with other circumstances its effect is to create an unreasonable and oppressive fetter on the right to redeem, a Court may, as pointed out in *Durga Singh* v. *Muhammad Raza Husain Khan* (1), allow redemption irrespective of that term on such conditions as it may deem fit to impose. The Courts below have not determined what the profits from the mortgaged property were. Surajbali, the Patwari of the village in which the property mortgaged is situated, states that the profits of the property do not exceed Rs. 90 per year. That being so, the importance of the covenant, requiring the mortgagors to pay double the amount of the principal money on redemption after 99 years, can easily be understood. The mortgagee cannot, however, be allowed to enforce the condition postponing redemption for 99 years with the covenant requiring the mortgagors to pay double the amount of the principal money, because the two covenants taken together may fetter the hands of the mortgagors to such an extent as to render redemption practically very difficult. The value of the mortgaged property may not amount to as much as double the amount of the principal money: and if redemption is postponed for that period, the mortgagors may not find it beneficial to redeem the mortgage at all. These covenants practically clog the equity of redemption and they cannot, therefore, be enforced except in so far as they allow the mortgagee reasonable interest to make up the deficiency in the profits. In *Miran Bakhsh* v. *Bajrang Bahadur Singh* (2) a covenant to pay half as much more as the amount of the principal sum secured by the mortgage was held to be valid. But in that case there was no covenant postponing redemption for an unduly long period. While the mortgagors can avoid these covenants, so far as they unreasonably fetter their right to redeem, the mortgagee cannot be deprived of the extra interest, which the deed of mortgage secured to him, in recognition of the deficiency in the profits. The deficit interest which the mortgagee was to receive for a period of 99 years was fixed at Rs. 2,200, or exactly double the amount of the principal money advanced. The mortgagee ought to get so much out of the same as would represent the deficiency for the period extending from the date of the mortgage to the date of redemption.

The appeal is, therefore, allowed and the claim of the plaintiffs decreed subject to the payment of Rs. 2,029-10-8 with such additional interest thereon as the defendants may be found entitled to from the date of the mortgage to the date of redemption calculating as if Rs. 2,029-10-8 had been stipulated to be made payable on account of interest for 99 years in addition to the profits. A decree will be framed in terms of Order XXXIV, rule 7 of the Code of Civil Procedure. Six months' time will be allowed for payment. In case of non payment the mortgagee will be allowed a decree for sale. The defendants-appellants will get their costs in the Court of first instance; but in this Court and in the lower Appellate Court the parties will bear their own costs.

Appeal allowed.

(1) 25 Ind. Cas. 912; 17 O. C. 313.
(2) 10 O. C. 214.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 1993 OF 1918.
August 22, 1919.
Present:—Mr. Justice Oldfield and
Mr. Justice Seshagiri Aiyar.
CHOWKARAN PAZHE PARAMBATH CHERIA KUNHI POCKER—DEFENDANT No. 2—APPELLANT
versus
CHOWKARAN PAZHE PARAMBATH MALIKAIAMMAL VALIA BAPPOLTY—PLAINTIFF—RESPONDENT.

Malabar Law—Tarwad—*Grant of* kanom *by* karna-

CHERIA KUNHI POCKER v. MALIKAIAMMAL.

van—*Payment of rent to transferee by tenants of* tarwad—Anandravan, *right of, to sue for possession, where transfer not binding on* tarwad—*Tenants, whether necessary parties*—Anandravan *alienee, position of.*

Where a *karnavan* of a Malabar *tarwad* grants a *kanom* which is found not to be binding on the *tarward*, and the tenants of the *tarwad* attorn to the alienee, an *anandravan* or a junior member of the *tarwad* has the right to sue for possession of the alienated properties on behalf of the *tarwad*, and his remedy is not confined to merely suing for a declaration [p. 773, col. 1.]

Receipt of rent is possession which can be recovered in a suit. Where tenants are in actual possession, rival claimants to the property can sue for possession without impleading the tenants as defendants. [p. 773, col. 1.]

Rathnasabapathi Pillai v. *Ramasami Aiyar*, 5 Ind. Cas. 630; 33 M. 452; (1910) M. W. N 112; 7 M. L. T. 311; 20 M. L. J. 201 and *Jayannatha Chary* v. *Rama Rayer*, 28 M. 238, applied.

Padammah v. *Themana Ammah*, 17 M. 232; 6 Ind Dec. (N. s) 160 and *Parakandyilparkum Kishakkayil* v. *Kilath Puthiya Purayil Ahmad*, 3 Ind. Cas. 41; 6 M. L. T. 157, distinguished.

The position of an *anandravan* who gets an alienation of the *tarwad* properties is not different from that of a stranger. If he ousts the *tarwad*, he may be sued by the other members just as if he was a stranger. [p. 773, cols. 1 & 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 699 of 1916, preferred against the decree of the Court of the Principal District Munsif, Tellicherry, in Original Suit No. 610 of 1913.

FACTS appear from the judgment.

Mr. *K. P. M. Menon*, for the Appellant.—The plaintiff's suit was unsustainable. The possession of the defendant must be treated as the possession of the Tarwad. If the Kanom is not binding on the Tarwad, the only remedy open to a junior member is to obtain a declaration to that effect. As a declaratory suit was barred, the plaintiff has adopted this device of suing for possession. See *Padammah* v. *Themana Ammah* (1) and *Parakandyilparkun Kishakkayil* v. *Kilath Puthiya Purayil Ahmad* (2).

An Anandravan who himself gets a Kanom and attornment from tenants stands in a different position from that of a stranger.

Mr. *C. Madhavan Nair*, for the Respondent.—The action has been rightly conceived. The alienation has been found to be not binding on the Tarwad, and the defendant alienee has been receiving rents from tenants. An Anandravan has certainly the right to secure possession on behalf of the Tarwad. Receipt of rent is possession. It is not necessary that a plaintiff should ask for physical possession to sustain an action for possession. The provision of Order XXI, rule 36, Civil Procedure Code, also supports this view.

The position of an Anandravan getting a Kanom is in no way different from that of a stranger. The only question is whether the alienation has injuriously affected the Tarwad and whether the Tarwad has been ousted.

The cases cited for appellant do not apply. In them there was no parting of possession.

JUDGMENT.—This is a suit by a junior member of a Tarwad who obtained permission to conduct the suit on behalf of all its members for possession of certain Tarwad properties. The predecessor of the present Karnavan, the 1st defendant, gave a Kanom in 1904 to the 2nd defendant under Exhibit X. Thereupon the tenants of the Tarwad attorned to the 2nd defendant and paid him rent. It was found by both the lower Courts that there was no consideration for the Kanom and that it is not binding on the Tarwad. The only ground urged by Mr. Menon in second appeal is that the possession of the defendant, if any, must be deemed to be possession of the Tarwad and that the only remedy open to an Anandravan under the circumstances is to sue for a declaration. He also contended that this is a subterfuge to evade the law of limitation as a suit for declaration would have been barred. Strong reliance was placed upon *Padammah* v. *Themana Ammah* (1) for this contention. There can be no doubt that, on the facts found by the lower Courts and accepted in second appeal by the High Court, that judgment was right. It was found in that case that the Karnavathi, although she executed certain deeds in favour of her daughters, did not part with possession of the alienated properties. There was no finding that the tenants paid any rent to the transferees. In these circumstances it was held that an Anandravan can secure the rights of the Tarwad by suing for a declaration without any consequential relief as to possession There are no doubt observations in that

(1) 17 M. 232; 6 Ind. Dec. (N. s.) 160.
(2) 3 Ind Cas. 41; 6 M. L. T. 157.

judgment about "unity of possession" and about the possession of the tenant being the possession of the Tarwad, etc. But they must be read with the facts of the case and do not support the contention that under no circumstances can a junior member of a Tarwad sue for possession if the Tarwad had parted with possession. The next case, *Parakandyilparkun Kishakkayil* v. *Kilath Puthiya Purayil Ahmad* (2), is clearly distinguishable from the present case. In that case what stood between the Tarwad and the 3rd defendant, the alienee, was a piece of paper under which no possession passed. The learned Judges must be taken to have held that this impediment in the way of the Tarwad, which might at any time endanger its rights, might best be removed by obtaining a declaration that the document was invalid. Neither of the two decisions quoted by the learned Counsel is authority for the broad proposition that a rightful owner can never sue for possession unless he wants physical possession. The acceptance of such a contention would mean that, in cases where tenants are actually in possession, rival claimants cannot seek to recover possession unless all the tenants are impleaded as defendants. Rule 36 of Order XXI, Code of Civil Procedure, to which Mr. Madavan Nair drew our attention, negatives this proposition. It has been held in *Rathnasabapathi Pillai* v. *Ramasami Aiyar* (3) that a receipt of rent by a trustee is possession which can be recovered in a suit. In *Jagannatha Charry* v. *Rama Rayer* (4) it was held that where tenants are actually on the land and the defendant collected rent from them, it was a matter to which the provisions of section 9 of the Specific Relief Act relating to possession applied. These decisions support the view taken by the Courts below that a suit like the present one is maintainable. Mr. Menon suggested that the position of an Anandravan who obtains a Kanom and gets attornment is different from that of a stranger. The character in which an alienee Anandravan holds possession will depend upon how far he ousts the Tarwad, and not upon whether he is a member of it or not. If the Tarwad is ousted then the possession of the ouster, whether he be a member of it or not, is as injurious to the Tarwad as ouster by a stranger and the member in possession must be sued as if he was a stranger. The principle is not inconsistent with the observations in *Padammah* v. *Themana Ammah* (1).

For these reasons the second appeal fails and must be dismissed with costs.

M. C. P.

Appeal dismissed.

(3) 5 Ind. Cas. 630; 33 M. 452; (1910) M. W. N. 112; 7 M. L. T. 311; 20 M. L. J. 301.

(4) 28 M. 238.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 74 OF 1918.

July 22, 1919.

Present :—Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.

Nawabzada Khajeh ATIKULLA AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Nawab Khajeh HABIBULLA—DEFENDANT—RESPONDENT.

Muhammadan Law—Wakf, *validity of*—*Admission of parties, effect of*—*Court, whether bound to enforce illegal transaction where parties do not object.*

Where the chief, if not the sole, object of a *wakf* is to create a settlement in perpetuity for the aggrandisement of the family of the testator, the deed of *wakf* is invalid and inoperative in law. To amount to a valid *wakf* there must be a substantial dedication of property to charitable uses at some period of time or other; where this is not so, the Court is not bound by the assumption of the parties as to the legality of the *wakf* and cannot be invited to adjudicate upon their claim in relation thereto. [p. 774, col. 1; p 775, col. 2.]

If the illegality of a transaction is brought to the notice of a Court, the Court will not assist the person invoking its aid, even though the defendant has not pleaded the illegality and does not wish to raise the objection. [p 774, col. 2]

Appeal against the decision of the Subordinate Judge, Dacca, dated the 21st January 1918

Babus *Gunada Charan Sen* and *Jatindra Nath Bose*, for the Appellants.

Messrs. *Lingford James* and *Myers*, Babus *Surendra Nath Guha* and *Pramatha Nath Banerjee*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of the office of Mutwalli and, as ancilliary thereto, for possession and control of the properties covered by a Wakf. The Wakf in question

was executed on the 8th May 1846, and it is alleged by the plaintiffs that the last Mutwalli, Nawab Sir Salimullah of Dacca, died on the 16th January 1915. They pray for reliefs in the alternative as follows: first, that the first plaintiff may be declared to be the Mutwalli appointed in accordance with the long-established custom and usage of the family and in conformity with the provisions of the deed of Wakf; secondly, if the Court should come to the conclusion that the first plaintiff has not been validly appointed Mutwalli, the Court may issue orders for the nomination and election of the Mutwalli by the members of the family and thereafter to appoint the person so nominated. The defendant denied the claim and alleged that he had been duly nominated and appointed Mutwalli by his father. The Subordinate Judge has dismissed the suit. He has found that Nawab Sir Salimullah appointed the defendant as his successor on the 8th January 1915, and the appointment was confirmed by him five days later. The Subordinate Judge has further held that this appointment was valid and operative and that the alleged election of the first plaintiff had no legal effect. On the present appeal, the plaintiffs have sought to impeach the conclusions of the Subordinate Judge upon all material points, but in view of the course we propose to adopt, we have not thought it necessary to hear them on the merits.

The deed of Wakf is, on the face of it, invalid and inoperative in law. The gift to charity was illusory, and the chief, if not the sole, object of the Wakf was to create a settlement in perpetuity for the aggrandisement of the family. The test to be applied in cases of this character is, whether there is a substantial dedication of the property to charitable uses at some period of time or other; the deed is a valid Wakf if its effect is to give the property in substance to charitable uses; it is not so, if the effect is to give the property in substance to the testator's family: *Mahomed Ahsanulla* v. *Amarchand Kundu* (1), *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhury* (2), *Mujib-un-nissa* v. *Abdur Rahim* (3), *Muhammad Munawar Ali* v. *Razia Bibi* (4) and *Ramanadan Chettiar* v. *Vara Lewai Marakayar* (5). This very document was under consideration in the case of *Habibullah* v. *Soleman Quader* (6), and the Court then came to the conclusion that as the gift to charity was illusory, there was no valid Wakf. We invited, however, the learned Vakil for the plaintiffs-appellants to address the Court on the question of the legality of the Wakf irrespective of the decision of this Court in the case last mentioned. But he conceded that in view of the long series of decisions of the Judicial Committee, any attempt to support the validity of the Wakf would be futile. He did not also dispute that the Musalman Wakf Validating Act of 1913 was not retrospective in operation and could not validate the Wakf which was invalid in its inception. He argued, however, that as in the Court below the parties had proceeded on the assumed basis that the Wakf was good and valid, this Court was not competent to determine whether this assumption was or was not well founded. He contended in substance that although we must examine the provisions of the instrument in order to determine the rights of the parties, yet we must not form an opinion as to its legality, even though on the very face of the document it was apparent beyond controversy that the object of the Wakf was a perpetual family settlement with an ultimate illusory gift to the poor We are clearly of opinion that this contention cannot possibly prevail.

It is well settled that if the illegality of a transaction is brought to the notice of the Court, the Court will not assist the person who invokes its aid, even though the defendant has not pleaded the illegality and does not wish to raise that objection. In support of this proposition, reference may be made to the decision of the Judicial Committee in the case of *Connolly* v. *Consumers*

(1) 17 C. 498; 17 I. A. 28; 5 Sar. P. C. J. 476; 8 Ind. Dec. (N. S.). 871.

(2) 22 C. 619 (P. C.); 22 I. A. 76; 6 Sar. P. C. J. 572; 11 Ind. Dec. (N.S.) 412.

(3) 23 A. 233; 28 I. A. 15; 5 C. W. N. 177; 11 M. L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829.

(4) 32 I. A. 86; 27 A. 320; 9 C. W. N. 625; 2 A. L. J. 513; 2 C. L. J. 179; 15 M. L. J. 261; 8 Sar. P. C. J. 788.

(5) 39 Ind Cas. 235; 40 M. 116; 25 C. L. J. 224; 21 C. W. N. 521; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 21 M. L. T. 215; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 (P. C.).

(6) 53 Ind. Cas. 764; 30 C. L. J. 102; 24 C. W. N. 18.

Cordage Co (7), where Lord Halsbury observed as follows: "Their Lordships entertain no doubt that it is the right and duty of the Court, at any stage of the cause, to consider, and, if it is sufficiently proved, to act upon, an illegality which may turn out to be fatal to the claim of either of the parties to the litigation." The Lord Chancellor added that "their Lordships did not doubt that the learned Judges who tried the case in the Court below had a right and that it was their duty, if they thought that the facts were established, to take care that the process of the Court should not be used for the purpose of establishing a claim that ought not to be permitted to be enforced in a Court of justice." In that case, however, as the Supreme Court of Canada had assumed the existence of an illegal conspiracy which had not been made the subject of investigation by the trial Court [*Consumers Cordage Co.* v. *Connolly* (8) per Girouard, J.], the Judicial Committee remanded the suit for a new trial, on the ground that a new point in appeal should not be allowed to be taken, if evidence could have been brought to affect it, had it been taken at the trial. The principle thus enunciated by the Judicial Committee has been repeatedly applied. Thus, in *Scott* v. *Brown* (9), a company promoter came into Court to enforce against his confederate a contract for purchase of shares at a fictitious premium. The contract was not sham, but it was part of a scheme, much favoured by company promoters, for deluding the public into thinking that there is a *bona fide* market for the shares. The plaintiff had to disclose the *turpis causa**, with the result that the Court of Appeal "drove him from the judgment seat." Lindley, L. J., observed with epigramatic severity, "I am quite aware it is very common, so is pocket picking," and rested his decision on the ground that no Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to its notice and if the person invoking its aid is himself implicated in the illegality. It matters not whether the defendant has pleaded illegality or whether he has not; if the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him. To the same effect are the decisions in *Gedge* v. *Royal Exchange Assurance Association* (10), *Royal Exchange Assurance Corporation* v. *Sjoforsakrons Aktiebolaget Vega* (11), *Thomas* v. *Dey* (12) and *Luckett* v. *Wood* (13). A similar view has been adopted in the Courts of the United States; thus in *Fabacher* v. *Bryant* (14), Miller, J., ruled that the Court, in aid of public policy and the law, will notice, irrespective of the pleadings, that the controversy submitted for adjudication grows out of illegal purposes or combinations, and when that illegality is manifested by the record, it is obligatory on the Court to dismiss the suit. If a contrary view were adopted as to the duty of the Court, the Court would have to assist a highwayman who might have the audacity to file a bill in equity for an account against his partner: *Everett* v. *Williams* (15); for the legend mentioned by Lord Kenyon, in *Ridler* v *Moore* (16), by Bacon, V. C., in *Ashhurst* v. *Mason* (17) and by Jessel, M. R., in *Sykes* v. *Beadon* (18) has turned out to be by no means apocryphal: See Note by Evans on Pothier on Obligations, Volume II, page 3.

We are of opinion that the Court is in no way bound by the assumption made by the parties as to the legality of the Wakf in question and cannot be invited by either of them to adjudicate upon their claim in relation thereto. Wakfs of this character have been pronounced invalid by the highest judicial tribunal in the empire as contrary to public policy, and this Court cannot with propriety declare, on the invitation of

(7) (1903) Beauchamp P. C. 49; 89 L. T. 347.
(8) (1903) 31 Canada Sup Ct. 244 at p 296.
(9) (1892) 2 Q. B 724; 61 L. J. Q B. 739; 4 R. 42; 67 L. T. 782; 41 W R 116; 57 J. P. 213.

*A base cause: a vile or immoral consideration. 39 Cyc.

(10) (1900) 2 Q. B. 214; 69 L. J. Q. B. 506; 82 L. T. 463; 15 T. L. R. 344; 5 Com. Cas. 229; 9 Asp. M. C. 57.
(11) (1902) 2 K. B. 384; 71 L. J. K. B. 739; 50 W. R. 694; 87 L. T 356; 18 T. L. R. 714; 7 Com. Cas. 205; 9 Asp. M. C. 329.
(12) (1903) 24 T. L. R. 272.
(13) (1908) 24 T. L. R. 617.
(14) (1894) 46 La. Ann. 820; 15 Southern 181.
(15) (1725) 9 L. Q. R. 197.
(16) (1797) Clifford Election Cases 371.
(17) (1875) 20 Eq. 225 at p. 230; 44 L. J. Ch. 337; 23 W. R. 506.
(18) (1879) 11 Ch. D. 170 at p. 195; 48 L. J. Ch. 522; 40 L. T. 243; 27 W. R. 464.

the plaintiffs, that one of them is the Mutwalli in respect of the Wakf and is entitled to invoke the assistance of the Court to place him in possession of properties for the furtherance of the objects of the Wakf.

The result is that the decree of the Subordinate Judge is affirmed, though not on the grounds assigned in his judgment, and the appeal is dismissed with cost.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 55 OF 1918.

April 10, 1919.

Present:—Mr. Daniels, A. J. C.

Musammat SUBHANI AND OTHERS—DEFENDANTS Nos. 11, 13, 16, 19 AND 21—APPELLANTS

versus

JAGDEO SINGH—PLAINTIFF,

NAGESHWAR PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Partition, private—Each co-sharer collecting his share of profits and paying revenue separately—Profits, liability for.

Where in a village there is a private partition in force, according to which each co-sharer collects profits to the extent of his share, and the parties have been paying their revenue separately, there can, as between the co-sharers, be no liability for profits, so long as this arrangement remains in force.

Appeal from the decree of the District Judge, Gonda, dated the 1st August 1918, modifying that of the Assistant Collector, Gonda, dated the 8th April 1918.

The Hon'ble Syed *Wazir Hasan* and Syed *Ali Mohammed*, for the Appellants.

Babu *Eisheshwar Nath Srivastava*, for Respondent No. 1.

Babu *Aditya Prasad*, for Respondent No. 2.

JUDGMENT.—This is an appeal in a suit for profits for the years 1322—1324 Fasli. The Assistant Collector found, and the finding is amply supported by the evidence on the record, that there is a private partition in force in the village according to which each co-sharer collects

to the extent of his own share. It appears also from the remand findings that the parties have been paying their revenue separately. The plaintiff's own witness admits that he collected up till the years in suit. As long as this arrangement remains in force, there can be no liability to profits. The learned District Judge disregarded it and remanded the case for a finding as to the actual amount collected by each co-sharer. The case in *Jokhu Singh* v. *Ran Autar Singh* (1) relied on by the respondent is clearly distinguishable. In my opinion the decree of the Assistant Collector was correct and I allow the appeal with costs and restore that decree.

As regards Nageshwar Prasad, objection is taken that he should not have been joined in the appeal. As all the co-sharers were concerned in the account, I am not prepared to hold this. Nageshwar Prasad will bear his own costs but will not be liable for costs of the appellant.

Appeal allowed.

(1) 11 O. C. 75.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 22-B OF 1918.

August 8, 1919.

Present:—Mr. Mittra, A. J. C., and Prideaux, A. J. C.

MOTIRAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ASARAM DECEASED, HEIRS RAMGOPAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by father—Suit on mortgage—Sons not made parties—Decree, whether binding on sons—Suit by sons to set aside decree—Plea that father was not competent to mortgage as property was under management of Collector, whether can be taken—Res judicata—*Civil Procedure Code (Act V of 1908), s. 11, Expl. IV, Sch III, para. 11.*

A transfer made in contravention of paragraph 11 of Schedule III to the Civil Procedure Code is void and of no legal effect. [p. 777, col. 2.]

MOTIRAM v. ASARAM.

R., the father and manager of a joint family consisting of himself and his three sons, mortgaged the entire family property to *A*. *A* brought a suit against *R.* on the basis of the mortgage and brought the property to sale in execution: to this suit the sons were not made parties. Shortly before the sale the sons instituted the present suit for a declaration that the mortgage and decree thereon were inoperative as the mortgage was executed when the property was under the management of the Collector, or in the alternative that the decree was not binding on the shares of the plaintiffs as the debt was not incurred for the benefit of the family:

Held, (1) that to the extent that the father represented the family, the decree was binding on the sons; [p. 778, col. 1.]

(2) that it was open to the father in the suit against him to plead that by virtue of paragraph 11 of Schedule III of the Civil Procedure Code he was incompetent to make the mortgage but as he did not do so, the sons were debarred under Explanation 4 of section 11 of the Civil Procedure Code from raising it, and obtaining a decision thereon in the present suit; [p. 778, cols. 1 & 2.]

(3) that the sons were entitled to have the question tried as to whether the mortgage executed by the father was binding upon them. [p. 778, col. 2.]

* Appeal against the decree of the Additional District Judge, East Berar, Amraoti, in Civil Suit No. 7 of 1917, dated the 21st December 1917.

Mr. *V. V. Chitale*, for the Appellant.

Mr. *M. V. Joshi*, for the Respondents.

JUDGMENT.—The facts of the case out of which this appeal arises are simple. Rajaram, defendant No. 2, who is the father of the three plaintiffs, mortgaged for Rs. 4,500 the joint ancestral property in suit to defendant No. 1 on the 26th April 1909. Civil Suit No. 169 of 1912 was instituted on the basis of this mortgage, but the plaintiffs were not made parties to it. The case was contested by defendant No. 2, but a preliminary sale decree was passed on the 11th March 1914 and a final decree on the 10th February 1915. A sale in pursuance of these decrees took place on the 31st August 1917, that is, a few months after the institution of the present suit.

One Vithal Sadashiv Karkare *alias* Bandunana obtained a decree against defendant No. 2 in Suit No. 191 of 1903. The execution of the decree was transferred to the Collector, who on the 8th October 1907 leased out the fields now in dispute, with the exception of Survey No. 424, to the judgment debtor, that is, defendant No. 2, for a period of twelve years from 1907 to 1919. The lease provided for payment of annual instalments, but in default of any single instalment the lease was to be void and the Collector was at liberty to resume possession and execute the decree in such manner as he thought fit.

The reliefs asked for in the present suit are: —

(1) a declaration that the mortgage deed dated the 26th April 1909 and the decree based upon it in Suit No. 169 of 1912 are both inoperative, as the mortgage was executed when the property was under the management of the Collector; or in the alternative

(2) that the decree does not bind the shares of the plaintiffs, as the debt was not incurred for the benefit of the family.

The suit was dismissed by the lower Court and the appeal has been filed by the plaintiffs.

It is now settled law that a transfer made in contravention of section 325 A of the Civil Procedure Code of 1832, which corresponds to paragraph 11 of Schedule III of the present Code, is void and of no legal effect whatever, as held by their Lordships of the Privy Council in *Gaurishankar Balmukund* v. *Chinnamiya* (1). It is admitted that the mortgage took place whilst the property was under the management of the Collector. Therefore, the mortgage was bad, except as to Field No. 434 which was not under the Collector's management at any time. The judgment debtor, however, was a lessee for twelve years. Rajaram as judgment-debtor was incompetent to mortgage the fields, but this disability did not extend to him in his capacity as lessee under the Collector. The lease has not been translated, and we do not know whether it provided for re-entry on the part of the Collector in the case of a transfer. Even if there is such a stipulation in the lease, it would not affect the power of defendant No. 2 to make a transfer binding him for the term of the lease, though it might be voidable at the instance of the lessor.

The main question for consideration, however, is the effect of the decree in Suit No. 169 of 1912. The Law of Mitak-

(1) 48 Ind. Cas. 312; 14 N. L. R. 181; 35 M. L. J. 733; 16 A. L. J. 998; 25 M. L. T. 64; 28 C. W. N. 350; 29 C. L. J. 20; 43 C. 183; 1 U. P. L. R. 14; 21 Bom. L. R. 541; 9 L. W. 327 (P. C.).

shara as interpreted in this Court regarding the power of a co-parcener to alienate his own share follows the rulings of the High Courts of Bombay and Madras. It has, therefore, not been contested before us that whatever may be the result of this litigation, the share of the father would pass to the auction-purchaser.

It is urged that as the plaintiffs were not parties to the former suit, they are not bound by the decree and can question the mortgage both as regards its validity and as regards its binding character so far as the plaintiffs' shares are concerned. It is, however, admitted that the father was the manager of the joint family consisting of himself and his three sons. The mortgage was of the entire family property and the suit was brought to enforce that mortgage not merely against the share of defendant No. 2 but against the whole family property. The suit was, therefore, brought against the father in his representative character. In such a case, as held in *Gore* v. *Kashiram* (2), the father represents the entire joint family and the sons cannot re-open the decree against the father, except on grounds personal to themselves, *e.g.*, that the debt for which the mortgage was given was not binding on them under Hindu Law. It is correctly pointed out on behalf of the appellants that in the case just cited the sons were seeking to redeem a mortgage already foreclosed in a suit against the father. In the present case they seek to impeach the validity of the mortgage as also its binding character so far as their shares are concerned. To the extent that the father represented the family the decree is binding on the sons. In Suit No. 169 of 1912 defendant No. 2 had set up a plea of repayment. This was expressly decided against him. It would not have been open to the present plaintiffs to re-agitate the same question. Similarly in regard to a plea that was open to the father equally with the sons, that is, a plea available to the joint family, whether expressly or constructively decided, the decision is binding on the sons. It was open to the father to have pleaded that he was incompetent to make the mortgage in view of the provisions of paragraph 11 of Schedule III of the Civil Procedure Code. Explanation 4 of section 11 bars the trial of that issue between the parties to the previous suit and their privies. The plaintiffs were represented by the father so far as this plea is concerned, and they cannot now be allowed to raise it.

The lower Court, however, is wrong in holding that the plaintiffs cannot question the binding character of the mortgage on their share. This is based upon a misreading of the case of *Gore* v. *Kashiram* (2). In *Nanomi Babuasin* v *Mothun Mohun* (3) Lord Hobhouse says:

"All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale."

We accept the appellants' contention that they are entitled to have the question tried as to whether the mortgage executed by the father was binding upon the sons.

On the evidence we have come to the conclusion that the mortgage was one binding on the entire family property and was justified by Hindu Law. There was a default in payment of the instalments due under the lease. This would have in all probability led to a sale of the fields by the Collector. Defendant No. 2 has been examined as witness in the case. Although he is trying to assist his sons, as would appear from an endorsement made by him on the summons, he is obliged to admit that he had to pay Vithal Sadashev, who had a decree against him for Rs. 4,500 (four thousand five hundred), and that he represented to defendant No. 1 that Rs. 4,000 (four thousand) was required to pay the decree-holder to get his property released. The mortgagee Asaram has also gone into the witness-box and he swears to these facts. He adds that the remaining sum of Rs. 500 (five hundred) was required by Rajaram for paying the Government assessment, and that after the payment it was treated as a *khata* debt.

(2) 18 Ind. Cas. 848; 9 N. L. R. 1.

(3) 13 C. 21 at p. 36 (P. C.); 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N.S.) 510.

The appellants, however, rely upon Exhibits P-3 and P-4 to impeach the testimony of Asaram. These are certified copies of depositions of Asaram. P-3 was his deposition in Suit No. 169 of 1912. No issue was raised in that suit regarding legal necessity. In cross-examination he says: "Why defendant borrowed Rs. 4,500 (four thousand five hundred) I cannot say. I do not know Bandunana." Bandunana is the *alias* of Sadasheo Karkare. The mortgagee might not have known why defendant borrowed Rs. 4,500, but he knew the representation that was made to him when the loan was asked. In point of fact the money was not eventually paid to Karkare. The deponent may not have known Karkare by the name of Bandunana. Exhibit P-5 is a copy of a deposition of Asaram in a criminal case under sections 467, 471 and 193 against Rajaram arising out of a receipt filed in Civil Suit No. 169 of 1912. Here the witness is recorded in the certified copy as having said that he did not know Vithal Sadasheo Karkun not Karkare. The discrepancy is capable of an explanation. When we have the testimony of the plaintiffs' father to corroborate the present deposition of Asaram, we feel justified in coming to the conclusion that the present testimony may be accepted as true. There are other witnesses who corroborate the story. The evidence regarding Rs. 500, (five hundred) is somewhat meagre, but on the whole we think Asaram's statement may be accepted as true. We, therefore, come to the conclusion that the father was justified in mortgaging the family property, inasmuch as there was legal necessity for the loan. The plaintiffs, we note, do not question the decree obtained by Karkare as constituting an antecedent debt of the father untainted by illegality or immorality. These are all the points argued before us.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 804 OF 1918.

May 23, 1919.

Present:—Justice Sir Asutosh Chaudhuri, KT., and Mr. Justice Cuming.

DAKSHAYANI DASSI—PLAINTIFF—APPELLANT

versus

AMRITA LAL GHOSE SARKAR—DEFENDANT—RESPONDENT.

Hindu Law—Will, construction of—Bequest of life-estate with remainder over, validity of—Hindu Wills Act (XXI of 1870), applicability of—Succession Act (X of 1865), ss. 100, 101, applicability of, to Will made before Act.

Section 100 of the Succession Act has no application to a Will made before the Hindu Wills Act came into operation, nor can section 101 of the Succession Act be invoked for the construction of Hindu Wills made before that section came into operation. By reason of the saving clause in the Hindu Wills Act, neither of the foregoing sections, though embodied in that Act, has any application to Hindu Wills. [p. 781, col. 2; p. 782, col. 1.]

A Hindu testator made a disposition of his properties in the following manner:—

(*a*) to his wife during her lifetime;

(*b*) on the death of his wife, to his daughter or daughters then living, during her or their lifetimes;

(*c*) on the death of his daughters, to his grandson or grandsons then living, during his or their lifetimes;

(*d*) on the death of his grandsons, to his younger brother and nephew, or on their death to their descendants in succession.

In the case of (*a*), (*b*) and (*c* the succession was not to be by right of inheritance, and in each case the properties were to be kept intact. The plaintiff, the widow of a grandson of the testator, brought the present suit, contending that the gift over to the brother and nephew of the testator was bad and inoperative, and that after the death of the testator's daughters, the estate vested absolutely in her husband and she was entitled to it as a Hindu widow:

Held, (1) that the bequest was not affected by the rule of remoteness and did not offend against the rule against perpetuities; [p. 782, col. 1.]

(2) that the husband of the plaintiff, who was in existence at the time the Will was made, though not specifically named therein, took only a life-estate under the Will; and that the remainder rightly vested in the brother and nephew of the testator. [p. 782, col. 1.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 29th January 1918, reversing that of the Munsif, 2nd Court at Hooghly, dated the 26th June 1915.

FACTS appear from the judgment.

Dr. *Dawarkanath Mitter* (with him Babu *Monindra Nath Banerji*), for the Plaintiff-Appellant.—The whole case turns upon the construction and legal effect of a certain Will of one Nobokrishna Ghosh. The plaintiff is the widow of Nibaran Chandra Sur, who was the son of Kurani—the widowed daughter of the testator. Kurani died in 1304 and Bhuban Mohini, the second daughter of the testator, died childless in 1305. Clause 4 of the Will, which purports to be a gift over to the brother and nephew of the testator after the death of his grandsons, is bad in law and so inoperative. I submit that after the death of the two daughters of the testator, the estate vested absolutely in the plaintiff's husband and she is entitled to it as a Hindu widow. Clause 4 is bad for remoteness. The learned Judge has misconstrued clause 3 by saying that the bequest to testator's grandsons was not wholly void but was operative so far as Nibaran—plaintiff's husband—was concerned. Nibaran took an absolute estate. Moreover, section 100 of the Succession Act militates against the provision of bequests in favour of the testator's grandson or grandsons. By gift over the vesting of the estate is postponed beyond a life and the attainment of majority by a possible minor. The bequest offends against the rule of perpetuities. Refers to *Sivasankara Pillai* v. *Soobramania Pillai* (1) and *Khimji* v. *Morarji* (2), *Chandi Churn Barua* v. *Sidheswari Debi* (3).

Babu *Shib Chandra Palit*, for the Defendant-Respondent.—The lower Appellate Court was quite right in its construction of clause 3 of the Will. The primary intention of the testator must be looked to. It does not at all matter that Nibaran has not been specifically mentioned. The testator clearly meant him as he was in existence at the time the Will was made. Refers to *Rai Bishen Chand* v. *Amaida Koer* (4), *Bhagabati Barmanya* v. *Kali Charan Singh* (5), *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (6). As the Will was made before the Hindu Wills Act was enforced, so the argument as regards section 100 of the Succession Act does not apply. There is nothing in the Will which can be attacked on the ground of remoteness or offending against the law of perpetuities, as the intention of the testator is clear. Refers to *Bhagabati Barmanya* v *Kali Charan Singh* (7), *Advocate-General* v. *Karmali Rahimbhai* (8). The secondary intention of the testator was that Nibaran, who was alive at the time of the Will and the death of the testator, was to take and all that he took was only a life-estate under the Will.

Dr. *Mitter* replied.

JUDGMENT.—This appeal relates to the construction of the Will in suit. The testator Nobokrishna Ghose died in Aghran 1268. At the date of the Will and of the testator's death his family consisted of his wife, Sreemati Dasimoni Dasi, and two daughters, Kurani, a widow, and Bhuban Mohini Dasi, a married woman whose husband was then living. Kurani had a son of the name of Nibaran Chandra Sur then living, the husband of the plaintiff in the suit out of which this appeal arises. There were also living at that time the testator's younger brother Ramratan Ghose and his nephew Harish Chandra Ghosh, son of a predeceased brother Iswar Chandra Ghose. The Will recites that the testator was in joint possession of his landed and ancestral properties with his co-sharers, referring to his brother and nephew. The following are material portions of the Will:

"I have my wife Sreemati Dasimoni Dasi and my two daughters, of whom the first, Kurani Dasi, is a widow and has a son named Nibaran Chandra Sur living, and the second, Bhuban Mohini Dasi, has her husband living, and is likely to have sons born to her. Now, while in full possession of my senses, I make the following disposition of my properties.

1. After my death my wife Sreemati Dasimoni Dasi shall possess my properties, but not by right of inheritance. She shall

(1) 31 M. 517; 4 M. L. T. 303.
(2) 22 B. 533; 11 Ind. Dec. (N. s.) 936.
(3) 16 C. 71 (P. C.); 15 I. A. 149; 12 Ind. Jur. 329; 5 Sar. P. C. J. 231; 8 Ind. Dec. (N. s.) 47.
(4) 6 A. 560; 11 I. A. 164; 4 Sar. P. C. J. 512; 3 Ind. Dec. (N, s.) 861.
(5) 10 Ind. Cas 641; 38 C. 468; 21 M. L. J. 387; 15 C. W. N. 393; 9 M. L. T. 411; 13 C. L. J. 434; 8 A. L. 433; 13 Bom. L. R. 375; (1911) 2 M. W. N. 295; 38 I. A. 54 (P. C.).
(6) 24 C. 643; 1 C. W. N. 573; 12 Ind. Dec. (N. s.) 1100.
(7) 32 C. 993; 1 C. L. J. 483 (F. B.); 9 C. W. N. 749.
(8) 29 B. 133; 6 Bom. L. R. 601.

enjoy the properties during her lifetime, keeping them as they are.

2. After the death of my wife my daughter or daughters whoever among them may be alive, whether with or without sons, shall possess my properties, but not by right of inheritance. She or they shall enjoy the properties during her or their lifetime, keeping them intact.

3. After the death of my daughters my grandson or grandsons, whoever among them may be alive, shall possess my properties, but not by right of inheritance. He or they shall enjoy the properties during his or their lifetime, keeping them intact.

4. After the death of my grandsons all my properties will go to my father's family, that is to say, my younger brother Ram Ratan Ghose and my nephew Harish Chandra Ghose, son of the deceased brother Iswar Chandra Ghose or, on their death, their descendants shall succeed to my properties and the same shall be enjoyed by them and their descendants in succession."

The plaintiff is the widow of Nibaran Chandra Sur who died in 1312 B S. Kurani died in 1304 and Bhuban Mohini in 1305, childless. The plaintiff contends that the gift over to the brother and nephew in clause 4 is bad and inoperative and, therefore, after the death of the testator's daughters the estate vested absolutely in her husband Nibaran Chandra Ghose, and she is now entitled to it as a Hindu widow. The learned Subordinate Judge held that the bequest to the testator's "grandson or grandsons" in clause 3 was not wholly void as a bequest to a class, but was operative so far as Nibaran was concerned having regard to the Privy Council decisions in *Rai Bishen Chand* v. *Amaida Koer* (4) and *Bhagabati Karmanya* v. *Kali Charan Singh* (5) and the decisions of the High Court in *Ram Lal Sett* v. *Kanai Lal Sett* (9) and *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (6), inasmuch as the primary intention of the testator was that his daughter's son who was in existence and such other daughter's son who might be born afterwards should take equally, and that his secondary intention was that the grandson, namely the plaintiff's husband, who was then in existence and, therefore, capable of taking, should take. It has been argued that the learned Subordinate Judge has erred in so construing clause 3. No doubt in that clause Nibaran has not been specifically named, but there is no doubt whatsoever that by the expression "my grandson or grandsons" he was referring to his grandson Nibaran who was in existence at the time the Will was made. The testator referred to "grandsons" as he contemplated the possibility of sons being born to Bouban Mohini. We do not think there can be any doubt whatever, upon the authorities referred to, that Nibaran Chandra Sur took a life-estate under the Will.

It is next argued that the bequest in favour of the testator's grandson or grandsons is void in view of section 100 of the Succession Act. The Subordinate Judge rightly held that as the Will in question was made before the Hindu Wills Act came into operation that section had no application. It appears to have been argued before the learned Subordinate Judge that the gift over in this case was bad having regard to section 101 of the Succession Act, and it is now argued that the gift over in clause 4 is not operative as it is said to be too remote and offends against the rule of perpetuities. It is argued that the gift over, having regard to clause 3 which speaks of a gift to grandson or grandsons then unborn, may delay the vesting of the estate beyond the lifetime of one or more persons living at the testator's decease and the minority of some persons who may be in existence at the expiration of that period. This argument overlooks what the section requires. It says: "No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some persons who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong." Here the thing bequeathed was to take immediate effect after the death of the daughters and Nibaran and other grandsons, if any, were to take at the same time. No vesting is postponed beyond a life and the attainment of majority of a possible minor. Section 101 by itself does not apply to this Will, as it

(9) 12 C. 663; 6 Ind. Dec. (N. S.) 450.

was made before the Hindu Wills Act. But it has been argued that the rule of perpetuities is operative as a matter of public policy even in respect of Wills made before the enactment. That may be so, but section 101 lays down a special rule and it differs from the English law on the subject. There is no reason why it should be invoked for the construction of Hindu Wills made before that section came into operation.

It was held in *Ram Lall Sett* v. *Kanai Lall Sett* (9) by Wilson, J., that it was settled law having regard to the decision in *Alangamoniori Dabee* v. *Sonamoni Dabee* (10) that by reason of the saving clause in the Hindu Wills Act neither section 100 nor section 101 of the Succession Act, though embodied in the Hindu Wills Act, had any application to Hindu Wills.

In *Bhagabati Barmanya* v. *Kali Charan Singh* (7) all these cases and *Leake* v. *Robinson* (11) were elaborately discussed. In that case the primary intention of the testator was, as found by the learned Judges, that all his nephews then born and those who may be born afterwards should take equally but those that had then been born were the immediate objects of his affection and bounty, and the idea must have occurred to the testator that if any other nephews were not born those who were then in existence, though not specifically named, should take the whole of the estate. They followed *Ooleman, In re* (12) and the *Advocate-General* v. *Karmali Rahimbhai* (8). The observations made in that case apply to the case before us.

We are of opinion that the bequest in this case is not affected by the rule of remoteness as applied in England and it does not offend against the law as to perpetuities. The secondary intention of the testator was that Nibaran, who was alive at the time of the Will and the death of the testator, was to take and all that he took under the Will was a life-estate and the remainder has rightly vested in the defendants. The Privy Council has upheld and approved the general rule of construction which was held applicable to Hindu Wills in *Ram Lal Sett* v. *Kanai Lall Sett* (9), and it has also affirmed the decision of the High Court in *Bhagabati Barmanya* v. *Kali Charan Singh* (7). They said that the principle enunciated in *Leake* v. *Robinson* (11) was sought to be introduced in India owing to a mistaken analogy and approved of the observations made in *Ram Lal Sett* v. *Kanai Lall Sett* (9). In this connection *Bhoba Tarini Debya* v. *Peary Lall Sanyal* (6) may also be referred to. *Sivasankara Pillai* v. *Soobramania Pillai* (1) has no application to this case. There was no gift to a grandson in that case. The testator there empowered the executor to divide his property into five shares as he had five sons and to deliver the shares to the grandsons in the case of sons with male issue, and in the case of sons without male issue to the sons themselves when the grandsons may attain their age. In that case the learned Judges held that section 101 was applicable, inasmuch as the distribution in that case was to take place only after all the sons who might be born to the sons of the testator had attained their majority.

In *Khimji* v. *Morarji* (2) the learned Judge deduced the following propositions from *Ram Lall Sett* v. *Kanai Lall Sett* (9) and other similar cases that "it is the primary duty of the Court so to construe a Will as to carry out, as far as possible, the intentions of the testator, and that if the Court comes to the conclusion that the testator had the primary intention of benefiting all the members of a class and if such intention fails by reason of its being void, yet if the Court could deduce a secondary intention that at least such members of the class should take as were in existence at the time of the testator's death, then effect should be given to such secondary intention". In adopting that test he came to the conclusion that in the case before him the testator intended to benefit all the members of certain classes and that he had no intention of benefiting any particular members of any of the classes in the event of the gift to the classes as a whole failing by reason of the non-existence of some of the members at the time of the testator's death. That case, therefore, has no application here.

(10) 8 C. 637; 10 C. L. R. 459; 6 Ind. Jur. 576; 4 Ind. Dec. (N. S.) 409.
(11) (1817) 2 Mer. 363; 16 R. R. 168; 35 E. R. 979.
(12) (1876) 4 Ch. D. 165; 46 L. J. Ch. 33.

INDI v. GHANIA.

Chandi Churn Barua v. *Sidheswari Debi* (3) also has no application. It was there held that the manifest purpose of the deed under construction was to fasten upon the grantor and his successors in the Raj a perpetual duty of giving, in some way or other, the means of maintenance to all the descendants of four persons who were in life at its date. It did not directly impose an obligation of that singular and unprecedented description; but on the failure of the then Raj, at any future time, to maintain these descendants, however numerous, the latter were to have immediate right to four of the donor's villages, which thenceforth were not to "appertain to his kingdom". That is altogether a different case from the present one.

We agree with the learned Subordinate Judge in his conclusions and dismiss the appeal with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 481 OF 1919.

June 11, 1919.

Present :—Mr. Justice Dundas.

Musammat INDI AND ANOTHER—DEFENDANTS —APPELLANTS

versus

GHANIA—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Guardianship—Minor—Mother, right of —Remarriage, effect of—Welfare of minor—Grandfather, whether can be appointed guardian in presence of mother—Right of mother to effect marriage of her daughter in presence of paternal grandfather.

Under Hindu Law the mother is, after the father, the natural legal guardian of her minor daughter and she does not lose her right by remarriage in any case when such remarriage is recognized as valid by custom. [p 783, col. 2.]

Unless it can be shown that the welfare of a female minor is being neglected by the mother, it is not permissible to appoint the paternal grandfather as guardian of the person of the minor and to allow him to remove the girl from the custody of the mother. [p. 784, col. 1.]

A Hindu mother can effect a valid marriage for her daughter even in the presence of the paternal grandfather. [p. 784, col. 2.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 4th January 1919, affirming that of the Senior Subordinate Judge, Hoshiarpur, dated the 3rd August 1918, decreeing the claim.

Sardar *Sewa Ram Singh*, for the Appellants.

Mr. *H. D. Bhalla*, for the Respondents.

JUDGMENT.—The case will be the clearer by a reference to the genealogy below :—

TEHLA

Sister of Suba	= Ghania, plaintiff	Suba,
Labhu (1)	= *Musammat* Indi, defendant	= (2)—Ganda defendant.

Musammat Banti, defendant.

The parties are Hindu Jats of the Hoshiarpur District.

The defendant, *Musammat* Indi, was first married to Labhu by whom she had a daughter, *Musammat* Banti.

On Labhu's death some thirteen years ago she remarried Ganda, taking her infant daughter with her, and the girl has lived with her mother in Ganda's house for twelve or thirteen years.

A suit has now been brought by the girl's paternal grandfather, Ghania, for a declaration that he has a prior right to *Musammat* Indi to give *Musammat* Banti in marriage; he has also applied to be appointed guardian of the person of *Musammat* Banti and has been successful in both proceedings, whilst *Musammat* Indi's appeal in the declaratory suit has been dismissed by the learned District Judge.

Musammat Indi has again appealed to this Court both in the suit and in the guardianship proceedings.

The parties are Hindu Jats and the decision should follow their custom if any definite custom can be ascertained, failing which it is permissible to fall back on their personal law.

Now there can be no doubt that under Hindu Law the mother is, after the father, the natural and legal guardian of her minor daughter and she does not lose her right by remarriage in any case where such remarriage is recognised as valid by custom [Mayne's Hindu Law, 8th Edition, page 276; Ram Krishna's Hindu Law, Volume II, pages 406-407, *Nur Bibi* v.

Mehran (1) and *Ganga Prasad* v. *Ramasrey* (2)].

This proposition is supported by much authority and is hardly open to question, whilst among Jats the custom of the remarriage of widows is certainly common and the validity of *Musammat* Indi's marriage to Ganda has not been denied.

Unless, therefore, it can be shewn that the welfare of the minor is being neglected by her mother, it certainly does not appear to be permissible to appoint the grandfather as guardian of the person of the minor and to allow him to remove the girl from the custody of her mother.

The rule that the mother or a maternal grandmother has the better title to the guardianship of a girl has been followed in many published decisions, *e. g.*, *Fatima* v. *Rani* (3), a case from Delhi, and *Ambo* v. *Ganga Sahai* (4), a Punjab case, where the maternal grandmother was preferred to the father's father, and *Bindo* v. *Sham Lal* (5) where the maternal grandmother was preferred to even the father.

As there does not appear to be any reason to suppose that *Musammat* Indi is neglecting the welfare of her daughter, it follows that the order of the Senior Subordinate Judge appointing Ghania as guardian of the person of *Musammat* Banti is not maintainable and must be set aside.

To turn to the question of the right of the grandfather to give the girl in marriage.

In the judgment of the learned District Judge some expressions appear from which it might be inferred that before him the original preferential right of the grandfather to select a husband for the girl was admitted.

Nevertheless the grounds of appeal in the District Court go so far as to deny the grandfather's right and in the grounds preferred to this Court it is not admitted: whilst in argument it is contended that in any case the grandfather has entirely neglected his grand daughter until the time when he thinks that he can derive some personal advantage from her disposal in marriage, that he is not interested in her welfare and has, therefore, forfeited his right, even supposing that any such right ever existed.

The text on which the grandfather's claim might be based is given in Mayne (8th Edition), page 101: "A father shall give his daughter in marriage himself or a brother with the father's consent or a grandfather, maternal uncle or relatives. In default of all these the mother, if she is qualified."

The view has, however, been taken in Madras that the object of placing the male relation before the mother was merely to supply that protection and advice which the Hindu system considered to be necessary on account of the dependant condition of women, which dependence has now practically ceased to be enforced by the law.

In a recent decision the text has been discussed, and the conclusion arrived at that the mother is entitled to so decided a voice in the selection of the bridegroom that she can effect a valid marriage for her daughter even in the presence of the paternal grandfather, and even though it be not shewn that he has neglected his duties [*Ranganaikammal* v. *Ramanuja Aiyangar* (6)].

In Bombay the view has been taken that the text refers to the ceremonial duties at the girl's marriage, which are laid upon the paternal relatives as a matter of duty and which are not ordinarily to be performed by a woman.

In the selection of the bridegroom, which is a different matter, the mother must be consulted; and the text inculcates on the paternal relative a duty, but does not confer a right [*Bai Ramkore* v. *Jamnadas Mulchand* (7)].

In the Punjab it has been held that the mother alone can effect a valid marriage of her daughter [*Maya Devi* v. *Ram Chand* (8)].

(1) 44 P. R. 1887.

(2) 10 Ind. Cas. 69; 38 C. 862; 15 C. W. N. 579; 13 C. L. J. 558.

(3) 28 Ind. Cas. 507; 101 P. L. R. 1915; 36 P. W. R. 1915.

(4) 18 Ind. Cas. 141; 44 P. W. R. 1913; 193 P. L. R. 1913.

(5) 29 A. 210; 4 A. L. J. 22; A. W. N. (1907) 24.

(6) 11 Ind. Cas. 570; 35 M. 728; 21 M. L. J. 600; 10 M. L. T. 57; (1911) 2 M. W. N. 285.

(7) 17 Ind. Cas. 95; 37 B. 18; 14 Bom. L. R. 765.

(8) 31 Ind. Cas. 184; 20 P. R. 1916; 177 P. W. R. 1916.

and in Bombay that a marriage so performed is not invalidated even by the absence of the father's consent [*Mulchand* v. *Bhudhia* (9)].

The authorities quoted above certainly do not lead to the conclusion that the text must be interpreted as conferring a right on the grandfather to dispose of the girl in marriage in opposition to the wishes of the mother and although there is a judgment in the Punjab [*Narain Das* v. *Musammat Gurdevi* (10)] to the effect that the mother is not entitled to entirely disregard the wishes of her husband's collaterals, this was a limitation placed on the view expressed by the local commissioner that the mother has full authority.

It is at least difficult to see why a girl should be liable to be taken away from her natural guardian and disposed of by a possibly distant kinsman, and there does not appear to be any judicial authority for this view, at least none has been quoted.

In the absence, therefore, of any great preponderance of evidence proving a custom to the contrary, the conclusion from judicial decisions would appear to be that the mother has a preferential right to select a bridegroom or at least that the grandfather cannot dispose of the girl in opposition to her wishes. From this it would follow that the grandfather is not entitled to the declaration sought and taking this view, I accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

(9) 22 B. 812.
(10) 64 P. R. 1884.

MADRAS HIGH COURT.
CIVIL APPEAL No 152 OF 1916
April 24, 1919.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

P. K. RAMACHENDRA THEVAR—PLAINTIFF—APPELLANT

versus

NAGAMUTHU NACHIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Surrender to reversioner—Maintenance, provision for, as part of transaction of surrender—Reservation of absolute interest in large properties far in excess of maintenance allowable—Validity of surrender.

The provision for the maintenance of a widow is consistent with the validity of a surrender of her husband's estate to the nearest reversioner. [p. 792, col. 2.]

If, however, the provision for maintenance is a cloak or device by the widow to divide the property with the reversioner or to secure large benefits for herself quite out of proportion to the maintenance that is legitimately awardable to her compatibly with her position and status in life, the surrender is invalid. [p. 793, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Original Suit No. 85 of 1914

This appeal coming on for hearing on the 5th and 6th December 1917, the Court delivered the following

JUDGMENT.—One of the arguments that have been addressed on behalf of the appellant in support of the deed of surrender, is to the effect that the provisions made therein for Mangaikkarasu Nachiar, including a gift to her in absolute right of one of the villages, were by way of maintenance, and that would not affect the validity of the surrender. Whether this is a sound argument or not would, it is urged, depend mainly on what is the total value and income of the entire properties and what is the income assigned to this lady and whether what she got under the deed of surrender could be said to be a *bona fide* provision for maintenance, having regard no doubt in this connection to the status of the family and to the practice prevailing in that family with reference to provisions for ladies entitled to maintenance. It is necessary, therefore, to ascertain what was the value and income of the entire estate of Sivagnanasami Thevar at the date of the surrender and of what was reserved to Mangaikkarasu Nachiar. With reference to the village which was given absolutely to Mangaikkarasu Nachiar, there is also the question whether it was intended at the time of the surrender that she was to make a gift of it to charity, and whether in fact that village was granted by the lady to a temple as is alleged on behalf of the respondents.

It has been contended that gifts by a Hindu limited owner, whether a widow or a mother, to charity would be valid if they are of a moderate and reasonable portion of

the estate. It ought also to be found whether, if it was contemplated by the parties to the surrender that Mangaikkarasu Nachiar should be given this village to enable her to dedicate it to a temple, and if, in fact, she so dedicated it, the gift was such as would be permitted by the Hindu Law, that is, whether it could legitimately form part of an arrangement by way of surrender.

The Subordinate Judge will submit findings on these points, and the parties will be at liberty to adduce fresh evidence with reference thereto. He will have time for two months from the date of the receipt of the records in his Court for the submission of the findings, and ten days will be allowed for filing objections.

We do not mean to express any opinion at this stage on the merits of the appeal.

In compliance with the order contained in the above judgment the Temporary Subordinate Judge of Ramnad at Madura submitted the following

FINDINGS.—I have been directed by the High Court to submit findings on the following three issues:—

i. What were the value and income of the entire estate of Sivagnanasami Tevar at the date of the surrender and of what was reserved to Mangaikarasu Nachiyar?

ii. Whether with reference to the village which was given absolutely to Mangaikarasu Nachiyar it was intended at the time of the surrender that she was to make a gift of it to charity and whether in fact that village was granted by the lady to a temple, as is alleged on behalf of the respondents?

iii. Whether, if it was contemplated by the parties to the surrender that Mangaikarasu Nachiyar should be given that village to enable her to dedicate it to a temple and if in fact she so dedicated it, the gift was such as would be permitted by the Hindu Law, that is, whether it could legitimately form part of an arrangement by way of surrender?

2. *First issue.*—This relates to the value and income of the entire estate of the late Sivagnanaswami Tevar and of the portion of the estate reserved for Mangaikarasu Nachiyar. The whole estate of the late Sivagnanaswami Tevar comprises the properties in Schedules A and B contained in Exhibits A and A1. A Schedule properties were taken by the brothers Pandithorai and Kottaswami Tevar consequent on the surrender by Mangaikarasu Nachiyar in their favour. The properties in B Schedule are those that were reserved to the lady by the two brothers under the surrender. There is no value given for the A Schedule properties in Exhibits A and A1, but for those in B Schedule values are given. The values of the B Schedule properties given in Exhibits A and A1 are objected to as being unduly low and intended to avoid the payment of excessive stamp and registration fees. Exhibits A and A1 are dated 15th November 1891. Exhibit K, the partition deed between the two brothers, dividing between them the properties in Schedule A, is dated 12th October 1892. The value of the said properties given in Exhibit K is Rs. 1,94,000-0-0. This value has not been objected to by either side and it may be taken as correct and as representing the value of the A Schedule properties on the date of the surrender. Plaintiff's second witness has also sworn to the value of the A Schedule properties as given in Exhibit K being correct. But there was a suit, Original Suit No. 35 of 1890 on the file of the East Sub-Court, Madura, pending at the time of the surrender against the whole estate which the brothers, Pandithorai and Kottaswami, were directed under the surrender deed to prosecute and take over to themselves the benefit or loss arising therefrom. The suit itself was for Rs 40,000-0-0 but the final decree in the suit was for Rs. 20,000-0-0. This decree amount of Rs. 20,000-0-0 Pandithorai and Kottaswami were to pay under the surrender deed. So, the A Schedule properties, when taken over by them, must be regarded as burdened with this debt of Rs. 20,000 0-0. In determining, therefore, the actual value of the said properties the burden on them to the extent of Rs. 20,000 0 0 will have to be deducted. Deducting therefore, this Rs. 20,000-0-0 from the value Rs. 1,94,000-0 0 given in Exhibit K, we will get the sum of Rs 1,74,000-0-0 as representing the net value of the A Schedule properties on the date of the surrender deed. Then as regards the value of the B Schedule items, I may note at the outset that the value given in Exhibits A and A1 has been grossly understated, whatever may have been the reason therefor. The B Schedule properties

consist of seven items. Almost all these items comprise Dharmasanam villages.

3. The sub-joined tabular statement will show the value of the several items at different periods, the cost price, the value given in the surrender deeds, Exhibits A and A1, the price for which they were sold later on by Panditborai in favour of the several defendants in the suit and the value given for them in the plaint in this suit.

4. The total cost price of the items in Schedule B, excepting the lease right in four Pangus in Ayan portion of Kalaiyoor village, the village of Panikkanendal and the palace reserved for the residence of Mangaikarasu, comes to Rs. 35,000-0-0. The palace is valued at Rs. 2,000-0-0 in Exhibit A, whereas in Exhibit K it is valued at Rs. 5,000 0 0. In 1906 Panikkanendal village was sold for Rs. 3,150-0-0. In the plaint in this suit, filed in 1914, it is valued at Rs. 7,000 0-0, that is, more than double the value in 1906. There is nothing from which the cost price of this village could be determined. When, as stated above, the cost price of the several items in Schedule B which were required between 1860 and 1869, except in regard to item No 5 which was purchased at Court auction in 1876, comes to Rs. 35,000-0-0, the total value of all the B Schedule properties including the palace and the Panikkanendal village and the lease right of Kalaiyoor village as given in Exhibits A and A1, is Rs. 10,250-0-0, that is, less than a third of the cost price itself. From the tabular statement it would be seen that mere nominal values have been given for some of the items. It has been attempted on the plaintiff's side by oral evidence to show that the prices of the B Schedule items given in Exhibits A and A1 were given with reference to the income from the several items without producing any statements or lists of the income of the items alleged to have been prepared at the time of the surrender deed and without any reference whatever to the prior title-deeds in respect of the items. It is not pretended on the plaintiff's side nor by any of the plaintiff's witnesses that the values of these items had gone down since their purchase till the year 1891, the date of the surrender. The values, therefore, given in Exhibits A and A1 regarding the B Schedule properties must be rejected as altogether fictitious and arbitrary. If between 1860 and 1870 the items in B Schedule were worth Rs. 35,000-0-0 (excepting the lease right in four Pangus in Kalaiyoor village and the Panaikkanendal village and the palace), in 1891, about 21 years thereafter, it may safely be taken to have been worth at least double the amount if not more, that is, Rs. 70,000-0 0. Adding the value of the palace given as Rs. 5,000 0 0 in Exhibit K and taking the value of the Panikkanendal village as Rs. 2,000-0-0 and the lease right in the four Pangus in the Ayan Kalaiyoor for 8 years at Rs. 5,000-0-0, (Rs. 639 being the annual income), the total value would come to Rs. 82,000-0-0. At any rate we may say that the value of all the B Schedule items in 1891 was over Rs. 70,000-0-0 and not less than that. This value would appear to be correct when examined in one or two modes. The annual net income of the B Schedule properties as per list filed on the plaintiff's side, calculated on an average of ten years prior to 1890, comes to Rs. 2,139-0-0. According to the plaintiff's third witness the income in the shape of interest from the B Schedule properties cannot go above four annas per cent. per mensem. The capitalised value, therefore, at the rate of four annas per cent. per mensem for a net income of Rs. 2,139-0-0 would be more than Rs. 70,000-0-0. Under the sale-deeds executed by Panditborai in favour of the several defendants in this suit and the sale-deed for Pottithatti village the purchase-money of the several items, excluding the palace and Sembilangudi (item No. 5) and Ayan Kalaiyoor, comes to Rs. 1,25,000-0-0. Even if we deduct Rs. 50,000-0-0 for the rise in price since 1891, we would get a balance of over Rs. 70,000-0 0 as representing the value of the said items in 1891 or thereabout. Farther, the valuation given in the plaint for the B Schedule items, excluding Ayan Kalaiyoor, the palace and Pottithatti village, is Rs. 91,600-0-0. Including their value on the date of the plaint in 1914 (taking Pottithatti to be worth Rs. 60,000-0 0, the palace, Rs. 10,000-0-0 and the Ayan Kalaiyoor, in lieu of which a fixed money allowance was provided for in the surrender deed, to be worth Rs. 6,000-0-0), the total value would come to Rs. 1,67,000-0-0 on the date of the plaint. Even taking that, on the date of the plaint, the properties had doubled in value from what they were in 1891, we would get not less than

Rs. 80,000 0 0 as the value of the properties in 1891. Making every allowance, we may take the value, at any rate, at not less than Rs. 70,000-0 0. The A Schedule properties were worth, as I have already stated, Rs. 1,74,000-0 0. Adding the value of the B Schedule properties, the total value of the estate of Sivagnanaswami Tevar, on the date of the surrender, would be Rs. 2,44,000-0-0. The properties reserved to Mangaikarasu Nachiyar, that is, the B Schedule properties, were worth not less than Rs. 70,000 0-0. The income of the whole estate including both the A Schedule and B Schedule properties in Exhibit A after deduction of public burdens is, according to the list put in by the plaintiff, based on the Jamabandi accounts and Exhibits R and T, is Rs. 16,745-0 0. The income of the B Schedule properties alone is Rs. 2,139-0 0. Deducting the income of the B Schedule properties from the total income for the whole Zamin, the income for the A Schedule properties comes to only Rs. 14,800-0 0. From this an amount representing the income of property worth Rs. 20,000 0 0, which was the decree debt charged on the A Schedule properties, would have to be deducted. In addition to the income of Rs. 2,139-0 0 (which is the average on a calculation of the income of ten years preceding 1890) Mangaikarasu was provided with an allowance of Rs. 250-0-0 per mensem under the surrender deed payable no doubt by the two brothers. Thus then the Nachiyar was provided with an annual income of Rs. 5,139 0-0, while the brothers would each have got only about Rs. 6,000-0 0 for his share out of the income of the A Schedule properties after allotting a share of the income for the decree debt of Rs. 20,000 0-0 which they had to pay. The income of the whole estate, therefore, at the time of the surrender was Rs. 16,980 0 0 less a proportion due on property worth Rs. 20,000 0 0, and that of the B Schedule properties was Rs. 2,139-0 0

5. *Second issue.*—There is nothing but oral evidence on the side of the plaintiff on the point. The documentary evidence is clearly against him. The evidence of the plaintiff's witnesses Nos. 1, 2, 3, 4, 5 and 8 of some talk between Mangaikarasu and her step-sons, Pandithorai and Kottaswami, or of Mangaikarasu sending word to the step sons requesting them to give the village of Pottithatti absolutely to her for being gifted for a Dharmam or for a temple and of the brothers having expressed their consent to do so, is too good to be believed. The lady and her step sons were admittedly on good terms and are admitted to have talked to each other regarding the surrender. So, there was no necessity for sending any mediaries by her to the step-sons regarding this matter. Plaintiff's first witness has, in his former deposition, admitted that the two brothers Pandithorai and Kottaswami talked directly to the lady Mangaikarasu and settled the arrangement and stated also that the Pottithatti village was given by Nachiyar to Muniyandi. The evidence of the plaintiff's witnesses is more or less interested and I am not prepared to believe it. Their evidence is also opposed to the recitals in Exhibits A and O. (the registration copy of Exhibit VIIt). If it had been originally arranged between the lady and her step-sons that this village of Pottithatti was to be given to her absolutely for the purpose of making a gift thereof to a charity or to a temple, there was nothing to prevent its being so stated in the document, Exhibit A. When in some of the preceding paragraphs in Exhibit A there is mention of Dharmam or charity by stating that the income from the villages has been assigned to her for her maintenance and for the pay of her servants and for expenses on charity (*i. e.*, Dharma Silavu), there is nothing said about any Dharmam or charity in the recital in Exhibit A, which states that the village is given absolutely with full powers of alienation to the lady. The omission is significant and tells against the plaintiff's version. Further the gift deed, Exhibit VIIt, is executed by the lady in favour of Muniyandi within ten days after Exhibit A. That deed does not mention a word about any charity or temple. It recites several reasons for her making a gift of the village to Muniyandi personally and not for any charity or temple. Exhibit VIIt is attested by Pandithorai. If the agreement between the step-sons and the lady was that the village was to be given absolutely to the lady for being gifted to the temple, then, when the document was taken to Pandithorai for his attestation, he should certainly have noticed the contravention or violation

of the original intention by the lady and he should certainly have objected to attesting it and should not have attested it at all, but should be expected to have taken steps for getting the gift-deed cancelled. If the story told by some of the plaintiff's witnesses, that the document was taken to Kottaswami also and he objected to attesting and refused to attest it altogether and even went the length of declining to pay his share of the allowance to the lady which she is said to have been forced to recover by legal proceedings, is true certainly it is inexplicable that Kottaswami should have taken no steps whatever for questioning this gift deed and for getting it cancelled. All this clearly points to the fact that the story of the plaintiff's witnesses that the village was intended to be given to any charity or temple is a pure fiction and a myth and cannot be accepted for a moment. The evidence of defence witnesses Nos. 1 and 5, attestor of Exhibit O and writer of Exhibit A1 respectively, to the effect that the intention of Mangaikarasu was only to make a gift of the village to Muniyandi absolutely and not to any temple, is consistent with the recitals in the documents and receives support from them and can, therefore, be relied upon. The recitals in Exhibit P, dated June 1892, (that is, within seven months after the date of Exhibit O), the gift-deed by the late Raja Bhaskara Sethupathi in favour of Muniyandi Servai's Subramaniaswami temple, would show that there had been no prior endowment or gift in favour of the said temple for the daily Pooja, Padittharam, etc., and at the request of Muniyandi to the Raja for a gift of a village for the purpose the Raja makes the gift in favour of the temple and not to Muniyandi, making provisions for the utilisation of the income from the village and for any surplus that might remain after the purpose connected with the temple had been met with. The document would show that Muniyandi himself never intended or recognised the gift in his favour under Exhibit O as a gift in favour of the temple. The attempt on the part of the learned Vakil for the plaintiff at the time of the arguments that Muniyandi had played fraud or imposition upon the lady in getting the gift-deed, Exhibit O, in his own name personally instead of in favour of the temple is a belated one and is a pure makeshift for the occasion with the object of getting rid of the recitals in the document itself There is not a word about any fraud or imposition in the plaint. Plaintiff's witness No. 3, who has written Exhibit O, can give no reason whatever for the omission in Exhibit O of the real object of the gift and of the mention in it of other reasons and motives for the personal gift to Muniyandi. There is no foundation for the plea of imposition or fraud by Muniyandi on the lady Mangaikarasu, for she is admitted to have known to read and write, and one deceased Sellammal, who was the Puranam reader to the lady, has also attested the document. Rejecting then the evidence of the plaintiff's witnesses regarding any intention to gift the village for charity or for temple, the recital in Exhibit O that the gift of the village was to Muniyandi personally in consideration of his past services to the donor's family, the undue haste in executing the gift deed within ten days after the date of the surrender as per Exhibits A and A1, the donor being a person able to read and write, and the document having been attested by Panditthorai and by Kandimathinatha Pillai, the lady's agent and manager of the estate, the evidence of the defendants' witnesses Nos. 1 and 5, attestors of Exhibit O, Muniyandi's obtaining the grant of Thuthaikulam village from Raja Bhaskara Sethupathi under Exhibit P about seven months after Exhibit O solely for the Pooja Padittharam, etc, of his Subramaniaswami temple and the recitals therein, these and other facts already adverted to completely negative the plaintiff's version of any intention on the part of the parties to the surrender to make a gift of the village of Pottithatti to any charity or to any temple Much less was the village granted at all to any charity or temple. Exhibit O or rather Exhibit VII-t (the original document) negatives any grant of the village by the lady to the temple. It is an out and-out grant to Muniyandi personally, and it appears from the evidence that he had mortgaged the village which his sons ultimately sold away last year for Rs. 67,000-0-0 under Exhibit VII. Pottithatti is the most important of the villages in B Schedule. Even in Exhibit A a higher value is given to it than for any other village. Muniyandi having been Mangaikarasu's agent for her house-

hold, very probably he set his heart upon that village so as to secure it for himself and since the lady got the village assigned to her absolutely under Exhibit A, with undue haste betraying rather his anxiety, he obtains the gift deed, Exhibit VII-t from Mangaikarasu gifting the village to himself personally. The second issue, therefore, I find against the plaintiff and for the defendants.

6. *Third issue.*—On my finding on the second issue this issue does not arise for consideration and does not call for a finding. Should, however, a finding on the issue be found necessary, I am certainly inclined to find it in the negative. The temple in this case was not one built by Mangaikarasu or by any members of her family. It was built or established by Muniyandi and has been called by the plaintiff's witnesses themselves as Muniyandi's temple. So there was no need or necessity for Mangaikarasu to dedicate or make a gift of the village in its favour. It is in the evidence of the plaintiff's witness No. 2 that Sivagnanasami Tevar, the father-in-law of Mangaikarasu, had built another temple and endowed it out of his own estate. There is also a Subramaniaswami's temple or shrine in that temple and out of the income of the estate the expenses of that temple have been met. So any religious merit or virtue by making any dedication or gift of property to a temple that could be acquired for the family had already been secured and there was, therefore, no necessity for the lady Mangaikarasu to make any gift for the purpose. Further, it was not the case of a gift in favour of the temple founded by her husband that is set up in this case, but a gift in favour of a temple founded or established by a different person altogether, that is by Muniyandi. The estate inherited by her was that of her son. A widow can, if at all, have authority or right to make a pious gift or offering in favour of an idol only for securing spiritual benefit only of her husband and not for any other person. By the gift in the present case she could not have secured any benefit to her deceased son but only for herself, for which she would have no authority in respect of her son's estate. In the case of *Ramkawal Singh* v. *Ram Kishore Das* (1) it was held that the gift by the widow to a temple established by her husband's mother was invalid and unsustainable. Much less so in this case the alleged gift in favour of Muniyandi's temple can be held valid or sustainable. Further the gift was only a matter of religious luxury and not a necessity, as observed by me already. The estate of her son when she inherited it was encumbered at the time of the surrender. A suit for Rs. 40,000-0-0 as against the estate was pending. Finally a decree in that suit was passed for Rs. 20,000-0-0 and made payable by Pandithorai and Kottaswami. An allowance of Rs. 250-0-0 (rather an exorbitant and exaggerated one considering the maintenance allowance allotted under Exhibit B3 to Kottaswami's own mother) per mensem payable by Pandithorai and Kottaswami to Mangaikarasu was also charged on the estate. The village of Pottithati was the most important of the Dharmasanam village assigned to her under the surrender arrangement. It must have been worth about Rs. 20,000-0-0 or Rs. 30,000-0-0 at the time of the surrender or the gift deed, that is more than a third and nearly a half of the value of the B Schedule properties assigned to her at the surrender. In these circumstances, therefore, I should hold that the gift, if any, of the village, even if it had been in favour of a temple and was out of all proportion or disproportionate in extent and value, was not such as would be permitted by the Hindu Law and could not form part of an arrangement by way of surrender.

7. I find the issue, therefore, against the plaintiff and for the defendants.

This appeal came on for final hearing on the 23rd of April 1919.

Mr. *S. Srinivasa Aiyangar* (Advocate-General), for the Appellant.—The stipulations which enure for the widow's benefit were only adequate provisions for her maintenance. The decisions have laid down that a provision for the maintenance of the widow in her deed of surrender would not invalidate the surrender. It is true that if it is a device to divide the property with the reversioners, the surrender would not be valid. But the position and respectability of the widow has to be considered, and all

(1) 22 C. 506.

the benefit she derived under the deed is a provision for her maintenance, which is none too high for her position and rank as a Zemindarini.

Pandithorai, the reversioner, and his representatives are estopped from resisting the title of the plaintiff under the surrender deed, Exhibit A, as they got possession under that document. Having elected to abide by the terms of that document, they are now estopped from questioning it. Pandithorai did not, as a fact, question the operation of the deed in respect of the other properties.

Messrs. *K. Sreenivasa Aiyangar* and *K. Jagannatha Iyer*, for the Respondents.—Such a large benefit as was secured for the widow Mangaikarasu, inclusive of an absolute right in a village, cannot be called a provision for maintenance even to a Zemindarini. She gets an income of over Rs. 400 a month besides an absolute right in a village. This is only a device to get a share for herself.

There is no question of estoppel or election arising in this case. Pandithorai did not get possession of the properties under the surrender deed, Exhibit A. He got possession after the death of Mangaikarasu as her reversioner.

JUDGMENT.—The first and the only question we have got to deal with in this appeal is whether the documents Exhibits A and A1 operate as a surrender by one Mangayarkarasi of her widow's estate in favour of the then nearest reversioners to the last male holder Sivagnanasami Thevar, namely, Kottasami Thevar and Pandithorai. Exhibit A is described as a 'release agreement.' It is signed by this lady and was executed on the 15th November 1911: It says: "I have given to you now by means of this deed, for the consideration under-mentioned, for being enjoyed with all rights by you who are fully legally entitled to them during my lifetime and after my death, the following :—those properties which are described in the Schedules A, B, C and D hereunder." Then paragraph 5 of the document states :—"As you have allowed me to utilise the profits of the villages described in Schedule B hereunder after paying the Poruppu, quit-rent, road cess, etc., myself, for my maintenance and for meeting the pay of my servants and for charities, till the end of my life, I shall accordingly enjoy the same." Paragraph 6 says: "As you have agreed to give me an allowance of Rs. 250-0-0 till my lifetime exclusive of the income derived from the villages left to me as mentioned in the above paragraph, I shall accordingly receive the allowance till my death." Paragraph 7 provides for her residence in what is called a small palace at Ramnad, and paragraph 8 recites: "As you have agreed to my enjoyment, with powers of gift, exchange and sale, of the village of Pottithatti comprising wet lands, Virayadi 117 Kalams 6 Marakals and $4\frac{1}{2}$ measures and dry lands 300 Kurkams, out of the villages mentioned in Schedule B, set apart for my maintenance, neither you nor your heirs should object to my alienating the said village whenever I like." Exhibit A1, which is called an agreement bearing the same date, is executed by the two reversioners containing the same terms as Exhibit A. We are not concerned in this appeal with the properties of A, C and D Schedules but only with those of B Schedule; that is, properties which are reserved for Mangayarkarasi.

The question is whether this is a valid surrender within the meaning of the law. The value of the entire estate left by Sivagnanasami, who had been divided from his brothers Kottasami and Pandithorai, is about $2\frac{1}{2}$ lakhs of rupees. What Mangayarkarasi, the mother of Sivagnanasami who was then in possession of the estate on the death of Sivagnana's widow, reserved to herself under the documents were several villages yielding about Rs. 1,800 a year for her lifetime for her maintenance, also an allowance of Rs. 250 a month payable by the reversioners and a right of residence in a portion of the palace belonging to her son. In addition to this, she kept in her absolute right the village of Pottithatti, which is described by the learned Subordinate Judge as a valuable property worth about 20 to 30 thousand rupees at the date of the documents. These are the main advantages which Mangayarkarasi reserved for herself under Exhibits A and A1. The whole income which she gets would be more than Rs. 400 a month with an absolute right to one of the villages which, according to the learned Judge, would be $\frac{1}{3}$rd in value of the entire B Schedule property.

The learned Advocate General argues that this is a valid surrender and the benefit which the widow gets or reserves for herself is nothing more than what would be a proper maintenance for a lady in her position. The law on the subject has been recently stated by the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (2). Their Lordships point out the distinction between a surrender and an alienation. They cite with approval their observations in *Behari Lal* v. *Madho Lal Ahir Gayawal* (3) on the subject of surrender in these words: "It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee." Then they say: "It has been suggested that the expressions in *Behari Lal's case* (3) only meant that the widow should retain no interest in what was surrendered and that, therefore, a partial surrender provided that the surrender was absolute as to that part was valid. This, however, is quite against the principle on which the whole transaction rests. As already pointed out, it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so, and consequently the suggestion was, in their Lordships' view, rightly rejected by the Calcutta Full Bench in *Debi Prosad Chowdhury* v. *Golap Bhagat* (4)." And further on, they sum up the result of the discussion of the authorities in these words:—"An alienation by a widow of her husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner" These are the general principles governing the question of the validity of a surrender. Their Lordships, however, do not deal with the question whether any reservation of a benefit for the widow by way of maintenance would be authorised or not as part of a transaction of surrender. But we have rulings of this Court which lay down that a provision for maintenance is not inconsistent with the validity of a surrender. That was considered quite recently by Sadasiva Aiyar and Napier, JJ., in *Chinnaswami Pillai* v. *Appaswami Pillai* (5), where they held that any stipulation by the widow surrendering her estate that she should be maintained during her lifetime by the person in whose favour the surrender is made would not in any way affect the surrender. This is also the effect of the rulings in *Mulugu Kotayya* v. *Mudigonda Chandramouli Sastri* (6) and in an unreported case, in *Gopala Krishnayya* v. *Gangayya*, Appeal No. 373 of 1915 noticed in *Chinnaswami Pillai* v. *Appaswami Pillai* (5). There are also two cases of the Patna High Court to the same effect, reported as *Raghunath Singh* v. *Kura Kumari* (7) and *Dilkor Koer* v. *Harku Singh* (8). We may take it, therefore, that the rulings support the view that a provision for the maintenance of a widow is consistent with the validity of a surrender of her estate to the nearest reversioner. It may be pointed out that there is nothing in the judgment of the Privy Council already referred to which can be taken to suggest that a widow surrendering her estate cannot stipulate for proper maintenance for herself. The surrender would be nonetheless a surrender of her entire estate having the effect of accelerating the reversion in spite of such a provision for maintenance. What the learned Advocate-General contends is that a surrender would not be bad if it in

(2) 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T 5; 10 L. W. 105 (P C.).

(3) 19 I. A. 30; 19 C. 236 (P. C.); 6 Sar. P. C. J. 88; 9 Ind. Dec. (N.s) 603.

(4) 19 Ind. Cas. 273; 40 C. 721 at p. 733; 17 C. W. N. 701; 17 C. L. J. 499.

(5) 48 Ind. Cas. 147; 42 M. 25; 35 M. L. J. 512; 8 L. W. 512; (1918 M. W. N. 756; 24 M. L T. 403.

(6) 36 Ind. Cas. 407; 31 M. L J 406; 20 M. L. T. 148; 4 L W. 149; 1916, 2 M. W N. 137.

(7) 3- Ind as 167; 1 P. L. W. 453; (1917) Pat. 91.

(8) 41 Ind. Cas. 631; 2 P. L. J. 578; 1 P. L. W. 760; (1917) Pat. 225.

fact does not amount to a device on the part of the widow to divide the estate with the reversioners, and he conceded that if the provisions of Exhibits A and AI in this case reserved to Mangayarkarasi anything substantially more than what would be a proper maintenance for her, the transfer would be bad, and it would in fact amount to a division of the estate between herself and the reversioners. He urged that having regard to the position of Mangayarkarasi as a Zamindar's widow, the provisions in the document under consideration should not be regarded as more than what she would be otherwise entitled to as maintenance if her husband died as member of a joint family. But in fact what she purported to reserve for herself was much more than could be needed for her maintenance. She gets an allowance of Rs. 250 a month, which, one would think, would be sufficient for the maintenance of a Hindu widow even though she might belong to a Zamindar's family, especially when she is separately provided with residence. Over and above that she keeps for herself a life estate in certain villages yielding an income of nearly Rs. 200 a month. Most important of all, she does not part with one of the important villages forming part of her son's estate, and this she retains in her absolute right. The learned Subordinate Judge, it seems to us, was quite justified in holding that provisions of this nature can hardly be justified as maintenance. He also points out that the senior widow of Kottasami received only Rs. 100 a month for her maintenance and the benefits which Mangayarkarasi stipulated for herself could not properly be described as provisions for her maintenanance. The Subordinate Judge is right in his view. Exhibit A could not properly be called a surrender of the whole of her estate. She reserves some of the villages for her life and an absolute right in another village. A document of this nature would not come within the principle of the law as laid down by the Judicial Committee. We are, therefore, clearly of opinion that Exhibit A cannot be upheld as a valid surrender.

In that view, it is unnecessary to deal with the question whether the village of Pottithatti was reserved to be made a gift of by Mangayarkarasi in favour of a certain temple, and we may mention that the learned Advocate-General at this hearing rested the case of his client on the basis entirely of surrender.

The next question argued by him was one of estoppel; the contention being that Pandithorai obtained possession of the properties under Exhibit A and, therefore, on the authority of some English rulings it is not open to Pandithorai's heirs or representatives to resist the title of the plaintiff under that document. It would be sufficient to meet this argument by pointing out that so far as B Schedule properties are concerned, and these are the only properties to which this litigation relates, he did not obtain possession of them until after Mangayarkarasi's death. Mangayarkarasi was to enjoy some of the villages for her life and with respect to the village of Pottithatti, she had an absolute right and, when she died, Pandithorai took possession of these villages not under the provisions of Exhibit A but as the nearest reversioner of Sivagnanasami, Kottasami having predeceased Mangayarkarasi. We may also point out that the cases cited by the learned Advocate-General have no bearing on the present question. The cases of *Board* v. *Board* (9) and *Dalton* v. *Fitzgerald* (10) have been considered by this Court in *Alamelu Ammal* v. *Balu Ammal* (11). In *Dalton* v. *Fitzgerald* (10) the person in possession of the property came into possession under a Will by which he got a life-estate, the remainder being given to some other person. The testator it appeared had no title to the property, but the person who got the life-estate under the Will acquired a good title by possession against the true owner. The question arose whether he was estopped from questioning the title of the remainderman as given by the Will. It was held that estoppel operated in such a case. Lord Justice Lopes at page 93 states the ground on which

(9) (1874) 9 Q. B. 48; 43 L. J. Q. B. 4; 29 L. T. 459; 22 W. R. 206.

(10) (1897) 2 Ch. D. 86; 66 L. J. Ch 604; 76 L. T. 700; 45 W. R. 685.

(11) 26 Ind. Cas. 455; 28 M. L. J. 685; (1915) M. W. N. 26, 16 M. L. T. 592.

GOPI CHAND *v.* BEMARSI DAS.

the estoppel was based as follows:—"If a man obtains possession of land claiming under a deed or Will, he cannot afterwards set up another title to the land against the Will or deed, though it did not operate to pass the land in question; and if he remain in possession till 12 years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the Will or deed." In this case we have got to deal with here, the title of Pandithorai was not acquired by virtue of any possession derived under Exhibit A. It is an independent title which accrued to him as reversioner on the death of Mangayarkarasi and not derived from the so-called deed of surrender.

Then it was argued that Pandithorai must, somehow or other, be taken to have elected to abide by Exhibit A. It is difficult to see how there can be any question of election in the present case. He got possession of B Schedule properties as a reversionary heir of the last male holder and there was no question of his electing to receive these properties in lieu of some other properties. It is pointed out that Pandithorai, so far as other properties were concerned, namely, A, C and D Schedule properties, did not question the operation of Exhibit A and that in fact both Kottasami and his heirs and Pandithorai acted upon the stipulations contained in that document by making payments to the widow according to its terms. But it is not easy to see how these facts can in any way operate as estoppel or amount to ratification or election. Any payments that were made by Kottasami to the widow were in lieu of the benefits which he received under Exhibit A, and it was not suggested by the learned Advocate-General that this is a case to which section 115 of the Evidence Act applies, for there was nothing in the conduct of Pandithorai on which Kottasami could be said to have relied upon to his prejudice.

In the result, the appeal must be held to have failed and it is dismissed with costs of respondents Nos. 4 to 6, 14 to 16 and 8, 9 and 10. There will be only one set of costs to be divided between these respondents in proportion to their interest in the properties concerned.

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 579 OF 1919.

November 10, 1919.

Present:—Sir Henry Rattigan, KT., Chief Justice.

GOPI CHAND—JUDGMENT-DEBTOR—APPELLANT

versus

BENARSI DAS—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 67 (2), 90—Execution of decree—Sale, application to set aside—Advertisement in Gazette, whether necessary—Irregularity—Prejudice, proof of—Objection not stated in application, whether can be taken—Appellate Court, whether can entertain new objection.

Order XXI, rule 67 (2), of the Civil Procedure Code merely provides that an executing Court may, in its discretion, direct an advertisement of a sale to be published in the Gazette, but there is no obligation on its part to do so, and the failure to give such a direction does not amount to material irregularity in the conduct of the sale within the meaning of rule 90 of the Order. [p. 795, col. 2.]

A judgment-debtor applying under Order XXI, rule 90, of the Civil Procedure Code to set aside an execution sale must show not only that there has been material irregularity in the conduct of the sale but also that such irregularity has resulted in substantial injury to him. [p. 796, col. 2.]

An execution Court should not consider objections other than those expressly stated in the application presented to it under Order XXI, rule 90, of the Civil Procedure Code. *A fortiori*, objections not so taken cannot be considered by an Appellate Court, when hearing an appeal from the order of the Court rejecting an application to set aside a sale. [p. 796, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Ambala, dated the 25th February 1919, rejecting the application for setting aside the auction sale.

Mr. *Jai Gopal Sethi* and Lala *Jagan Nath*, for the Appellant.

Mr. *Manohar Lal* for Benarsi Das, Decree-Holder, and Mr. *Gullu Ram*, for Lachhman

Singh, Auction Purchaser, Respondents.

JUDGMENT.—This is an appeal from the order of the Senior Subordinate Judge, Ambala, rejecting an application, under Order XXI, rule 90, Civil Procedure Code, by the judgment-debtor to set aside an auction sale on the ground of irregularities in proclaiming and conducting it. The facts, so far as they are material for the purposes of the appeal before me, are briefly as follows:—

In 1912 the decree-holder, Benarsi Das, applied for execution of a decree for Rs. 17,640 which he held against the judgment-debtors Gopi Chand and others, and prayed for attachment and sale of the rights which the judgment-debtors possessed as mortgagees in a certain bungalow and garden situate in the town of Jagadhri. The application was granted and the property attached was sold in 1913, but the sale was subsequently set aside on the application of the judgment-debtors. A second sale in July 1915 and a third sale in December 1916 both in favour of the decree-holder who had bid Rs. 11,000 for the property were also set aside, and a similar fate befell a fourth sale in December 1918 in favour of Sardar Lachhman Singh who had bid Rs. 13,000. All these sales were cancelled on the application of the judgment-debtors, and, finally, on the 13th January 19.9 a fifth sale, when the property again realised Rs. 13,000, was effected in favour of the said Sardar Lachman Singh. The judgment-debtors applied as usual for cancellation of the said sale, and the objections urged by them on the ground upon which their application was based in the Court executing the decree, were as follows:—

(1) That the auction sale was not duly proclaimed by beat of drum. This objection is not in accordance with the facts, as the proclamation of sale was duly made by that means, and Mr. Jai Gopal Sethi, while admitting that the proclamation was duly made, explains that the real objection was that there was no beat of drum at the time when the sale actually took place. Assuming that this was so, I can find no irregularity as there is no provision of law making it incumbent upon a Court to have a drum beaten while the sale is going on;

(2) that the sale was very hurriedly conducted and was concluded in two hours. Here again the objection is contrary to the facts, as the sale was proclaimed on the date fixed, from 10 A. M. till 5 P. M., when the last bid of Rs. 13,000 was made and accepted;

(3) that the property is of great value and that in order to notify the residents of the neighbouring Kalsia State and Saharanpur who would have been the likely purchasers, it was necessary to advertise the sale in the Gazette. Reference in this connection is made to Order XXI, rule 67 (2), Civil Procedure Code, but the Code merely provides that the Court may in its discretion direct an advertisement of the sale in the Gazette and there is no obligation on its part to do so;

(4) that in the proclamation of sale neither the *khasra* numbers nor the amount of revenue nor the area of the land was specified. This objection ignores the fact that the bungalow and garden are not agricultural land or assessed to revenue. No doubt the area of the property was not specifically stated, but in view of the fact that four previous sales had taken place and that few, if any, persons in the neighbourhood could have been unaware of the exact property that was being sold, I cannot agree that the omission in this particular instance to specify with accuracy the details of the property amounted to a material irregularity;

(5) that the decretal amount as stated in the proclamation is said to be Rs. 17,500 whereas the proper amount due to the decree-holder under the decree of the Appellate Court which awarded him costs was Rs. 20,217-3-4. As regards this objection I agree with the Subordinate Judge that the judgment-debtor was in no way prejudiced by the inaccuracy, inasmuch as the probabilities are that more persons would be inclined to buy the property upon which the decree-holder had a lien for only Rs. 17,500 than would be likely to purchase the property upon which the lien amounted to over Rs. 20,200. If any one was injured by a mistake of this kind, it was the auction-purchaser and not the judgment-debtor, and the former is satisfied with his bargain;

(6) that the agricultural land should have

been sold in a separate lot from that in which the bungalow was included and that the sale of both properties in one lot greatly decreased their value. The answer to this objection is that there is no "agricultural land" and that the land surrounding the house and appurtenent to it is a garden It is also pointed out by Mr. Gullu Ram that it was at the express request of the decree holder and the judgment-debtor, made at the time when the property was first attached, that the garden and bungalow were sold in one lot and not separately. This objection, therefore, also fails.

The foregoing are the only objections taken in the application made to the Court executing the decree, but before me Mr. Jai Gopal Sethi wished to urge further on the judgment debtors' behalf that the sale was invalid (*a*) because no notice had been given to the judgment-debtors; (*b*) that one-fourth of the property sold belonged not to the judgment-debtors but to their relation *Musammat* Pishto, and (*c*) that the value of the judgment-debtors' mortgagee rights in the property had not been specified in the proclamation of sale. Assuming that there might have been force in these objections or any one of them, I have no hesitation in holding that they cannot be urged at this stage of the case. The Allahabad High Court has held, and if I may venture to say so rightly, that the Court should not consider objections other than those expressly stated in the application presented to it under rule 90, Order XXI, Civil Procedure Code: *Harbans Lal* v. *Kundan Lal* (1). *A fortiori* objection not so taken cannot be considered by an Appellate Court when hearing an appeal from the order of the Court rejecting an application to set aside a sale.

Mr. Gullu Ram has also urged that it was incumbent upon the judgment-debtors to adduce evidence to prove that they had suffered substantial injury owing to the alleged irregularities in the proclamation and conduct of the sale, whereas in point of fact no evidence whatever was given to show that either directly or by necessary implication such substantial injury had been caused. On this ground also the appeal before me must fail, as there is the highest authority for holding that in cases such as the present the judgment-debtors must show not only that there had been material irregularities but also that such irregularities had resulted in substantial injury to them.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 21 A. 140; A. W. N. (1898) 212.]

MADRAS HIGH COURT.

CIVIL APPEAL No 276 OF 1918.

August 12, 1919.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Burn.

VISALAKSHI AMMAL—PLAINTIFF—APPELLANT

versus

KALI NARAYANASWAMI AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*Hindu Law—Widow—Maintenance, suit to recover, by pauper widow—Suit decreed in part—Costs, rule as to award of—Contract Act (IX of 1872), s. 69—Expenses incurred by widow in performing marriage of daughter, whether can be charged on ancestral property—Limitation for suit—*Bangles *and* seemantham *ceremonies, expenses of, whether can be recovered.*

In a maintenance suit by a pauper widow where the right to maintenance is established by decree, the plaintiff alone ought, as a rule, to be given costs in proportion to the amount of her success. [p. 798, col 1.]

A claim by a Hindu widow for the expenses of the marriage of a daughter might be made a charge on ancestral property by a decree of Court, but it does not become a complete charge till it is so constituted by the decree Such expenses are recoverable from the person legally bound to defray them either under section 69 of the Contract Act, or on a principle of equity analogous to that underlying the section. A suit to enforce such a claim must be brought within six years of the date of incurring the expense [p 798, col. 2.]

The expenses incurred in the *bangles* ceremony and *seemantham* ceremony respectively are not such as would create any legal obligation on the girl's uncles to discharge. [p. 798, col. 2.]

Appeal against the decree of the Subordinate Judge, Kumbakonam, in Original Suit No. 37 of 1917.

Messrs. *T. V. Venkatrama Iyer, K. S. Jayarama Iyer* and *A. Ganesa Iyer*, for the Appellant,

VISALAKSHI AMMAL v. KALI NARAYANASWAMI AIYAR.

Messrs. *T. R. Venkatrama Sastri* and *C. A. Seshagiri Sastri*, for the Respondents.

JUDGMENT.—The plaintiff is the appellant before us. She sued her two brothers-in-law for the recovery of future maintenance at the rate of Rs. 277 a year and also for the recovery of Rs. 1,866 odd for arrears of maintenance from February 1907 to the end of June 1916, besides Rs. 1,500 for expenses incurred by her in connection with the nuptials marriage of her daughter and on the occasions of the Bangles ceremony and the Seemantham ceremony performed during her daughter's first pregnancy. The learned Subordinate Judge decreed future maintenance at the rate of 24 Kalams and Rs. 61 a year (the total of which according to the present value of paddy amounts to about Rs. 109 a year). He also awarded arrears of maintenance at the rate of Rs. 109 a year from June 1912 and he also allowed Rs. 200 *plus* Rs. 50 *plus* Rs. 70, altogether Rs. 320, on account of expenses incurred for the three ceremonies mentioned above (Rs. 1,500 having been claimed by her in the plaint). He awarded proportionate costs to both sides but directed the plaintiff to pay the Court-fees due to Government, the plaintiff having been allowed to sue as a pauper.

The questions we have to decide in this appeal and in the connected memorandum of objections may be formulated thus:—

(1) What is the net income derivable from the family lands which belonged to the plaintiff's husband and whether the rate of future maintenance allowed should be increased; and if so, to what extent?

(2) Is the plaintiff entitled to arrears of maintenance from February 1907 as claimed by her?

(3) Is she entitled to a sum of Rs. 68-8-0, subsistence allowance of witnesses alleged to have been disallowed in the lower Court's decree by mistake?

(4) Is the lower Court's award of proportionate costs to the defendants improper?

(5) Whether the lower Court ought to have decreed Rs. 50 for the right of residence claimed by the plaintiff?

(6) Whether (*vide* memorandum of objections) the claim for the expenses of nuptials ceremony incurred in 1907 was barred by limitation?

(7) Whether the award of the expenses incurred for Valagappu and Seemantham ceremonies was not warranted by law? and

(8) Whether the plaintiff is not entitled to any arrears of maintenance before date of suit?

As regards the first question, we accept the reasons given by the lower Court in support of its finding that the income derivable from the joint family properties is only Rs. 590 net a year. The plaintiff's husband's share of that income, if he was alive, would, no doubt, be about Rs. 200 a year, but that whole sum is not to be awarded to the plaintiff unless that amount is so small that it would just suffice for her maintenance. The 1st defendant stated in his chief examination that the plaintiff would require 2 Kalams and Rs. 3 to 4 a month for her expenses. In cross-examination he said that the plaintiff would need two female cloths a year at Rs. 3-8-0 or Rs. 4-0-0 each at the present rate He was not cross examined on the question as to what she would require for food expenses. The plaintiff herself as her own first witness said that two Kalams a month was enough, but she wanted Rs. 10 a month for other expenses. We do not think that the lower Court was not justified in accepting the evidence of the 1st defendant on the question of the fair rate of maintenance to be allowed to the plaintiff. The 1st defendant, in his counter-affidavit during the pauper proceedings and also in his written statement, has no doubt raised some contentions which savour of legal chicanery, but his evidence in the box seems to be straightforward and we see no reason not to accept the general accuracy and truthfulness of his statements in the witness box. We shall, therefore, not interfere with the award of the lower Court in respect of the rate of maintenance.

On the question of arrears of maintenance having regard to the notice, Exhibit A, in which the plaintiff did not claim any arrears but only required the defendants to make arrangements in respect of the plaintiff's maintenance and of the Stridhanam to be given to her daughter within a week, we think it is apparent that she

never intended to claim arrears of maintenance. She had been living with her son-in-law and her father prior to the date of the notice and after misunderstandings arose between her and the defendants in connection with the performance of the nuptials of her daughter. Even those misunderstandings seem to have been not at all serious in the beginning. We, therefore, agree with the lower Court in its refusal to award arrears of maintenance prior to the date of the notice Exhibit A.

The next question is about the subsistence allowance for witnesses (Rs. 68-8-0) which is alleged to have been disallowed by the lower Court. There is no order on record by the Judge disallowing any portion of the subsistence allowance or witnesses' Batta claimed by the plaintiff and if there is any clerical or arithmetical error in drawing up the decree, that error should be corrected.

The next question is whether the lower Court was right in awarding proportionate costs to the defendants on the value of the disallowed portion of the plaintiff's claim. Having regard to the denial of the whole of the plaintiff's claim in the written statement, we think that in such maintenance suits by pauper widows where the right to maintenance is established by the decree, the plaintiff alone ought, as a rule, to be given proportionate costs to the extent of the plaintiff's success and the defendant need not be given proportionate costs. We would modify the decree of the lower Court accordingly, disallowing the defendants' costs in the lower Court.

The plaintiff is entitled to a right of residence in the family house and if her being allowed to exercise such right would be inconvenient to all parties, it seems reasonable that she should be awarded a sum of money which would produce an income sufficient to secure a convenient residence for her. As only Rs. 50 is claimed in the memorandum of second appeal for residence and as it is clear that, having regard to the very strained feelings between the parties, it would be inconvenient for both parties that the plaintiff should be allowed to reside in the family house in the village, we allow the modest sum of Rs. 50 as claimed.

Then we come to the contentions of the defendants raised in the memorandum of objections, the most important being whether the claim for the amount incurred in 1907 for the expenses of the nuptials ceremony is barred by limitation. This expense was incurred about nine years before suit. The claim for the expenses of nuptials marriage might, no doubt, be made a charge on the ancestral properties by a decree of Court just as the maintenance allowed to a widow in a family may be so charged. But it does not become a completed charge till it is so constituted by decree of Court. Further while a claim for maintenance accrues daily throughout the life of the widowed claimant or till her remarriage, the expense of the daughter's nuptials ceremony is incurred once for all and there is only one cause of action for its recovery as soon as it is incurred. Lastly, the plaintiff who incurred the expenses in the interests of her daughter can claim recovery of that amount from the person legally bound to defray that amount either under section 69 of the Indian Contract Act or, probably as pointed out in *Ranganaikammal* v. *Ramanuja Aiyangar* (1), on the principle of equity analogous to that underlying section 69 of the Contract Act. In either view, we do not think that more than six years can be the period of limitation for enforcing such a claim. This contention in the memorandum of objections must, therefore, be allowed.

Coming to the sum of Rs. 50 and of Rs. 70 allowed for the Bangles ceremony and Seemantham ceremony respectively, these are not expenses the incurring of which is obligatory on the girl's father's undivided brothers, especially the expenses of the former ceremony which is not mentioned in any Shastra. The Seemantham ceremony is a rite to be performed at the expense of the husband as one of the sacramental purificatory ceremonies of the child in the womb and the expected mother's uncles are under no legal obligation to incur the expenses therefor. The conventional presents of cloths made on such occasion between the households cannot be raised to the dignity of a legal obligation on either side.

(1) 11 Ind. Cas. 570; 35 M. 728; 21 M. L. J. 600; 10 M. L. T. 57; (1911) 2 M. W. N. 285.

The result is that the memorandum of objections has to be allowed on these two points, though as regards the further contention that arrears of maintenance ought not to have been allowed even from 1912 to the date of suit, it fails.

As regards the costs of this appeal and the memorandum of objections, the parties will bear their own respective costs.

M. C. P.

Appeal and Memo. of Objections partly allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 29 OF 1919.

July 29, 1919.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Heaton.

JIVRAJ BALOO SPINNING AND WEAVING CO., LTD.—APPELLANTS

versus

CHAMPSEY BHARA & CO.—RESPONDENTS.

Arbitration and award—Error of law patent on face of award—Award, whether liable to be set aside—Contravention of rule binding on parties, whether error of law—Vendor and purchaser—Contract, breach of, by vendor—Purchaser, whether can be made to pay damages—Common Law.

A Court will set aside an award if there is an error of law patent on the face of it. [p. 802, col. 1.]

Where a rule binding on the parties to an arbitration lays down that in no case is a particular party liable to pay a sum of money as damages or compensation, then an award directing that party to pay a sum of money is bad on the face of it in point of law. [p. 802, col. 2.]

Under rule 52 of the Rules of the Bombay Cotton Trade Association where a buyer refuses the cotton on account of non-approval of tender, he may exercise either of two options, *viz.*, he may buy in the market at a reasonable rate on the account, risk and expense of the seller or he may invoice the cotton back to the seller at the market rate of the day, upon which the final award is made; but he is not bound to exercise either of these options, and the failure to exercise either of these options does not render him liable to pay damages to the seller. [p. 801, col. 2.]

Where an award imposes a liability on a party which cannot possibly be said to have been provided for by the contract between the parties on a proper construction of its terms, there is an error of law patent upon the face of the award which entitles the Court to set it aside. [p. 803, col. 1.]

It is entirely opposed to the general provisions of the Contract Act and to the Common Law that a buyer who has rightly rejected goods tendered under a contract of purchase and sale should be in any way liable to the seller. [p. 802, col. 2.]

Per *Heaton, J.*—Where an award imports by reference the contract rules and correspondence between the parties and then contravenes one of the rules, it can properly be said that there is an error of law patent on the face of the award. [p. 803, col. 1.]

Appeal from the following decision of Mr. Justice Pratt, dismissing an application to set aside an award:—

"This is a petition to set aside the award made in an arbitration under the Rules of the Bombay Cotton Trade Association.

The respondents had made two contracts to deliver cotton to the petitioners. The petitioners complained that the cotton was of an inferior quality and demanded a survey or arbitration under rule 12 of the Rules of the Association. The surveyor or arbitrator found that the quality of the cotton tendered was Rs. 10-8-0 a candy inferior. This award was appealed against and was upheld on appeal by the tribunal appointed under the Association's rules. The award so appealed against was under rule 12 final and conclusive, and rule 52 gave the petitioners the right to reject the cotton and they did so. The respondents then preferred a claim for damages, contending that the contract should be settled at the market rate, which was lower than the contract rate, and claiming that the difference, Rs. 25,000, was payable to them. The petitioners refused to meet this claim. The dispute was referred to arbitration under rule 13, and the arbitrators have awarded the respondents their claim. The petitioners appealed against the award, which was confirmed by the appellate tribunal. It is this award, so confirmed, which is the subject of this petition.

The petitioners went to arbitration under protest contending that there was no dispute to arbitrate upon, and this is the first objection taken to the award. It is contended that there was no dispute which could form the subject-matter of the arbitration and that the arbitrators had,

therefore, no jurisdiction. There is no substance in this objection. The respondents' claim was based on the contract and was for the difference between the contract rate and the market rate. There was thus clearly a question in dispute arising out of or in relation to the contract. This was a dispute which fell under rule 13 of the rules and one which the arbitrators had jurisdiction to adjudicate upon. It may be an altogether unjustifiable claim but that was a matter for the arbitrators to decide.

The next objection raised to the jurisdiction of the arbitrators is one raised by Mr. Inverarity in the course of his reply, and that is that when the contract was broken by reason of the respondents' default, the arbitration clause fell with it. But the cases cited do not support this proposition. In *Smith Coney & Barrett* v. *Becker Gray & Co.* (1) it was conceded that if the whole contract was illegal by reason of the war, the arbitration clause would also be void. In the case of *Jureidini* v. *National British and Irish Millers' Insurance Company, Limited* (2) the Insurance company, having repudiated the whole contract on the ground of fraud, were estopped from raising the arbitration clause as a defence to the suit on the doctrine that they could not both approbate and reprobate. There is here no question of legality or estoppel. The agreement to arbitrate is a collateral agreement. It does not fall when the main agreement is broken, but in fact the breach of the main agreement is one of the factors which brings the agreement of arbitration into operation.

The next and the only other objection taken is that there is an error patent on the face of the award, which is, therefore, liable to be set aside under the rule in *Hodgkinson* v. *Fernie* (3), followed in *Landauer* v. *Asser* (4) and *British Westinghouse Electric and Manufacturing Company Limited* v. *Underground Electric Railways Company of London, Limited* (5). It seems to me, however, impossible to impugn the award on this ground, for the award gives no reasons. It merely states the dispute and then gives the arbitrators' decision on that dispute. The error of law pleaded by the petitioners is that the arbitrators have misconstrued rule 52 of the Rules of the Association. This rule gives the buyer, in the case of a tender of inferior goods, when inferiority of the quality is in excess of Rs. 5 a candy, the option of invoicing back at the market rate. This is an option which was admittedly not exercised, and it is impossible that the petitioners could have exercised that option to their own detriment when the market rate was less than the contract rate. It may be that the arbitrators have misconstrued this rule as making the exercise of this option compulsory. But this is only a matter for speculation It is equally possible that the arbitrators have proceeded on the terms in the contracts which provide that they cannot be cancelled for any cause whatever. The arbitrators may have construed this term of the contract as superseding the rule giving the petitioners the right of rejection and may also have erred in making no allowance for inferiority of quality. Again, it is also possible that the arbitrators have overlooked the final effect of the survey or award under rule 12 and considering that the goods were of the contract quality have held that they were wrongly rejected by the petitioners. These seem to exhaust the possible errors which the arbitrators may have committed, but the very fact that there are several errors to choose from makes it clear that the error is one that is latent, and not one that is patent on the face of the award. The strongest of the cases cited is that of *Landauer* v. *Asser* (4), but there the award "expressly and implicitly founded its conclusions on the terms of the contract" (p. 193) which gave no warrant for these conclusions. But here it is impossible to trace the error. It may be

(1) (1916) 2 Ch. 86; 84 L. J. Ch. 865; 112 L. T. 914; 31 T. L. R. 151.

(2) 1915) A. C. 499; 84 L. J. K. B. 640; (1915) W. C. & I. Rep. 239; 112 L. T. 531, 59 S. J. 205; 31 T. L. R. 132.

(3) (1857) 3 C. B. (N. S.) 189; 27 L. J. C. P. 66; 3 Jur. (N. S.) 818, 6 W. R. 181; 111 R. R. 614; 140 E. R. 712.

(4) (1905) 2 K. B. 184; 74 L. J. K. B. 659; 93 L. T. 20; 53 W. R. 534; 10 Com. Cas. 265; 21 T. L. R. 429.

(5) (1912) A. C. 673; 81 L. J. K. B. 1132; 107 L. T. 325; 56 S. J. 734.

an error of construction of the rules or of the contract, or of fact as to the quality of the goods tendered.

Arbitrators are judges of law as well as of fact and an error of law does not vitiate an award: *Ghulam Jilani* v. *Muhammad Hassan* (6).

I accordingly dismiss the petition with costs and direct that the award shall stand filed."

Messrs. *Kanga* and *Desai*, for the Appellants.

Messrs. *Setalvad* and *Captain*, for the Respondents.

JUDGMENT.

MACLEOD, C. J.—This is an appeal from the decision of Pratt, J.

The appellants, the Jivraj Baloo Spinning and Weaving Co., Ltd., filed a petition to set aside an award in favour of the respondents, Messrs. Champsey Bhara & Co., which had been made in the following circumstances.

On the 17th August 1918 the respondents contracted to sell to the appellants 100 bales New Machine Ginned Fully Good Mundra Cotton at Rs. 905 a candy, delivery 1st October to 25th November.

On the 4th September 1918, a similar contract was made for the sale of 100 bales at Rs. 950 a candy. Both the said contracts were subject to the Rules and Regulations of the Bombay Cotton Trade Association, Ltd

Against the said contracts the respondents tendered cotton. Surveys were held and in each case the arbitrators made awards giving an allowance of Rs. 10-8 0 per candy. These awards were confirmed on appeal by the Appeal Committee. Rule 52 of the Bombay Cotton Trade Association Rules lays down what are the buyer's rights if the tender is not approved. If the final award for inferiority of quality be in excess of Rs. 5 a candy, the buyer shall have the option either to take the cotton at the allowance fixed by the arbitrators or the Appeal Committee, or upon giving notice in writing to the seller and original tenderer to refuse the same.

Accordingly, on the 25th November, the appellants gave the respondents notice that they refused the cotton tendered.

The rule then provides that if the buyer refuses the cotton he may either buy in the market at a reasonable rate on account, risk and expense of the seller or invoice it back to the seller at the market rate of the day upon which the final award shall have been made. In the event of the buyer exercising his option of invoicing the cotton back to the seller at the market rate of the day upon which the final award has been made, he shall notify his immediate seller and the original tenderer within twenty-four hours of the arbitration and/or appeal, if any, being finally disposed of.

The appellants did not exercise either of the options mentioned in the rule. The obvious reason was that the market had fallen.

On the 29th November the respondents wrote to the appellants claiming Rs. 25,000, being the difference between the contract rates and the room rates when the cotton was rejected. The appellants replied on the 30th November that the contracts were broken and, therefore, they were not liable to the respondents.

On the 4th December the respondents wrote that they proposed to refer the matter to arbitration under the provisions of rule 13.

The appellants replied that they were not bound to refer the matter to arbitration.

At the request of the respondents the Association appointed two arbitrators under the Rules to decide the alleged claim preferred by the respondents. The appellants submitted their contentions to the arbitrators in writing.

On the 23rd of December the arbitrators published their award.

After reciting the contracts above mentioned, the rejection of the cotton tendered, the claim of the respondents, and the denial of liability by the appellants, the arbitrators awarded and directed that the appellants should pay to the respondents the sum of Rs. 25,000.

This award was confirmed by the Appeal Board on the 9th June. The appellants thereupon filed a petition to set aside the award. It was argued before the learned Judge (1) that there was no dispute which

(6) 29 I. A. 51; 4 Bom. L. R. 161; 12 M. L. J. 77; 6 C. W. N. 226; 29 C. 167; 25 P. R. 1902; 8 Sar. P. C. J. 154 (P. C.)

could be referred to arbitration, (2) that the arbitrators had no jurisdiction, (3) that there was an error of law patent on the face of the award. All these objections were held to be untenable and the petition was dismissed.

In the view I take of the proper construction of rule 52, a dispute could only validly arise in the event of the buyer exercising one of the options mentioned in the rule. But I think that really the first two points are involved in the third, since, if the third cannot be found in the appellants' favour, it would follow that there was a dispute which it was within the jurisdiction of the arbitrators to decide. The question whether there was an error patent on the face of the award presents many difficulties.

The rule is clear, as laid down in *Landauer* v. *Asser* (4), that the Court will set aside an award if there is an error of law patent on the face of it. It was contended that the arbitrators having given no reasons for their award, the error of law which it is said they have committed is a matter of speculation only, so that it cannot be patent on the face of the award.

But the arbitrators have recited the contracts which include the Rules of the Association, the rejection of the cotton tendered, and the reasons for such rejection, and the claim of the respondents, and it seems perfectly obvious from their award that they have allowed the claim made by the respondents in their letter of the 29th November, based on their construction of the provisions of rule 52.

If then it is patent that the arbitrators have wrongly construed the contracts, it seems on the authority of *Landauer* v. *Asser* (4) that we are entitled to set aside the award. Kennedy, J., at page 191, after reading the terms of the award, said:—

"'The reasoning of the umpire, which he puts forward in the expression 'as the parties to the contract, etc., were by the terms thereof principals thereto,' is, as Counsel for both parties seemed to agree, far from clear. I do not understand how in any case the facts help Messrs. Asser. But whatever this expression means it is, I think, quite clear that the umpire bases his decision that Messrs. Asser, the sellers, are, and Messrs. Landauer, the buyers, are not entitled to the sum in dispute, entirely upon the terms of the contract of November 3, 1903."

I think it may be said, to use the language of Kennedy, J., that the arbitrators in this case have based their decision that the respondents are entitled to the sum they claim entirely upon the terms of the contract.

Now if it is clear that in no case under rule 52 can the buyer be liable to pay a sum of money as damages or compensation or whatever else it may be called to the seller after he has rightly rejected the cotton, then it seems to me that an award directing him to pay in such a case a certain sum of money is bad on the face of it in point of law.

What are the buyer's rights if he rejects the cotton? (1) He may buy in the market at a reasonable rate on account, risk and expense of the seller. That is to say, if the market has gone up and he buys he can call upon the seller to pay the difference. If the market has gone down and he buys, it is obvious he has no claim against the seller, but the seller has certainly no claim on the buyer for the saving the buyer has effected. (2) The buyer may invoice the cotton back to the seller at the market rate of the day upon which the final award has been made. This he could only do if the market had risen. There is no compulsion upon him to invoice the cotton back to the seller if the market has fallen. These two options are the usual ones given to a buyer as a foundation for a claim against his seller for damages (compare rules 37, 38 and 47) and no man in his senses would exercise either of them unless the market had risen. If the market falls, he has no claim against the seller and he can either buy or not as he chooses. The argument that the word 'may' must be read 'shall' is based on an obvious misreading of the rule. The marginal note shows that paragraph 1 of the Rule deals only with the buyer's rights if the tender is not approved. It is entirely opposed to the general provisions of the Contract Act and to the Common Law that a buyer who has rightly rejected goods tendered under a contract of purchase and sale should be in any way liable to the seller. If the members of the Association think that there should

be such a liability, then they must provide for it by express conditions in the contract.

I am aware that my opinion is contrary to the view of the arbitrators and the members of the Board of Appeal who were persons of great experience in the cotton trade, but as they have imposed, as I think they have done, a liability on the buyer which cannot possibly be said to have been provided for by the contract on a proper construction of its terms, I think there is an error of law patent upon the face of the award which entitles the Court to set it aside.

The appellants must have their costs in both Courts.

As the appellants have paid the sum awarded they will be entitled to a refund and interest at 6 per cent. from the date of payment.

HEATON, J.—It is to me quite plain from the facts stated in the judgment of my Lord the Chief Justice that no Court of law would allow damages or compensation to the seller in this case. He broke the contract by tendering goods of a quality such that the buyer was entitled to reject them and did so. It is directly contrary to law that the person who breaks the contract should receive damages or compensation for the breach. Undoubtedly, therefore, there is an error of law and it is so startling, so fundamental, that it becomes plainly apparent as soon as the award and the papers recited in the award are read. This is so because from the admitted facts and the contract and the rules, both of which are recited in the award, it is apparent that the buyer rightly and not wrongly rejected the goods. I have added this brief statement to the judgment of my Lord the Chief Justice with which I agree, because at first it seemed to me doubtful whether the error could be described as apparent on the face of the award. But as the award imports by reference the contract, the rules, and the correspondence between the parties, it may, I think, properly be said that the error of law is apparent on the face of the award.

I agree that the appeal should be allowed.

Appeal allowed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 216 AND 229 OF 1918.

May 29, 1919.

Present :—Mr. Justice Jwala Prasad and Mr. Justice Atkinson.

A. J. MEIK, ESQR., MANAGER OF BARABHUM ENCUMBERED ESTATE, MANBHUM—JUDGMENT-DEBTOR—APPELLANT

versus

THE MIDNAPUR ZEMINDARY COMPANY, LTD.—DECREE HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 15, 17—Execution of decree—Joint decree—One of several joint decree-holders, whether can apply for execution—Procedure—Amendment of application for execution, when permissible.

A joint decree cannot be executed by one of the several joint decree-holders in respect of what the applicant considers his share in the decree. Much less can it be executed by one of the decree-holders in respect of the entire decree, unless it is on behalf of the decree-holders for the benefit of them all. Even if the application for execution of the decree by one of the decree-holders be on behalf of or for the benefit of them all, it is for the Court to allow, for sufficient cause, the execution of the decree on such application, and in case the Court does allow the application and the decree to be so executed, the Court is required to make such order "as it deems necessary for protecting the interests of the persons who have not joined in the application." [p. 804, col. 2; p. 805, col. 1.]

The requirements of rule 15 of Order XXI of the Civil Procedure Code go to the root of the execution of the decree itself, and, therefore, while rule 17 of the Order empowers an executing Court to allow a defect in the requirements of rules 11 to 14 of the Order to be amended it does not include rule 15 of the Order, so that an application for execution of a decree which does not comply with the requirements of rule 15 cannot be allowed to be amended. [p. 805, col. 1.]

Miscellaneous appeals from the orders of the Subordinate Judge, Manbhum, dated the 11th May 1918 and the 6th July 1918, respectively.

Syed *Fakhruddin*, K. B., for the Appellant.

Syed *Hasan Imam* and Mr. *S. N. Palit*, for the Respondent.

JUDGMENT.

JWALA PRASAD, J.—Miscellaneous Appeals Nos. 216 and 229 of 1918 are presented against the orders of the Subordinate Judge, dated the 11th May 1918 and the 6th July 1918 respectively. By these orders the Subordinate Judge disallowed the several objections of the judgment-debtor, Mr

MEIK, A. J. *v.* MIDNAPUR ZAMINDARY COMPANY LD.

A. J. Meik, Manager of Barabhum Encumbered Estate, Manbhum, to the execution of a joint decree held by the respondent, the Midnapur Zemindary Company, Limited, and one Mr. Mathesa against the appellant. The facts shortly stated are as follows :—

The Raja of Barabhum, Sri Ramkanai Singh Deo, brought a suit No. 89 of 1906 against the respondent, the Midnapur Zamindary Company, for setting aside a Patni. The Subordinate Judge dismissed the suit and awarded costs to defendants, the Midnapur Zemindary Company and Mr. Mathesa. The Raja preferred an appeal No. 79 of 1908 to the Calcutta High Court which was also dismissed on 28th April 1910 with costs. During the pendency of the appeal in the High Court the Raja, on the 17th December 1909, obtained a decree against the Midnapur Zamindary Company for a large sum of money due as arrears of Patni rent. The Deputy Commissioner of Manbhum as Manager of the Encumbered Estate of the Raja obtained leave to appeal to His Majesty in Council against the decree of the Calcutta High Court, dated 28th April 1910, in favour of the Midnapur Zamindary Company, and on 7th February 1911 hypothecated the said rent decree of the 17th December 1909 in favour of the Raja as security for the respondent's costs of appeal to the Privy Council. An appeal was preferred. In February 1915, the Privy Council dismissed the appeal awarding costs to the defendants, the Midnapur Zamindary Company and Mr. Mathesa. Out of the two decree holders the Midnapur Zamindary Company and Mr. Mathesa, only the former applied for execution of the entire decree to the Subordinate Judge on 23rd June 1917. The execution comprises three decrees for costs :—

1. For costs awarded by the Subordinate Judge in Suit No. 89, Rs. 1,701 9-0, which with interest and costs of the previous executions amounted to Rs. 2,686 1-6.

2. For costs awarded by the High Court in Appeal No. 79, Rs. 2,008 6 0, which with interest and costs of the previous executions amounted to Rs. 2,873-0-3.

3. For costs awarded by His Majesty in Council in Appeal No. 62, Rs. 5,814-12 0.

The total sum covered by the execution is Rs. 11,373-13 9. The decree-holder applied for recovery of the money by attachment and sale of the judgment-debtor's Zamindary right in Barabhum Estate Pargana, Tauzi No. 1, District Manbhum. The Deputy Commissioner, as manager of the estate of the judgment-debtor under the Chota Nagpur Encumbered Estates Act, filed a petition objecting to the execution of the decree on the 15th of August 1917. This was disposed of against the judgment-debtor by the Subordinate Judge on the 11th May 1918, and the execution was ordered to proceed. Appeal No. 216 is against this order of the Subordinate Judge. On the 29th June 1918, the judgment debtor filed further objections which were disposed of by the order of the Court on the 6th of July 1918. Appeal No. 229 is by the judgment-debtor against this order of the Subordinate Judge. These two appeals may be considered at one and the same time and may be disposed of by one judgment as they relate to the execution of the same decree, and the objections of the judgment-debtor are more or less overlapping.

Mr. Fakhruddin, appearing on behalf of the appellant, has strenuously contended that the petition for the execution of the decree was invalid inasmuch as it contravened the provisions of Order XXI, rule 15. The petition for the execution of the decree was taken out by one of the two joint decree-holders in respect of the whole decree. Under rule 15 of the said Order this is permissible if the execution is for the benefit of all the decree holders. The petition for execution of the decree, dated the 23rd June 1917, does not state that the execution was for the benefit of all the decree holders. The name of the other decree holder—Mr. Mathesa—is not even mentioned in the column prescribed for stating the names of the parties nor anywhere else in the application. It is, therefore, clear that the execution was taken out by the Midnapur Zamindary Company, Limited, one of the decree-holders only, in respect of the entire decree solely on its own behalf. A joint decree cannot be executed by one of the several joint decree-holders in respect of what the applicant considers his share in the decree. Much less can it be executed by one of the decree-holders in respect of the entire decree,

unless it is on behalf of all the decree-holders or for the benefit of them all. Even if the application for execution of the decree by one of the decree-holders be on behalf of or for the benefit of them all it is for the Court to allow, for sufficient cause, the execution of the decree on such application, and in case the Court does allow the application and the decree to be so executed, the Court is required to make such order "as it deems necessary for protecting the interests of the persons who have not joined in the application." This is imperative in order to make an execution of a decree by one of the joint decree-holders valid and competent, as the word "shall" in clause 2 indicates. In the present case there is no application for the execution of the joint decree for the benefit of all the joint decree-holders; nor has the decree been allowed to be executed by one of the decree-holders, nor has the Court passed any order for protecting the interest of the other decree-holder who has not joined in the application. The execution, therefore, is invalid and incompetent. The Court below disposed of this objection by its order, dated 11th May 1918, by simply stating that "Order XXI, rule 15, of the Code of Civil Procedure enables one of the joint decree-holders to execute the whole decree:" *vide* order 20, dated the 11th May, 1918. The lower Court has overlooked the provisions of the said rule. On behalf of the respondent it has been suggested that the application may be allowed to be amended. Rule 17 of Order XXI, while it empowers the Court to allow a defect in the requirements of rules 11 to 14 to be amended, does not include rule 15 in it and hence the application cannot be allowed to be amended. There appears to be good reason for the said distinction. The defects in the requirements under rules 11 to 14 are only of formal character, whereas rule 15 goes to the root of the execution of the decree itself. The contention of the judgment-debtor must, therefore, prevail and it must be held that there was no valid application for execution of the decree before the lower Appellate Court and the same must, therefore, be disallowed.

The objection as to the execution being invalid under Order XXI, rule 15, has been taken in Appeal No. 216 which relates to the order of the Court of the 11th May 1918, and not in Appeal No. 229 which relates to the order of the Court of the 6th July 1918. But inasmuch as the petition for execution of the decree was in itself invalid, the orders of the Court of the 11th May directing execution to proceed and of the 6th July directing notice to issue under Order XXI, rule 66, are illegal and must, therefore, be set aside.

It is needless to consider the other points raised in both these appeals and we, therefore, abstain from giving any opinion on those points.

The result is that the appeals are allowed with costs. We assess the hearing fee at five gold *mohurs* for both the appeals.

ATKINSON, J.—I agree.

Appeal allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 17 OF 1919.

July 29, 1919.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

GOVIND LAXMAN GOKHALE—APPELLANT

versus

HIRACHAND MANCHARAM—RESPONDENT.

Precedents, value of—Application of rules to particular facts—Vendor and purchaser—Construction of document—Contract, when completed—Document to be drawn up by Vakil, whether condition precedent—Specific performance.

Where a general rule of construction has once been laid down by authority, a decision arising from its application to a particular set of facts cannot operate as a precedent, for the very remote chance of any two sets of facts being absolutely similar may be excluded. No Judge can be fettered by an attempt by another Judge to lay down any rule of construction based on his opinion on the facts of the case before him. [p. 807, col. 1.]

When a document forms merely the basis of a future agreement, it is open to either party to suggest fresh terms as to the price or any other matter The mere fact, however, that an agreement provides that a bargain paper is to be made through a Vakil cannot of itself prove that there is a condition precedent to the agreement becoming effectual as a contract. [p. 808, col. 1.]

Appeal from the decision of Mr. Justice Marten, dismissing the plaintiff's suit, reported as 50 Ind. Cas. 403.

Mr. *Kanga* (with him Mr. *Setalvad*), for the Appellant.

GOVIND LAXMAN *v.* HIRACHAND MANCHARAM.

Mr. *Bahadurji* (acting Advocate General) (with him Mr. *Taraporevala*), for the Respondent.

JUDGMENT.

MACLEOD, C. J.—This is an appeal from the decision of Marten, J., dismissing the suit which the plaintiff had filed praying that the defendant might be ordered to specifically perform an alleged agreement, dated the 28th November 1917, and to do all acts necessary for carrying out his part of the agreement.

The facts are not in dispute and the evidence in the case is purely documentary.

On the 28th November 1917, the plaintiff and defendant drew up two writings in Gujarati which are Exhibits A and AI in the case. It is admitted that for all intents and purposes the documents are in identical terms. Exhibit A was signed by the defendant and Exhibit AI by the plaintiff. The plaintiff contended that those two documents constituted a complete agreement for the sale by the defendant to the plaintiff of a certain property for Rs. 2,15,000. Looking at the documents this would at first sight appear obvious. They contain the names of the parties, the description of the property to be sold, the price to be paid, a provision regarding the division of the costs of the conveyance, etc., the conditions that the seller must make out a marketable title, and that the vendor must get the signature of a certain adopted son on the sale-deed, a provision that the seller has not to pay brokerage, and the time for completion. Finally each party writes 'I have given and taken from you the agreement to the above effect of my own free will and pleasure.' The main defence is contained in paragraph 2 of the written statement:—

"The defendant says that the Gujarati writings signed by the plaintiff and defendant respectively were merely the terms agreed on as a basis for the contract, and not the contract itself which was to be made through a Vakil as stated in clause 1 of the Gujarati writing."

After these documents were executed, a draft agreement in English was prepared but the parties could not agree to the terms of the draft. Eventually, on the 8th December 1917, the defendant's Solicitors wrote that as the plaintiff did not agree to the terms of the draft agreement as altered by them, there was no course left open to the defendant but to break off the negotiation for the sale of the property; that the Gujarati Chitti was not the agreement which the parties intended to enter into for the sale of the property, as their client understood that the altered agreement for sale and all the necessary terms and conditions of such sale would be entered into at the office of the Vakil as provided in the said Chitti. This contention found favour with the learned trial Judge.

After referring to various authorities he said:

"I think the words 'the conditions in respect thereof are as follows' are important, and it is also important that the first of the conditions referred to is for a bargain paper through a Vakil The reference to the more formal document (*viz.*, the bargain paper) is, therefore, a 'condition', and according to Lord Parker, that fact is 'generally if not invariably conclusive against the reference being treated as the expression of a mere desire.' Further, I think there was a special reason here for the parties requiring the services of a Vakil before they were finally bound. That reason was the situation with reference to the two High Court suits, which was a peculiar one and which clauses 2 and 4 of Exhibit A might not entirely meet.

"Then, too, I think it is in favour of the defendants that the earnest money was to be paid on the execution of the bargain paper and not on the execution of Exhibit A."

The fallacy in this argument, with due respect, is the failure to observe that the word 'condition' has two meanings. It is often used as synonymous with 'term' and ordinarily when it is stated in a document which takes the form of an agreement that "the conditions are as follows" as it is stated in Exhibit A, the word 'condition' means 'term.' The commonest occasion when the word has this meaning is when conditions of sale are drawn up for an auction. When a successful bidder signs the agreement annexed to the conditions of sale, those conditions become part of the contract. Therefore, the mere fact that a bargain paper was to be made through a Vakil cannot of itself prove that there was a condition precedent to the agreement becoming effectual

as a term of the agreement. There are a great many cases reported where the question before the Court has been whether or not on the evidence in the case there has been a concluded agreement, if there is a provision for the execution of a formal agreement thereafter, and this is to be regretted as once the general rule of construction has been laid down by authority, a decision arising from its application to a particular set of facts cannot operate as a precedent, for the very remote chance of any two sets of fact being absolutely similar may be excluded. And in my humble opinion no Judge can be fettered by an attempt by another Judge to lay down any special rule of construction based on his opinion on the facts of the case before him.

The general rule of construction was laid down by the House of Lords in *Rossiter* v. *Miller* (1) and it will be as well to set out the facts of that case. Certain land had been laid out in plots and a plan prepared. Eight conditions were printed on the plan headed, "the following are the conditions of sale." After the conditions came the following clause: "Each purchaser will be required to sign a contract embodying the foregoing conditions and providing for the payment of a deposit at the rate of 10 per cent. and for the completion of the purchase within two months of the contract." Miller offered orally to purchase some of the lots for £1,000 and was informed he must purchase under the conditions printed on the plan. Then certain letters passed and it was contended that Miller's offer had been accepted.

Cairns, L. C., said: "The main question...is whether there was...a concluded contract." Then after setting out the conditions of sale and the correspondence the Lord Chancellor proceeded:

"I pause there for the purpose of pointing out...that in these conditions there are to be found the terms...of a contract, such as might reasonably be expected to be proposed with regard to sales of plots of land of this description...If you find, not an unqualified acceptance of a contract, but an acceptance *subject to the condition* that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract."

Lord Hatherley said:

"If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a Solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say: 'We will have this agreement put into due form by a Solicitor.'"

Lord Blackburn said:

"But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

Lastly Lord Gordon said:

"No doubt these conditions provided for a subsequent and formal deed being executed by the parties: but that deed was only for the purpose of more formally setting forth the conditions upon which the parties had agreed. If there was anything introduced into the proposed deed, which the purchaser considered beyond the terms and conditions on which he purchased the property, he would have been entitled to object, and, if necessary, the proper terms of the deed could have been adjusted at the sight of a Court of Law."

(1) (1878) 3 App. Cas. 1124 at pp. 1132, 1139, 1143, 1151, 1154; 48 L. J. Ch. 10; 39 L. T. 173; 26 W. R. 865.

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The facts of that case more nearly approach the facts of this case than the facts of any of the other cases which have been cited to us. There were conditions of sale which were considered to be the terms upon which the lots were offered for sale. It was provided that each purchaser was to sign a contract embodying the conditions and providing for the payment of a deposit. But the facts of this case are very much stronger, as the alleged contract is to be found not in correspondence between the parties but in a document which is in the form of a regular agreement. Each party writes that he has given and taken an agreement to the above effect, that is to say, according to the conditions or terms in the document and not *subject* to any condition. And there is this further fact that Messrs. Hiralal and Co. by their letter of the 1st December certainly considered that the agreement by a Vakil was to be drawn up in consonance with the terms of the Gujarati Chitti. If that document was merely the basis for a future agreement, then it would be open to either party to suggest fresh terms as to price and any other matter.

Now I turn to the facts in the cases on which the respondent relied.

In *Winn* v. *Bull* (2) there was an agreement for a lease of a freehold but *subject to* the preparation and approval of a formal contract.

Jessel, M. R., said:

"The plaintiff says in effect, 'I agree to grant you a lease on certain terms, but *subject* to something else being approved.' He does not say: 'Nothing more shall be required'...but 'something else is required'... That being so, the agreement is uncertain in its terms..."

In *Lloyd* v. *Nowell* (3) the defendant wrote "*subject* to the preparation by my Solicitors and completion of a formal contract, I am willing to sell to you the lease, etc."

Kekewich, J., said:

"I cannot myself get out of the plain meaning of the words: 'I am willing to sell, not absolutely, but subject to the preparation by my Solicitor, and completion, of a formal contract'...That provision seems to me to go to the root of the contract."

In *Watson* v. *McAllum* (4) the letter ran: "We agree to sell the above for £ 1,775 subject to agreement stating fully the conditions being prepared and signed at our office on Monday."

Joyce, J, said: "What is the effect of the words '*subject to*'? They introduced a condition or proviso."

Lastly in *Von Hatzfeldt-Wildenburg* v. *Alexander* (5), the case so much relied upon by the learned trial Judge, there was an offer by letter to accept £ 25,000 for the lease of a certain house and a reply by letter accepting '*subject to* the following conditions,' and one condition was that the buyer approved her surveyors' report on the structure, and drainage, etc., another was that the buyer's Solicitors should approve of the title and the form of contract. The plaintiff did not approve of her surveyors' report, and the defendant withdrew the offer to sell.

It will be seen, therefore, that in all these cases the words 'subject to' were used and it was held that they imported a condition or proviso.

I may also refer to the decision of Jessel, M. R, in *Crossley* v. *Maycock* (6) where the learned Judge said:

"The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at."

Lastly the remarks of Spankie, J., in *Whymper* v. *Buckle* (7) seem directly in point. The learned Judge said:

"With all this authority before us we may safely conclude that, unless the defendants can show that by mutual consent there was a condition antecedent to a contract, to the effect that there should be

(2) (1877) 7 Ch, D. 29 at p. 31; 47 L. J. Ch. 139; 26 W. R. 230.

(3) (1895) 2 Ch. D. 744 at p. 746; 64 L. J. Ch. 744; 13 R. 712; 73 L. T. 154; 44 W. R. 43.

(4) (1902) 87 L. T. 547 at p. 548.

(5) (1912) 1 Ch. 284; 81 L. J. Ch. 184; 105 L. T. 434.

(6) (1874) 18 Eq. 180 at p 181; 43 L. J. Ch. 379; 22 W. R 87.

(7) 3 A. 469 at p. 478.

no binding agreement until a written contract had been executed by the parties, or that the assent communicated in their letter of the 20th December 1877, was subject to the provision as to a written contract, then, assuming that any agreement has been proved, that agreement would be binding upon the parties. The case, therefore, must stand or fall to pieces on the evidence."

To say that the words "the conditions thereof are as follows," appearing in a document which has all the appearance of a final agreement, import that all that follows constitutes conditions antecedent to a contract is begging the question. An agreement having been executed, the defendant has to show that it was not to take effect until certain conditions precedent had been fulfilled.

It has been argued that some dispute might arise when drawing up the clause in the formal agreement corresponding to condition 4 in Exhibit A. Now to my mind that clause is perfectly clear. If the pending suits are not disposed of within six months, the agreement is to remain in force until they are disposed of. Disposal must mean final disposal. It could not be read into the clause that if the defendant got a decision in his favour in the first Court, the plaintiff would be bound to purchase without regard to the chance of the decision in the first Court being reversed on appeal. But the fact that a dispute might arise in drafting the formal agreement was considered by Lord Gordon in *Rossiter* v. *Miller* (1) in the passage I have referred to above and cannot in any way affect the question we have to determine, unless the defendant can show that the condition in clause 4 is so uncertain that it is patent that no agreement was arrived at and that the parties intended that the actual agreement should be settled thereafter when the bargain paper was executed. But that has not been shown, the question raised by the defendant's Solicitors whether the defendant's agreement was passing to and fro between the parties is no longer of any importance, as we have been told the suits have been settled and the defendants are free to convey, but as long as the suits were pending there would have been no difficulty that I can see, in the event of disputes arising over the terms of the agreement, in getting them *or any others* adjusted by the Court.

In my opinion, therefore, there was a binding agreement on the 22th November 1917 and the plaintiff is entitled to specific performance.

On the issues, I do not understand the form of the first issue and I think it should be struck out.

On the second issue I should say there was a concluded contract the terms of which are to be found in Exhibit A. I would answer issue No. (3) in the negative, issue No. (4) in the affirmative and issue No. (5) in the affirmative.

The result is that the appeal must be allowed and the plaintiff's claim decreed with costs in both Courts.

HEATON, J.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No 46 OF 1918.

August 21, 1919.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

THEKKEDATH NEELU NEITHIAR AND ANOTHER—PETITIONERS—APPELLANTS

versus

SUBRAMANIA MOOTHAN AND ANOTHER —COUNTER-PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 66, 90—Execution of decree—Sale—Application to set aside sale on ground of omission to give notice of settlement of sale proclamation Appeal, whether lies—Appeal, second, whether competent—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts. 166, 181.

An application to set aside an execution sale on the ground of absence of notice of the settlement of the sale proclamation, as required by rule 66, Order XXI of the Civil Procedure Code, can only be considered under section 47 of the Code, and any order passed thereon is open to appeal and second appeal. [p. 810, col. 2.]

Such an application is governed by Article 166 and not by Article 181 of Schedule I to the Limitation Act. [p. 813, col. 1.]

The failure to give notice to the judgment-debtor before setting a proclamation of sale would not of itself invalidate the sale. [p. 813, col. 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat

at Calicut, dated 28th November 1917, in Appeal Suit No. 180 of 1917 (Appeal Suit No. 344 of 1917 of the District Court), preferred against the order of the Court of the District Munsif, Palghat, in Execution Appeals Nos. 3348 and 3568 of 1916, in Execution Petition No. 2091 of 1915 (Original Suit No. 74 of 1914).

The appeal against appellate order came on for hearing on the 25th of February 1919.

FACTS appear from the judgment.

Mr. *C. V. Anantha Krishna Aiyar* (with him Mr. *P. R. Ramakrishna Aiyar*), for the Respondents, raised the preliminary objection that no second appeal lay against the order. The application is one substantially under Order XXI, rule 90, Civil Procedure Code. Under section 104 (2) no second appeal lies.

Mr. *C. Madhavan Nair*, for the Appellant.—A ground for setting aside a sale may be alleged *de hors* rule 90 and would be covered by section 47, Civil Procedure Code. One of the main grounds is that defendants had no notice of the settlement of the sale proclamation. That can only be considered under section 47. There is an appeal and a second appeal.

The absence of notice under Order XXI, rule 66, was due to the decree-holder's fraud. The judgment-debtor is entitled to rely on section 18 of the Limitation Act to save the bar. Even if there was no fraud, the sale itself is a nullity as it was held in defiance of a distinct statutory provision. *Syam Mondal* v. *Sati Nath Banerjee* (1).

The suit is not barred, the Article of the Limitation Act applicable being Article 181.

Messrs. *C. V. Anantha Krishna Aiyar* and *P. R. Ramakrishna Aiyar*, for the Respondents.—There is no fraud in this case. The failure to issue notice was the fault of the ministerial staff of the Court. Section 18 of the Limitation Act cannot be availed of. Besides, the fraud complained of was anterior to the sale.

Article 166 of the Limitation Act applies and bars the application.

Under Order XXI, rule 66, the giving of notice is not a condition precedent to the validity of the execution proceedings as in Order XXI, rule 22.

JUDGMENT.—A preliminary objection is taken to the hearing of the appeal against appellate order on the ground that no second appeal lies. The application was by the judgment-debtor to set aside the sale on various grounds. Many of them would be covered by Order XXI, rule 90. There is one allegation at least which is outside its scope. That allegation is that no notice was given to defendants Nos. 5 and 23 as required by rule 66, Order XXI, before the proclamation was settled. It was suggested that this is a matter relating to the publication or the conduct of the sale. We do not agree with this contention. There are at least three stages contemplated by rule 66. First the settlement of the proclamation, then its publication, and lastly the conduct of the sale in pursuance of it. The first of these stages is not a matter connected with the publication or the conduct of the sale. On the other hand, it is clearly anterior to both these processes. Now comes the question, as this complaint against the sale is not covered by section 90, whether a second appeal lies. It has been held in *Anantharama Iyer* v. *Vettath Kuttimalu Kovilammal* (2) a ground for setting aside a sale may be alleged *de hors* rule 90; and that such an allegation would be covered by section 47. It was contended by the learned Vakil for the respondent that even if the allegation was within section 47, if it can also be brought under rule 90 of Order XXI, there will be no second appeal by virtue of the prohibition contained in section 104, clause (2). *Asimuddi Sheikh* v. *Sundari Bibee* (3) and *Sheo Prasad Singh* v *Premma Kuar* (4), have taken this view. *Anantharama Iyer* v. *Vettath Kuttimalu Kovilammal* (2) impliedly accepts this principle. However that may be, we are clear that the ground of complaint relating to the violation of rule 66 can only be considered under section 47. Therefore, there is an appeal and a second appeal against a decision relating thereto. We overrule the preliminary objection. On the merits, the point most pressed by Mr. Madhavan Nair is that the failure to give notice before settling the proclamation was an act of fraud which resulted in his clients being kept ignorant of the subsequent sale and that,

(1) 38 Ind. Cas. 493; 44 C. 954 at p. 961; 24 C. L. J. 523; 21 C. W. N. 776.

(2) 34 Ind. Cas. 829; 30 M. L. J. 611; 19 M. L. T. 357; 3 L. W. 504.

(3) 10 Ind. Cas. 345; 38 C. 339; 15 C. W. N. 844; 14 C. L. J. 224.

(4) 43 Ind. Cas. 522; 40 A. 122; 15 A. L. J. 920.

therefore, they are entitled to rely on section 18 of the Limitation Act to save the bar. We must say that this allegation is not clearly made, but looking to the place in which it appears, we are not satisfied that the appellant did not complain of this procedure on the part of the decree-holder as fraudulent.

The Courts below, especially the lower Appellate Court, in dealing with the question of fraud, have relied on decisions which lay down that in order that section 18 may be applied, the fraud must be subsequent to the sale and not anterior. At this stage of the case, we prefer to express no opinion on this point. In our opinion, it is necessary that the Subordinate Judge should be directed to find specifically, whether the decree-holder fraudulently failed to give notice to defendants Nos. 5 and 23 as required by Order XXI, rule 66. On the return of the finding the question of materiality of the damage and its relation to the irregularity will be considered, as well as the question of law whether the fraud should be subsequent to the sale if section 18 is to be applied. Finding will be submitted in six weeks and seven days are allowed for filing objections.

In compliance with the order contained in the above judgment the Temporary Subordinate Judge of Ottapalam submitted the following

FINDING.—The case has been sent back for a specific finding whether the decree-holder fraudulently failed to give notice to the defendants Nos. 5 and 23 as required by Order XXI, rule 66 of the Code of Civil Procedure.

2. It is conceded on both sides that in settling the sale proclamation the District Munsif failed to comply with the provisions of Order XXI, rule 66 of the Code, requiring notice to be given to the decree-holder as well as the judgment-debtor before the proclamation is drawn up. The facts in connection with what happened in the executing Court will be found stated in paragraph 4 of my predecessor's judgment. It being admitted that notice was not in fact served on the defendants Nos. 5 and 23, the further question arises as to whether the omission was due to any fraudulent act or contrivance on the part of the decree-holder,

3. Mr. V. Raman Nair, who appeared for the defendants Nos. 5 and 23 at the hearing before me, sought to make out a case of fraud by an elaborate reference to the whole of the proceedings that took place before the lower Court both before and after the sale. His position was that fraud by its very nature is not susceptible of direct proof in cases like this and that the Court must infer it from a consideration of all the circumstances. On this basis I was taken through all the papers in the case and with special reference to the entries in the B. Diary. It was contended that there was no service at all on the defendants Nos. 5 and 23 at any time from the inception of execution proceedings owing to the decree-holder having already elaborated in his mind the scheme of fraud which he subsequently carried into effect at various stages of the execution case and that the Court must start with such non service of notice under Order XXI, rule 22, for judging of the later proceedings. The gross undervaluation of the 4th item in the sale proclamation and the fact that there were only three bidders in all, consisting of the decree-holder himself and two of his creatures, were also alleged to be material facts to be considered in arriving at a finding.

4. As regards the question of service of notice on the defendants Nos. 5 and 23 the District Munsif deals with the matter in paragraph 10 of his order, and taking into consideration the relationship of these parties with the other members of the Tarwad and the circumstances attending the service of processes, I think it must be held that there was valid service. It is true that the lower Court has not taken care to record in the order sheet that the defendants had been duly served. But where, as in the present case, the later proceedings show clearly that the Court considered that due service has been effected, the mere omission to pass a specific order on the return of the process-server that the process had been duly served is not of much consequence. I need only refer to *Mahomed Mera Rowther* v. *Kadir Mera Rowther* (5).

5. The main contention which forms the basis of the argument fails. There remains

(5) 22 Ind. Cas. 302; (1914) M. W. N. 63,

the specific point as to whether the omission to serve notices on the defendants Nos. 5 and 23 in connection with the settlement of the proclamation of sale under Order XXI, rule 66 (2), was due to the decree-holder's fraud. As to this the defendants have no case at all.

6. There is absolutely nothing on record from which it can be suggested that fraud must have been at the bottom of the failure to observe the procedure laid down by the rule. Under section 287 of the former Code there was no provision at all for the issue of notice to the parties before the sale was settled by the Court. But when the section re-emerged in the new Code as Order XXI, rule 66, the words "after notice to the decree holder and the judgment-debtor" were added in clause 2, apparently with the object of rendering the proclamation as full and accurate as possible by calling upon the parties to contribute such facts within their knowledge as would help the Court in arriving at a correct estimate of the particulars to be inserted in the proclamation A subsidiary object may possibly have been to prevent the parties from afterwards questioning the sale on the ground of want of knowledge. However this may be, the fact remains that the provision for previous notice to the decree holder and the judgment-debtor has been newly introduced in the present Code and it emphasizes the view held by the Courts that an execution sale is primarily the act of the Court itself. See *Raja of Kalahasti* v. *Maharajah of Venkatagiri* (6). It is thus obvious that whether notice is given or not to the parties in connection with the drawing up of the sale proclamation, it is in the first instance a matter for which the Court alone is responsible. This is made all the more clear by the provision that notice should issue to the decree-holder also. It is the latter that sets the Court in motion by his execution petition praying for sale of property and in no case could any step be taken in execution without his knowledge or active co operation. Further, with regard to sales it is the decree-holder that prepares and files in Court the draft proclamation which is to be accepted afterwards with or without amendments by the Court. That notwithstanding these well known facts the Legislature should have thought it necessary to require in the new Code that a notice must go to him quite as much as to the judgment debtor calling their attention to the fact that the Court is about to settle the terms of the sale is almost conclusive as to the Court being made solely responsible for the sale, proclamation. In a case, therefore, of an allegation of fraud as regards the omission to issue notice under Order XXI, rule 66, to the judgment-debtor there must be clear and positive evidence that the decree holder contrived by some act or other to mislead the Court into not doing its duty and to stay its hand in the matter of issue of notice. Short of this, it may be pointed out, a charge of fraud must inevitably break down.

7. In the present case the records show that the District Munsif overlooked the additions introduced in rule 66 and that he alone was responsible for not passing an order for the issue of notice to the parties. In my opinion, the decree-holder, whatever complexion his other acts may bear in the matter of the execution sale, must be pronounced to be innocent of any fraudulent act or complicity in connection with the question of notice under rule 66.

8. There would be some substance in the defendants' contention if the decree-holder had put in a separate application for settlement of sale [*vide* Order XXI, rule 66, clause (3) and if it were shown that he managed to get the Court to pass orders on it without notice to the defendants by means of some device or subterfuge. But what happened was something quite different. The decree-holder filed an execution petition once for all and that was being kept on the file and various steps taken. Most of the defendants had appeared and had taken time to satisfy the decree. At this stage of the proceedings the defendants' attention seems to have been concentrated on the effort to raise money and pay off the decree-holder. This they were unable to do and eventually their Pleader intimated he had no instructions. On the same day the Court called for the usual papers for holding the sale and then further proceedings ensued. It

(6) 21 Ind. Cas. 389; 38 M. 387; 25 M. L. J. 198; 14 M. L. T. 320.

was for the Court to have ordered notice to issue on the parties as soon as the papers were filed. But as stated above, the District Munsif was apparently unaware of the newly added provisions as to notice in Order XXI, rule 66. He also overlooked the provisions of rule 150 of the "Civil Rules of Practice, 1905," which provide for the settlement of the proclamation of sale after notice to the judgment-debtor or other party whose property is to be sold and after hearing his objections, if any.

9. The decree-holder's Vakil dwelt upon the imperfections in the defendants' affidavit, which omits to give any details or particulars of the fraud set up and based a series of arguments thereon. In the view I take of the question remitted it is not necessary to deal with this aspect of the case.

10. I find that the failure to give notice under Order XXI, rule 66, was due to inadvertence on the part of the executing Court and that the decree-holder was not responsible for it in any way.

This second appeal coming on for final hearing after return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—The finding is not attacked, and, therefore, accepting it, we dismiss from consideration the argument based on section 18 of the Limitation Act.

It is then contended that, as the petitioners were parties to the litigation, the Article of Schedule I of the Limitation Act to be applied is No. 181, not No. 166. This is contended with reference to the recent decision of the Full Bench in A. A. A. O. No. 103 of 1917, *Thattantavita* v. *Puthalathau Kandi Kombi Aliassan* (7). But that decision dealt with a claim to apply Article No. 165 and we do not think that its application and that of Article No. 166 stand on the same footing or can be dealt with on similar considerations. We have not been shown reasons for restricting the very comprehensive wording of the latter to exclude the present case.

Lastly it is urged that the sale is unsustainable on its merits, because owing to the absence of notice to petitioners of the proceedings for framing proclamation it was held without jurisdiction and is a nullity. *Syam Mondal* v. *Sati Nath Banerjee* (1) is referred to in this connection But there the notice, absence of which was relied on, was one required by Order XXI, rule 22, and its issue was a condition precedent to the validity of any execution proceedings. The notice referred to in Order XXI, rule 66, is an incident in the course of execution proceedings, the validity of which is independent of it. Taking this view we disallow this contention also. The appeal against appellate order is dismissed with costs.

M.C.P.

Appeal dismissed.

(7) 53 Ind. Cas. 437; 73 M. L. J. 340; 10 L. W. 410; 26 M. L. T. 297; (1919) M. W. N. 732; 42 M. 753 (F.B.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 803 OF 1919.

July 17, 1919.

Present:—Sir Henry Rattigan, KT., Chief Justice.

KISHAN DAYAL—DEFENDANT—APPELLANT

versus

RODU AND OTHERS—PLAINTIFFS AND *Musammat* BAHADRI AND ANOTHER—DEFENDANTS —RESPONDENTS.

Construction of document—Intention of parties—Conduct—Mortgage by several joint owners—Transaction, whether divisible—Refusal of one to execute, effect of.

Plaintiff sued for a declaratory decree to the effect that certain land was liable to attachment and sale in execution of his decree against the defendants. It appeared that the land was released from attachment on the objection of *K.*, who contended that it had been mortgaged to him. The mortgage deed was drawn up in favour of *K* and was to have been executed by three persons, who were joint owners in equal shares of the land in dispute. One of these three refused to execute it on the ground that it was without consideration:

Held, (1) that as the mortgage deed was not signed and executed by all three joint owners of the land, it was incomplete and conferred no rights whatever upon *K.*; [p. 814, col. 1.]

(2) that the mortgage was intended to be one single and indivisible transaction and could not be split up [p. 814, cols. 1 & 2]

The construction to be put on a particular transaction must depend upon the intention of the parties as inferred from their acts and conduct. [p. 814, col. 2.]

Second appeal from the decree of the Additional Judge of Kangra at Dharmsala, dated the 20th January 1919, affirming that of the Munsif, 3rd Class, Nurpur, District

Kangra, dated the 30th May 1918, decreeing the claim with costs.

Mr. *Badrud Din Qureshi*, for the Appellant.

Mr. *Manohar Lal* for Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—Plaintiffs sued for a declaratory decree to the effect that 4 *kanals* 3 *marlas* of land which had been released from attachment by order of the Court, dated the 8th October 1917, were actually liable to attachment and sale in execution of his decree against defendants Nos. 1 to 3. It appears that after the land had been attached by the decree-holder, one Kishan Dayal, defendant No. 4, objected to the attachment on the ground that the land had been mortgaged to him by an unregistered deed, dated the 25th November 1916, for Rs. 35. His objection was upheld, the property was released, and the decree-holder accordingly brought the present suit. It appears that the mortgage deed was drawn up in favour of Kishan Dayal and was to have been executed by Salo, Santu and *Musammat* Bahadri, who are joint owners in equal shares of the land in suit. The deed was duly signed and executed by Salo and Santu, but *Musammat* Bahadri refused to execute it on the ground that it was without consideration. The first Court held that the mortgage deed was incomplete and gave no rights to Kishan Dayal and that consequently plaintiffs were entitled to the decree prayed for. The Additional Judge on appeal upheld the order of the first Court and upon the same ground. He further held that the mortgage was not effected *bona fide*, that no mutation had taken place, and that even up to the date of suit Kishan Dayal had made no attempt to have mutation effected in his favour. He also points out that it has been proved that the land is still in the possession of defendants Nos. 1 to 3, though the mortgage was supposed to be with possession, and that it is defendants Nos. 1 to 3 who have been paying land revenue.

The defendant Kishan Dayal has appealed to this Court, and on his behalf it is contended that the mortgage was effectual, if not against *Musammat* Bahadri, at all events to the extent of the shares of Salo and Santu. After hearing Counsel on both sides I am of opinion that in the present case the mortgage was intended to be one indivisible transaction and that it cannot be split up in the manner desired by the appellant. It is further obvious that the mortgage was not a genuine transaction and that none of the parties to it intended that it should be acted upon. In cases of this kind the construction to be put on a particular transaction must depend upon the intention of the parties as inferred from their acts and conduct, and in the present case, even if it can be assumed that the transaction was intended to be genuine, there is nothing in the deed itself to shew that the mortgage was not one single and indivisible transaction but in actual fact three separate and distinct mortgages effected by one instrument. The consideration was stated in a lump sum and there is no specification of the shares of the mortgagors. I hold, therefore, that unless and until the deed was signed and executed by all three joint owners of the land, it was, as found by the lower Courts, incomplete and conferred no rights whatever upon Kishan Dayal, defendant No. 4.

This appeal is accordingly dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 3 OF 1918.

November 20, 1918.

Present—Mr. Justice Newbould and Mr. Justice Panton.

KUMUD BEHARY PAL—PLAINTIFF

versus

HARI CHARAN SARDAR—DEFENDANT.

Civil Procedure Code (Act V of 1908), ss. 7, 94, 95, O. XXXVIII, r. 5, O. L—Provincial Small Cause Court, power of, to attach moveables before judgment—Orders excluded from jurisdiction of Small Cause Court.

A Provincial Small Cause Court or a Court exercising the powers of a Small Cause Court has power to attach moveables before judgment. [p. 815, col. 2.]

The orders excluded from the jurisdiction of a Small Cause Court are those specifically mentioned in section 94 of the Civil Procedure Code as injunctions or interlocutory orders, that is to say, orders under clause (*c*) or clause (*e*) of the section. [p. 815, col. 1.]

Civil reference by the Munsif, 2nd Court, Alipore, dated June 10, 1918.

NANAK GIR *v.* KISHEN KAUR.

Babu *Ram Charan Mitra* (Senior Government Pleader), for the Government.

JUDGMENT.—This is a reference under rule 1, Order XLVI, of the Civil Procedure Code by the Munsif of the 2nd Court at Alipore vested with Small Cause Court powers. The point referred is whether a Provincial Small Cause Court has the power to attach moveables before judgment.

The provision of the Code relating to attachment before judgment is rule 5, Order XXXVIII. Order L of the First Schedule of the Code provides that certain portions of that schedule shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Small Cause Court under that Act. It is quite clear that there is nothing in Order L to prevent Small Cause Courts exercising powers of attachment before judgment.

The only other provision in the Code that requires to be considered is section 7 of the body of the Code. Under that section, sections 94 and 95, so far as they relate to injunctions and interlocutory orders, do not extend to Provincial Small Cause Courts or Courts exercising the jurisdiction of a Court of Small Causes.

The referring Munsif seems to have thought that all orders under section 94, including those under clause (*b*) of that section, must be held to be interlocutory orders. In dealing with this reference it is not necessary to consider whether orders for attachment before judgment can under any circumstances be regarded as interlocutory orders: but we are certainly of the opinion that for the purpose of interpreting clause (*b*) of section 7 of the Code, an attachment before judgment is not one of the interlocutory orders there referred to. If it was intended to exclude from the jurisdiction of Small Cause Courts the powers to make any order of the nature described in section 94, the words "so far as they relate to injunctions and interlocutory orders" would be superfluous. In our opinion, the only orders excluded are those specifically mentioned in section 94 as injunctions or interlocutory orders, that is to say, orders under clause (*c*) or clause (*e*) of section 94. We do not think that the new Code of Civil Procedure has made any change in the former law, and we answer the point referred by saying that a Provincial Small Cause Court has the power to attach moveables before judgment.

Answer accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2397 OF 1915.

May 19, 1919.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

NANAK GIR—DEFENDANT—APPELLANT

versus

Musammat KISHEN KAUR AND OTHERS, MINORS, THROUGH GHANAYA GIR —PLAINTIFFS—RESPONDENTS.

Hindu Law – Succession –Sister, whether can succeed as bandhu.

Under the Hindu Law a sister can come in as a *bandhu*. [p. 816, col. 2.]

Raghunath Kuari v. *Munnan Misr*, 20 A. 191; A. W. N. (1898) 13, *Nallanna* v. *Ponnal*, 14 M. 149; 1 M. L. J. 46, followed.

The decision of the question, however, depends upon the special circumstances of each case and on the consideration of the respective relationships of the parties. [p. 816, col. 2.]

As against an utter stranger a sister of the deceased has undoubtedly a preferential right of succession. [p. 816, col. 2.]

Second appeal from the decree of the District Judge, Ludhiana, dated the 19th July 1915, affirming that of the Additional District Judge, Ludhiana, dated the 1st October 1914, decreeing the claim.

Mr. *N. C. Mehra*, for the Appellant.

Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The facts giving rise to this suit out of which this appeal has arisen are the following:—Nihal Gir, a Subedar in the army, acquired the property in suit and was in possession of it till his death in 1897. He left on his death two widows Jai Dai and Naraini. After him his widow Jai Dai and his son Harnam Gir, succeeded to the property. Harnam Gir died in 1905 leaving a widow *Musammat* Khemi, two sons Bishen Gir and Kishen Gir and three daughters *Musammat* Kishen Kaur, *Musammat* Bishen Kaur and *Musammat* Santi. His share was inherited by his two sons Kishen Gir and Bishen Gir. The

latter having died in 1907 was succeeded by his surviving brother. *Musammat* Jai Dai having died in 1908 Kishen Gir succeeded to her share also. Kishen Gir having died, the names of his grandmother *Musammat* Naraini and her nephew (sister's son Nanak Gir) were entered in the revenue papers as his successors. Thereupon *Musammat* Khemi, the widow of Harnam Gir, and one Kanhya Gir, a nephew of Nihal Gir, instituted a suit against *Musammat* Naraini and Nanak Gir for the possession of the property in dispute. The case eventually came up in appeal before the Chief Court. During the pendency of the appeal in the Chief Court *Musammat* Naraini having died, the appeal was prosecuted by Nanak Gir alone as the sole surviving appellant. It was contended on his behalf that assuming that he had no title to the land in dispute Kanhya Gir, respondent, had no right of succession in the presence of the daughters of Harnam Gir as the land was the self-acquired property of Nihal Gir. It may be noted here that *Musammat* Khemi, having contracted a second marriage, had been held by the Divisional Judge to have forfeited her life estate as the mother of Kishen Gir. The dispute in the appeal was, therefore, between Nanak Gir on the one hand and Kanhya Gir on the other. It was admitted by the Counsel of Kanhya Gir at the hearing of the appeal before the Chief Court that the daughters of Harnam Gir had a right to succeed to the property in preference to his client. The learned Judges accordingly allowed the appeal on the ground that in the presence of the daughters of Harnam Gir, Kanhya Gir had no right to sue for the ejectment of Nanak Gir. The appeal was accordingly allowed and the suit was dismissed.

The present suit has now been instituted by the three minor daughters of Harnam Gir for the possession of the property in dispute, on the ground that under the law they are entitled to succeed to the property left by their brother Kishen Gir who has left no issue. The suit was contested by Nanak Gir, defendant, on the ground that he being the *chela* of Nihal Gir, who was a *sanyasi*, had a preferential right to succeed and that the plaintiffs as the sisters of Kishen Gir had no superior right of succession. Both the Courts below have held as a fact that Nanak Gir has failed to prove that he was a *chela* of Nihal Gir. They have held that the plaintiffs are entitled to succeed to the property left by Kishen Gir and have given a decree in favour of the plaintiffs for the possession of the property in dispute.

Nanak Gir has come up in second appeal to this Court and fourteen grounds of appeal have been taken in the memorandum of appeal on his behalf. Most of the pleas taken either challenge findings of fact or raise irrelevant questions. The only relevant question that has been urged before us and which we are called upon to decide, is whether under the circumstances of this case the plaintiffs are entitled to come in as the heirs of their brother Kishen Gir, the last owner. Having regard to the rulings in *Multani Chand* v. *Lala Mal* (1), *Raghunath Kuari* v *Munnan Misr* (2), *Mari* v. *Chinnammal* (3) and *Nallanna* v. *Ponnal* (4) referred to by the Court of first instance in its judgment, there can be no doubt that sisters can come in as Bandhus under the Hindu Law. The decision of the question will, however, depend upon the special circumstances of each case and on the consideration of the respective relationship of the contending parties. In this case, however, there is no difficulty in deciding the question, as the defendant Nanak Gir is admittedly an utter stranger and has no right to compete with the plaintiffs. He has failed to prove that he was a *chela* of Nihal Gir.

In this view the decisions of the Courts below are correct and the appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

(1) 180 P. R. 1889.
(2) 20 A. 191; A. W. N. (1898) 13.
(3) 8 M. 137 at p. 130.
(4) 14 M. 149; 1 M. L. J. 46.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 168 of 1919.
CRIMINAL REVISION PETITION No 135 OF 1919.
September 9, 1919.

Present:—Mr. Justice Seshagiri Aiyar.

KARUPPACHAKKILI—COMPLAINANT—PETITIONER

versus

PALANISWAMI GOUNDAN AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 437—Discharge, order of—Revision by Sessions Judge or District Magistrate—Further enquiry, when to be directed.

The power of revision granted to a Sessions Judge or District Magistrate under section 437, Criminal Procedure Code, to direct further enquiry in a case of discharge by a Subordinate Magistrate is not to be exercised as if the case were being heard on appeal. The Revisional Court has only to see whether the evidence is of such a character that it is possible to come to only one conclusion upon it, *viz.*, that the accused has been guilty and that there has been a miscarriage of justice consequent upon the one-sided or perverse view taken by the trial Magistrate. [p 818, col. 1.]

Queen-Empress v. *Balasinnatambi*, 14 M 334 (F. B.); 1 M. L. J. 343; 2 Weir 557 5 Ind Dec. (N. S.) 234; *Narayanaswami Naidu* v. *Emperor*, 1 Ind. Cas. 228; 32 M 220; 5 M. L. T 233 (F. B.); 19 M. L. J. 157; 9 Cr. L. J. 192, explained.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order, dated 20th December 1918, of the Court of Session of the Coimbatore Division, in Criminal Revision Petition No. 34 of 1918, preferred against the judgment of the Court of the Acting Third Class Magistrate, Dharmapuram, in C. C. No. 227 of 1918.

FACTS.—On a charge of hurt, the accused were discharged after the examination of the prosecution witnesses. The complainant applied in revision to the Sessions Judge, who simply affirmed the order of discharge on the findings of the lower Court. Hence the present revision petition.

Mr. *K. V. Sesha Aiyangar*, for the Petitioner.—Section 437 read with section 435 of the Criminal Procedure Code makes it incumbent on the Sessions Judge to apply his mind to the facts alleged and the evidence adduced in the case and see for himself whether the findings of the Magistrate are correct. An incorrect finding is one of the things to be examined into on revision. The judgment must show that such examination has taken place. It is not enough to say that there is no reason to interfere. Reasons must be stated why the discharge is to be confirmed. The powers on revision are fully dealt with in *Queen-Empress* v. *Balasinnatambi* (1) and *Narayanaswami Naidu* v. *Emperor* (2).

[SESHAGIRI AIYAR, J.—That the Sessions Judge thinks that there has been misappreciation of evidence is no ground for interference.]

When a discharge is challenged as improper, he is bound to consider the grounds of impeachment.

[SESHAGIRI AIYAR, J.—Granting that he is bound to consider, he is not bound to interfere unless he considers the discharge as improper. At any rate the High Court won't interfere unless it can be shown that the only conclusion possible on the evidence was as to the guilt of the accused.]

Mr. *V. C. Sesha Chariar*, for the Respondents, was not called upon.

ORDER.—This is an application to revise the order of the Sessions Judge of Coimbatore refusing to interfere with the order of discharge made by the Subordinate Magistrate. The accused was charged under section 323, Indian Penal Code, with having beaten the complainant with what is known as Sattaivar or rope attached to a stick which is not infrequently used in villages. The Magistrate came to the conclusion, after taking into account the medical evidence in the case, that the evidence as to the beating was discrepant and that there were no sufficient grounds for believing that the accused acted in the manner suggested by the prosecution. Thereupon an application was made to the Sessions Judge to direct further enquiry. It is to be regretted that the Sessions Judge has not expressed any opinion upon the evidence in the case. That would have put an end to this revision petition. He has proceeded upon grounds which one might say are not quite relevant to the consideration of what ought to have been taken into account in dealing with a petition under section 437. Mr. Sesha Aiyangar drew my attention to the fact that the Appellate

(1) 14 M. 334 (F. B.); 1 M. L. J. 343; 2 Weir 557; 5 Ind Dec. (N. S.) 234.
(2) 1 Ind. Cas. 228; 32 M. 220; 5 M. L. T. 233 (F. B.); 19 M. L. J. 157; 9 Cr. L. J. 102.

ASIRUDDIN v. EMPEROR.

Judge, be he a Magistrate or a Sessions Judge, who deals with an application under section 437 has larger powers than the High Court has in dealing with similar matters. It is true, as has been pointed out in *Queen-Empress* v. *Balasinnatambi* (1) and *Narayanaswami Naidu* v. *Emperor* (2), the Sessions Judge or the District Magistrate can come to the conclusion that there has been an improper appreciation of the evidence, and that the Magistrate should be directed to further enquire into the truth of the complaint. I do not understand the decisions to lay down that the Appellate Court has to act as if it were hearing an appeal in a criminal case. The powers with which the Magistrate or Sessions Judge is clothed are powers of revision; and in exercising those powers of revision what the Appellate Court has to see is whether the evidence is of such a character that it is possible to come to only one conclusion upon it, namely, that the accused has been guilty. The mere fact that if he had heard the evidence himself he would have come to a different conclusion on the facts would not ordinarily be a sufficient ground for setting aside the order of discharge. It may not be a question of perversity, but it must be very near it. The Appellate Court must satisfy itself that there has been a miscarriage of justice consequent upon the one-sided or perverse view taken by the trial Magistrate. The Legislature, if Mr. Sesha Aiyangar's contention is accepted, has given to the complainant a right of appeal in all cases of discharge. In my opinion, unless the Appellate Court is satisfied that there has been either of the elements which I have already indicated, it should not set aside the order of discharge. I have made these observations, as questions relating to the setting aside of the order of discharge have come before me frequently during the last two or three weeks and I think it desirable that I should express my view on this question of law. As I said before, the Sessions Judge would have done well if he had expressed his own opinion on the facts of the case. As he has not done so, I heard Mr. Sesha Aiyangar upon the facts and I am satisfied that if I were the Sessions Judge I would not have set aside the order of discharge. I have heard the evidence read and I am clear that the conclusion come to by the Sessions Judge is not unwarranted or that the Magistrate's conclusion is so one-sided or perverse as to have called for interference by the Appellate Court. For these reasons I am of opinion that the order of the Sessions Judge must be sustained though not for the reasons given by him.

I dismiss the petition.

M. C. P.

Petition dismissed.

PATNA HIGH COURT.

CIVIL CRIMINAL REVISION No. 17 OF 1919.

July 22, 1919.

Present :—Mr. Justice Das.

Shaikh ASIRUDDIN AND ANOTHER —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Order directing prosecution—No evidence on which conviction can be based—Order, legality of.

Where there is no evidence on the record to show that an accused person is guilty of the offence with which he is charged, an order for his prosecution under section 476 of the Criminal Procedure Code is bad in law and must be set aside. [p. 819, col. 1.]

Abdul Sattar v. *Emperor*, 48 Ind. Cas. 894; (1918) Pat. 352; 20 Cr. L. J. 94; *Jadunandan Singh* v. *Emperor*, 4 Ind Cas. 710; 37 C. 250; 14 C. W. N. 330; 10 C. L. J. 564; 11 Cr. L. J. 37, followed.

Criminal revision against the order of the Sub-Divisional Magistrate, Sitamarhi, dated the 4th June 1919, sanctioning the prosecution of the petitioners under section 476, Criminal Procedure Code, for offences committed under section 196, 471/109 and 196/109, Indian Penal Code.

Messrs. *Ahghar*, *Gajendra Prosad Das* and *Gour Chandra Pal*, for the Petitioners.

JUDGMENT.—This application is directed against an order passed by the Sub-Divisional Officer of Sitamarhi sanctioning the prosecution of the petitioners under section 476 of the Code of Criminal Procedure for offences alleged to have been committed under section 196, 471, 471/109 and 196/109, Indian Penal Code.

It appears to me, reading the affidavit which has been placed before me, that there

is absolutely no evidence on the record to justify the conviction of the petitioners under the sections which I have just enumerated. It has been held by this Court in the case of *Abdul Sattar* v. *Emperor* (1) that where there is no evidence on the record to show that the petitioner was guilty of any offence with which he is charged, the order for his prosecution is bad in law and should be set aside. Mr. Justice Mookerjee, in the case of *Jadunandan Singh* v. *Emperor* (2), expressed the same view. He said: "The principle which should guide Courts in taking action under section 195 or 476 is now well settled. No sanction should be granted unless there is a reasonable probability of conviction." On the materials on the record I am of opinion that there is no reasonable probability of conviction and that, therefore, the order under section 476 is bad, and I accordingly direct that the order sanctioning the prosecution be set aside and that no further proceedings be taken in the matter.

Order set aside.

(1) 43 Ind. Cas. 994; (1918) Pat. 352; 20 Cr. L. J 94.

(2) 4 Ind. Cas. 710; 37 C. 250; 14 C. W. N. 330; 10 C. L. J. 534; 11 Cr. L. J. 37.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 233 OF 1919.
CRIMINAL REVISION PETITION No. 237 OF 1919.
September 26, 1919.

Present:—Mr. Justice Seshagiri Aiyar.

In re JAIMULLABDIN—PETITIONER—ACCUSED.

Evidence Act (I of 1872), s. 114, ill. (a)—"Soon after," meaning of—Person found in possession of stolen goods one year after theft, whether bound to explain possession—Presumption—Penal Code (Act XLV of 1860), s. 411.

The expression "soon after" in section 114, ill. (a), of the Evidence Act would not apply to the case of goods discovered thirteen months after the theft. [p. 819, col. 2; p. 820, col. 1.]

A person found in possession of stolen goods 2 or 3 years after the theft is not bound to explain his possession thereof. [p. 820, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court, Bellary, in Criminal Appeal No. 19 of 1919, preferred against the judgment of the Court of the Sub Divisional 1st Class Magistrate, Anantapur, in Calendar Case No. 2 of 1919.

FACTS.—The accused was convicted under section 411, Indian Penal Code, on the ground that "he, in January 1919, was found in possession of certain articles lost by one *V.* in December 1917." Reliance was placed by the Court below on illustration (*a*) to section 114 of the Indian Evidence Act.

Dr. *S. Swaminadhan*, for the Petitioner.—The presumption under the illustration (*a*) to section 114 of the Evidence Act arises only when the possession is found to be soon after the theft. There is no allegation in the present case that a theft took place. Loss is not always theft. Further, the possession was only more than a year after. It has been held in *Ina Sheikh* v. *Queen-Empress* (1) that such long interval precludes the presumption. That case has been followed in *District Magistrate of Bellary* v. *Obbava* (2) (Miller, J.) and in Criminal Revision Case No. 320 of 1919 (Spencer and Krishnan, JJ.)

Mr. *V. L. Ethiraj*, for the Public Prosecutor.—The effect of the interval is taken away by the other circumstances in the case. It is found that the accused is a habitual offender and properties stolen from various other persons were recovered from him.

ORDER.—The conviction must be quashed. The Sessions Judge begins his judgment by saying, "There is no time limit, however, applicable to the presumption in section 114 (*a*) of the Indian Evidence Act" (Act I of 1872). The section is clear upon the point. It says that "the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession." Certainly 13 months after the theft is not

(1) 11 C. 160; 5 Ind. Dec. (N. S.) 866.

(2) 16 Ind. Cas. 164; (1912) M. W. N. 529; 13 Cr. L. J. 596.

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"soon after." Moreover, the evidence of P. W. No. 7 shows that he lost the articles some two or three years before. Even granting that the evidence of P. W. No. 7 is to be accepted in its entirety that the articles now found out belonged to him, as pointed out in *Ina Sheikh* v. *Queen-Empress* (1), this is not a case in which the accused should be called upon to explain his possession. Miller, J., in *District Magistrate of Bellary* v. *Obbava* (2) took the same view and that has since been approved in Criminal Revision Case No. 320 of 1919. I am in entire accord with the observations in *Ina Sheikh* v. *Queen-Empress* (1) and I think that the Magistrate was wrong in thinking that the accused was bound to explain his possession of the articles.

I was told that there were other articles found in an open well in the compound of the accused which was accessible to all. It does not follow because certain articles were found in a well which could have been reached by other persons, that the accused should have put them into the well having known them to be stolen property. In my opinion the evidence upon which the conviction is based is wholly insufficient to sustain a conviction. I set aside the conviction and direct the bail bond to be cancelled.

M. C. P.

Conviction quashed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 207 OF 1919.

July 23, 1919.

Present :—Mr. Justice Coutts and Mr. Justice Adami.

JAGO SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 350—Transfer of Magistrate—Trial de novo—Return of Magistrate—Trial, whether can be started from stage at which it had arrived before transfer.

When on the transfer of a Magistrate a criminal case pending before him is taken up by another Magistrate and the trial is started *de novo*, the proceedings which had already taken place before the Magistrate who has been transferred are wiped out, and section 350 of the Criminal Procedure Code gives no jurisdiction to such Magistrate on his re-transfer to the district to proceed with the trial from the point where he had left it. [p. 821, col. 1]

Criminal revision against the order of the Sessions Judge, Monghyr, dated the 1st May 1919, affirming that of the Joint Magistrate, Monghyr, dated the 20th March 1919, convicting the petitioners under section 325, Indian Penal Code, and sentencing them to various terms of imprisonment.

Messrs. *Gour Chandra Pal* and *Harihar Prasad Sinha*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

COUTTS, J.—The petitioners in this case, Jago Singh and Hurnandan Singh, have been convicted under section 325, Indian Penal Code. Jago Singh has been sentenced to two years' rigorous imprisonment.

It appears that north of the petitioner's house there is a plot of *parti* land which is claimed by both the complainant in the case and by the present petitioners. On this land and close to the wall of the petitioners' house the complainant dug the foundation for a cowshed. After the trench for the foundation had been dug and while the complainant was away, the two petitioners came and began to fill up the ditch, one with a *kodoli* and the other with his hands. While they were doing this, the complainant came on the scene and struck the petitioner Jago with a *lathi*. Hurnandan went into his house and fetched out a spear with which he attacked the complainant and some others who were with him, and then Jago went into the house and fetched out a sword with which he also attacked them. The result was that the complainant and his friends were severely wounded.

Three points are urged before us on behalf of the petitioners. *First*, that they have not exceeded the right of private defence; *secondly*, that the procedure adopted in the trial is wholly illegal, and *thirdly*, that the Trying Magistrate went and inspected the locality and, without making any report of his proceedings or what he

saw, has imported the result of his inspection into his judgment. There does not appear to be any force in the first contention. It may be that the petitioners have a claim to the land upon which the complainant dug the trench, but they had no right to go into their house and fetch out deadly weapons and with them to attack the complainant.

On the second point, however, it appears to me that the petitioners must succeed. What happened is this. The case was first taken up by the Assistant Magistrate Mr. Thadani and the whole of the prosecution witnesses were examined and cross-examined. At this stage Mr. Thadani was transferred and the Sub-Divisional Officer withdrew the case to his own file. In accordance with their right under section 350 the accused demanded a *de novo* trial. The trial was accordingly started again and was proceeded with by the Sub Divisional Magistrate, who examined some of the prosecution witnesses. Mr. Thadani then again returned to Monghyr and the Sub-Divisional Magistrate re-transferred the case to his file, with the direction that he was to take it up from the point where he, Mr. Thadani, had left it. This Mr. Thadani did. He finished the trial and the petitioners were convicted and sentenced as has already been stated.

The procedure adopted is wholly illegal. When the Sub-Divisional Magistrate took the case on his own file and started the trial *de novo*, the proceedings before the Assistant Magistrate were wiped out and section 350 gave the Assistant Magistrate no jurisdiction to proceed on the evidence which he had already recorded when the case was re-transferred to him again. It is not a case covered by section 350 at all. Consequently the question of material prejudice does not arise.

In this view of the case it is unnecessary to consider the last point which has been urged. I would only say that the Assistant Magistrate should have made a record of what he observed and what he did at the time of the local inspection.

The conviction and sentences must, therefore, be set aside and the case remanded for re-hearing.

ADAMI, J.—I agree.

Case remanded.

PATNA HIGH COURT.

CRIMINAL REVISION No. 224 OF 1919.

August 4, 1919.

Present:—Mr. Justice Das.

Choudhry SADHU CHARAN SINGH —PETITIONER

versus

UDHO PRASAD SINGH—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss 439, 476—Penal Code (Act XLV of 1860), s. 18—Petition before Magistrate asking that enquiry might be made—Allegations found to be false—Order directing prosecution, legality of—Jurisdiction—Revision—High Court, interference by.

Accused presented a petition before a Magistrate, stating that a certain person was collecting men and that the accused was under the apprehension that the object was to cause him some injury, and asked that an enquiry might be made through the Police. After the enquiry the Magistrate, holding that the petition was false and vexatious, directed the prosecution of the accused for an offence under section 182 of the Penal Code:

Held, that the accused having given information to a Magistrate which had been held to be false and which was intended to cause the Magistrate to use his lawful powers to the injury or annoyance of another within the meaning of section 182 of the Penal Code, the order directing the prosecution of the accused could not be said to be illegal. [p. 822, col. 2; p. 823, col. 1.]

The mere fact that the High Court would, if dealing with a certain matter, have come to a conclusion different from that arrived at by a Subordinate Court is no reason for setting aside in revision an order which is not illegal [p. 823, col. 1.]

Criminal revision against the order of the Sessions Judge, Arrah, refusing to make a reference under section 433 of the Code of Criminal Procedure against the order of the Sub Divisional Officer, Arrah, directing the prosecution of the petitioner under section 182, Indian Penal Code.

Messrs. *Yunus* and *Parmeshwar Dayal*, for the Petitioner.

The Government Advocate, for the Opposite Party.

JUDGMENT.—This application is directed against an order passed by the Sub-Divisional Officer of Arrah giving sanction for the prosecution of the petitioner under section 476 of the Criminal Procedure Code for having committed an offence under section 182 of the Indian Penal Code. There was an application against this order before the learned Sessions

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Judge of Arrah, but the learned Sessions Judge thought that the finding of the learned Sub-Divisional Officer was perhaps open to objection on the ground of vagueness. But he saw nothing illegal in the Magistrate's procedure which would warrant a reference under section 438 of the Code of Criminal Procedure. Accordingly he rejected the application.

It is argued before me by Mr. Yunus on behalf of the petitioner that the petition presented by his client before the Police, which is the foundation of the proceedings against him, does not contain a single word which is false and, therefore, he cannot be put on trial for having committed an offence under section 182 of the Indian Penal Code.

It appears that there have been various disputes between the petitioner and the daughter and son-in-law of Babu Nathuni Singh, who died leaving a Will by which he bequeathed his property to his daughter and son-in-law. There have been probate proceedings between the parties and there have been various criminal disputes between the parties.

The petition presented by the petitioner before the Sub-Divisional Magistrate states that Udho Prasad Singh was collecting people from villages. He says that the pretext put forward by Udho Prasad Singh was that they had come for a *jalsa*, but his apprehension was that steps might be taken against him and his relatives. He thereupon asked for an enquiry to be made at once through the Superintendent of Police as to the fact why the aforesaid person was collecting people. He then proceeds to say that his presence in the Court may be taken note of and protection afforded to him. The learned Sub-Divisional Magistrate thought after the Police enquiry that the petition was false, vexatious and annoying, and thereupon he has granted sanction under section 476 of the Code to prosecute the petitioner.

Mr. Yunus on behalf of the petitioner argues that there is not a single statement in the whole petition which may be said to be false. There was undoubtedly, he says, a collection of people for the *jalsa*. Undoubtedly (that is his next argument) the petitioner had an apprehension in his mind that some steps might be taken against him by the people who had collected, and, as he points out, there were various criminal disputes between the parties which naturally may have caused him a certain amount of alarm. But the question still remains that he did ask for an enquiry and an enquiry was undoubtedly made by the Police. Reading the petition as a whole, it appears to me that he does make a charge against Udho Prasad Singh and others for having collected people from the villages for causing him some sort of harm. It is quite possible that there was some apprehension in his mind that they might really do him some harm, and it is not for me now to express any opinion on the case at all. It would not be proper that I should. But clearly there was a charge against the opposite party for having collected people from the villages to cause him injury. The question, therefore, is, does it not come under section 182, Indian Penal Code? The charge against him may be false; it may be proved to be false on evidence, but can I at this stage interfere with the order passed by the Sub-Divisional Magistrate? The learned Sessions Judge came to the conclusion that he had no power at all and in my opinion he has come to a correct conclusion on this point.

Now the question is, did the petitioner give any information to any public servant which he knew or believed to be false intending thereby to cause, or knowing it to be likely that it will thereby cause such public servant to use the lawful power of such public servant to cause injury to any person? That is the whole point. He undoubtedly has given information to a public servant. It has got to be determined in the trial whether that information is false or whether he believed it to be false. I cannot at this stage express any opinion on the point, nor can the learned Sub-Divisional Magistrate who disposed of this application. He undoubtedly made the application in order that such public servant may make an enquiry, and of course the whole subject matter of the charge against him now is that his object was to cause the public servant to use the lawful power to the injury or

annoyance of some person. I am of opinion that there is no point of law in this matter and that, therefore, I cannot interfere with the order passed by the Sub-Divisional Magistrate. The case seems to me a very trifling one and it is quite possible that no more than a technical offence under that section has been committed by the petitioner. It is quite possible that if I had to deal with that application myself I would have come to another conclusion, but that is no ground at all for setting aside in revision an order which is not an illegal order at all. I, therefore, refuse the application.

Application refused.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 19 OF 1917.

March 6, 1917.

Present:—Sir Henry Drake-Brockman, J. C.

RAJARAM—APPLICANT

versus

KUNJILAL—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 520—Notice, whether necessary—Order passed in favour of person, whether should be set aside behind his back.

Although section 520 of the Criminal Procedure Code does not prescribe the issue of notice to any person before an order under that section is passed, yet it is a general principle of law that an order duly passed by a competent authority in favour of any person should not be set aside without that person being heard.

Laxman Rangu, In re, 9 Ind. Cas. 947; 35 B. 253; 13 Bom. L. R. 131; 12 Cr. L. J. 169, followed.

Criminal revision of the order of the Judge, Small Cause Court, Raipur, dated the 20th August 1917, in Miscellaneous Case No. 49 of 1917.

Dr. *H. S. Gour*, for the Applicant.

Mr. *G. P. Dick*, for the Non-Applicant.

ORDER.—The order of the Sessions Judge in this matter is not supported either by the learned Standing Counsel for the Crown or by the non-applicant's Pleaders. It was passed without hearing the present applicant, to whom at the close of the non-applicant's prosecution for criminal breach of trust the property in dispute was delivered with the non-applicant's consent. The prosecution in fact was only withdrawn by the Police because the non-applicant professed his readiness to allow the property to be so delivered

It is true that section 520, Criminal Procedure Code, does not prescribe the issue of a notice to any person before an order under that section is passed. But it is a general principle of law that an order duly passed by competent authority in favour of any person should not be set aside without that person being heard. If particular authority is required to support this proposition, I would refer to *Laxman Rangu, In re* (1).

The Sessions Judge's order is set aside and he will now proceed to dispose of the application made to him under section 520, Criminal Procedure Code, after giving notice thereof and of the date fixed for hearing to *Musamnat* Rajrani.

Order set aside.

(1) 9 Ind. Cas. 947; 35 B. 253; 13 Bom. L. R. 131; 12 Cr. L. J. 169.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 147 OF 1919.

CRIMINAL REVISION PETITION No. 119 OF 1919.

August 7, 1919.

Present:—Mr. Justice Kumaraswami Sastri.

In re TANTRAVAHI BAPIRAJU AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 36, 530 (h)—Trial before Bench of Magistrates—Evidence recorded in absence of one member, effect of—Conviction, legality of.

It is illegal for a Bench of Honorary Magistrates to convict in a case in which the evidence is recorded and the judgment delivered in the absence of one of the members of the Bench.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the 1st Class Deputy Magistrate, Peddapur Division, in Criminal Appeal No. 83 of 1918, preferred against the judgment of the Court of the 2nd Class Bench Magistrates, Cocanada, in B. C. No. 2276 of 1917.

SHYAM BEHARI SINGH *v.* SAGAR SINGH.

FACTS appear from the judgment.

Mr. *T. Ramachandra Row*, for the Petitioners.—The conviction is illegal. The judgment is not that of the whole Bench. One of the Bench Magistrates was absent when witnesses were examined. The trial should not have gone on during his absence. The judgment also was delivered during his absence. The irregularity vitiates the trial. See *Subramania Iyer, In re* (1).

The Public Prosecutor, for the Crown.—It is only an irregularity which has not prejudiced the accused. In any case the judgment was that of the majority.

ORDER.—It appears from the affidavit filed and the attendance register that one of the Magistrates, Hussain Khan Sahib, was absent on the 2nd May 1918 when the case was taken up and witnesses examined and also on the 25th July 1918 when judgment was delivered.

I think that the absence on the 2nd May 1919 of one of the Magistrates vitiates the conviction. I need only refer to *Subramania Iyer, In re* (1), where it was held by Ayling, J., that a conviction was illegal. A similar view was taken by a Bench of this Court in Criminal Revision Case No. 416 of 1918 (Criminal Revision Petition No. 357 of 1918).

I set aside the conviction and direct that the case be retried by the 2nd Class Magistrate of Cocanada. The fine, if paid, will be refunded.

Conviction set aside and retrial ordered.

Conviction quashed.

M. C. P.

(1) 29 Ind Cas. 329; 38 M. 304; 16 Cr. L. J. 489.

PATNA HIGH COURT.

CRIMINAL REVISION No. 204 OF 1919.

July 25, 1919.

Present:—Mr. Justice Coutts and Mr. Justice Adami.

SHYAM BEHARI SINGH—PETITIONER

versus

SAGAR SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 248, 345—Withdrawal of complaint as against one of several accused, effect of—Compounding offence with regard to one of several accused, effect of.

Section 248 of the Criminal Procedure Code contemplates the withdrawal of a complaint as a whole. Where a complaint against several accused persons is withdrawn as against one of them, the withdrawal amounts to a withdrawal of the whole complaint in respect of all the accused. [p 825, col 1.]

The compounding of an offence in regard to one of several accused persons amounts to a compounding of the offence in regard to all. [p. 825, col. 1.]

Criminal revision against the order of the Additional District Magistrate, Patna, affirming that of the Deputy Magistrate, Patna, refusing to withdraw the case against the petitioner.

Mr. *A. Sami*, for the Petitioner.

Mr. *S. P. Varma*, for the Opposite Party.

JUDGMENT.

COUTTS, J.—In this case a complaint was made under section 323, Indian Penal Code, and section 24 of the Cattle Trespass Act against two persons, Sham Behari Singh and Hurnandan Singh. After process had issued the complainant, Sagar Singh, filed a petition to the effect that Hurnandan Singh had expressed his sorrow, that he had accepted his apology and asked that he should be acquitted without hearing. The case was then proceeding against the other accused Sham Behari Singh, when he filed a petition contending that as the offence under section 323, Indian Penal Code, had been compounded and as the case under section 24 of the Cattle Trespass Act had been withdrawn by the complainant as against Hurnandan Singh, the whole offence under section 323, Indian Penal Code, had been compounded and the whole complaint under section 24 had been withdrawn, and he asked that he also should be acquitted.

The learned Deputy Magistrate rejected this application, and on an application in revision to the District Magistrate it was held by him that the compounding of the offence under section 323, Indian Penal Code, with Hurnandan Singh did not affect the other accused, Sham Behari Singh, and that there was no withdrawal of the complaint under section 24 of the Cattle Trespass Act at all.

Against this order the present application in revision has been made. Different views have been taken by the Courts in India,

KRISHNASWAMI IYER, *In re.*

By the Calcutta High Court it has been held that the compounding of an offence in regard to one accused is a compounding of the offence in regard to all: *Chandra Kumar Das* v. *Emperor* (1). This view has been dissented from by the Madras High Court, but in our opinion the view of the Calcutta High Court is the correct one.

So far as the case under section 24 of the Cattle Trespass Act is concerned, it is clear that the petition which was filed, asking that Hurnandan Singh should be acquitted without hearing, was withdrawal of the complaint so far as it concerned him. Section 248 of the Criminal Procedure Code, however, contemplates the withdrawal of the complaint, that is, the complaint as a whole. The complaint in this case was one against both the accused and although only one accused is mentioned in the withdrawal petition, it is a withdrawal of the whole complaint and consequently a withdrawal of the complaint in respect of both accused. The order of the District Magistrate must, therefore, be set aside and the petitioner must be acquitted.

ADAMI, J.—I agree.

Petition accepted.

(1) 7 C. W. N. 176.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No 218 OF 1919.
CRIMINAL REVISION PETITION No. 180 OF 1919.
August 8, 1919.

Present:—Mr. Justice Kumaraswami Sastri.

In re C. KRISHNASWAMI IYER,—

ACCUSED—PETITIONER.

Motor Vehicles Act (VIII of 1914), s. 16—Madras Motor Vehicles Rules, r. 16A, whether applies to absent owner—Non-lighting of car, conviction for, legality of, when owner not in or near car.

Rule 16A of the Madras Motor Vehicle Rules does not apply to an absent owner, and the conviction of the owner under the rule for not lighting the car is illegal when the owner was not in the car or so near it as to be aware that the lamps were not lighted.

Sohan Singh v. *Emperor*, 47 Ind Cas 444: 27 P. R. 1918 Cr.; 19 Cr. L. J. 928; 37 P. W. R. 1918 Cr; 15 P. L. R. 1919, relied upon.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Chief Presidency Magistrate, Egmore, dated the 8th January 1919, in Calendar Case No. 17253 of 1918.

Mr. *A. V. Narayanswami Iyer*, for the Accused.

The Crown Prosecutor, for the Crown.

ORDER.—The petitioner has been convicted under section 16 of the Motor Vehicles Act for having left his car without a light contrary to rule 16-A of the Madras Motor Vehicle Rules.

Rule 16A states that no person may cause or permit a motor vehicle to stand or be used in a public place between half an hour after sunset or half an hour before sunrise unless it carries lights burning as stated in the rule.

Before the owner of a motor vehicle can be convicted for an offence under this rule it must be shown that he caused or permitted the car to stand without lights burning. As pointed out by the Punjab Chief Court in *Sohan Singh* v. *Emperor* (1), rules cannot apply to an absent owner.

There is no evidence that the accused knew that the car had no lights burning or permitted it to stand without lights. The evidence is that he purchased and put oil lights on the car and that his chauffeur was also given carbide. He was not in the car or so near it as to be aware that the lamps were not lighted.

I set aside the conviction and direct that the fine be refunded.

Conviction set aside.

M. C. P.

(1) 47 Ind. Cas 444; 27 P. R. 1918 Cr.; 19 Cr. L. J. 928; 37 P. W. R. 1918 Cr.; 15 P. L. R. 1919.

PATNA HIGH COURT.
CIVIL CRIMINAL REVISION No. 19 OF 1919.
August 4, 1919.
Present:—Mr. Justice Das.
JAGDEO LAL—PETITIONER
versus
RAM LAGAN SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Appellate Court, power of, to take additional evidence, limits of—Evidence improperly admitted—Order directing prosecution based on such evidence, legality of.

Order XLI, rule 27, of the Civil Procedure Code does not provide that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence may be admitted in appeal. It only provides that where it is impossible to pronounce judgment at all on the evidence, the Court might admit additional evidence. [p. 827, cols. 1 & 2.]

The legitimate occasion for the use of the power conferred by Order XLI, rule 27, of the Civil Procedure Code on an Appellate Court is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. [p. 827, col. 1.]

Where additional evidence is improperly admitted in appeal, the Court has no jurisdiction to direct the prosecution of a witness on the basis of such evidence and an order made under section 476 of the Criminal Procedure Code in such a case cannot be sustained. [p. 827, col. 2.]

Civil criminal revision against the order of the District Judge, Chapra, directing the prosecution of the petitioner under section 476, Criminal Procedure Code.

Mr. *Rajendra Prasad*, for the Petitioner.

Mr. *Gour Chandra Pal*, for the Opposite Party.

JUDGMENT.—This application is directed against an order under section 476 of the Criminal Procedure Code passed by the learned District Judge of Chapra.

It is necessary to state the facts very briefly.

It appears that on the 17th of November 1916 Ram Lagan, who is the opposite party in these proceedings, took a *zurpeshgee* lease from a lady of the name of Phulesra Kuer for a consideration of Rs. 899. There were two previous mortgages affecting the property in favour of the petitioner, one for Rs. 149-14 and the other for Rs. 70, and the petitioner was in possession of the property by virtue of the two previous mortgages. It was provided in the document executed by Phulesra Kuer in favour of Ram Lagan that Ram Lagan should discharge the two debts due to the petitioner and that he should pay the lady the balance of the money. Ram Lagan tendered these two specific sums of money to the petitioner. The petitioner refused to take them, contending that on the 9th of November 1916, that is to say, before the *zurpeshgee* deed was executed in favour of Ram Lagan, Phulesra Kuer executed a sale-deed in respect of the same property in his favour. He, therefore, claimed to be in possession of the property as and from the 9th November 1916 as the owner of the property. His case is that after the execution of the document the lady would not register it and so he had the document compulsorily registered on the 7th March 1917.

Ram Lagan thereupon brought the usual suit for redemption against the petitioner. The question before the learned Munsif, who tried the case in the first instance, was as to which of the documents was earlier in point of time, namely, the document executed in favour of Ram Lagan on the 17th November 1916, or the document alleged to have been executed in favour of the petitioner on the 8th November 1916. The learned Munsif came to the conclusion that the document executed by the lady in favour of the petitioner on the 9th November 1916 was a genuine document and that, therefore his document being prior in time must prevail over the document propounded by the opposite party. He thereupon dismissed the redemption suit brought by Ram Lagan against the petitioner.

From that judgment there was an appeal to the Court of the District Judge of Chapra. There the learned District Judge took a course which has been described as unprecedented in the case of *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1). He thought that it was necessary to have some further evidence in the case and he thereupon remanded the case to the lower Court, that is to say to the Court of first instance, merely for the purpose of recording the evidence and transmitting the evidence so recorded to the Court of the District Judge.

(1) 31 B. 381; 9 Bom. L. R. 671; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 17 M. L. J. 347; 34 I. A. 115; 2 M. L. T. 435 (P. C.).

Now it is not suggested that this evidence was tendered in the Court of first instance and was rejected by that Court. That is not the suggestion of Mr. Gour Chandra Pal, who has with my leave appeared to argue the case on behalf of the opposite party. It is not suggested by the learned District Judge that there was an inherent defect or lacuna in the evidence as it stood which prevented him from disposing of the case either in favour of the appellant or the respondent. The learned District Judge thought that further evidence was necessary. In my opinion Order XLI, rule 27, gives him no power at all to remand the case to the Court of first instance for the purpose of recording further evidence. The point was discussed in the case which I have just cited and which is reported as *Kessowji Issur* v. *Great Indian Peninsula Railway Company* (1). I may draw the attention of the learned District Judge to the weighty words of Lord Robertson in the case which I have just cited. With reference to this very point, Lord Robertson said as follows:—

"The legitimate occasion for section 568" which corresponds to the present Order XLI, rule 27, "is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in section 623".

It seems to me that it was not necessary for the Court at all to admit this fresh evidence in order to enable it to pronounce judgment in the case. The record was complete so far as it went; only the additional evidence might enable the learned District Judge to take another view of the case. That does not fall within the scope of Order XLI, rule 27, at all. The same point has been debated in this Court in more cases than one, and I may draw the attention of the learned District Judge to the case of *Kalika Dutt Mandar* v. *Tulsi Mandar* (2). With reference to Order XLI, rule 27, Mr. Justice Roe said as follows:—

"This does not mean that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence, the Court may call for a document. In this case the burden of proof was upon the plaintiff and in the absence of proof of the consideration the Court was in a position to pronounce judgment in favour of the defendant. The document was not required to enable the Court to pronounce judgment. The highest at which it can be put is that it might have been required in order to enable the Court to pronounce judgment in favour of the plaintiff, which is an entirely different thing."

In this case I have no doubt at all that the fresh evidence which has been recorded by the Munsif by the direction of Mr. Monahan, the learned District Judge, might enable that Court to pronounce judgment in favour of a particular party, but that, as I have already said, is not within the scope of the section at all. The record as it stood enabled the learned District Judge to pronounce judgment in the case: that being so, the question arises whether the order passed by the learned District Judge sanctioning the prosecution of the petitioner under section 476 of the Code of Criminal Procedure is a proper order. In my view only one answer can be given to this question, namely, that it is not a proper order and cannot be sustained. It is clear to me that the learned District Judge formed an opinion on this matter on evidence which he had no jurisdiction to take in the case at all. In my opinion, therefore, the order against the petitioner must be set aside and I order accordingly.

Order set aside.

(2) 37 Ind. Cas. 1008; 1 P. L. J. 435.

MUTHUSAWMI ASARI, *In re.*

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 115 OF 1919.
July 28, 1919.
Present:—Mr Justice Sadasiva Aiyar and Mr. Justice Odgers.
In re MUTHUSAWMI ASARI—
PRISONER—APPELLANT

Penal Code (Act XLV of 1860), ss 84, 302—Murder, commission of, by person subject to insane fits some time previous to occurrence—Knowledge of nature of act, absence of, not proved—Criminal responsibility of accused—Conviction—Procedure—Practice—Criminal Procedure Code Act V of 1898), s 401.

The accused was charged with having stabbed his wife with a knife as a result of which she died It was proved that sometime before the occurrence he was subject to insane fits, but there was no proof that when he committed the murder he did not know the nature or the consequences of his act. The accused was convicted and sentenced to transportation for life:

Held, that the conviction was right, but that the papers should be submitted to the Government under section 401, Criminal Procedure Code, for such action as it might think fit to take. [p. 828, col 2.]

Queen-Empress v. *Venkatasami*, 12 M. 459. 1 Weir 42; 4 Ind Dec (N S) 669; *Queen-Empress* v. *Kader Nasyer Shah*, 23 C. 604; 12 Ind. Dec. N. S. 401, followed.

Appeal against the order of the Court of the Sessions Judge of Ramnad at Madura, in Case No. 3 of the Calendar for 1919.

Mr. *T. Rangaramanuchariar*, for the Appellant.—The accused's wife, *i.e.*, the deceased herself admitted that her husband was subject to fits of insanity and that he had had such fits 4 days before the occurrence. No motive has been alleged or proved. The act must have been done in a state of homicidal mania. Accused was not responsible for his act. He is saved by the provisions of section 84, Indian Penal Code.

The Public Prosecutor, for the Crown.—Section 84 cannot apply. It is not shown that the accused did not know the nature and consequences of his act. In the absence of such proof, his criminal responsibility is not absolved. The medical evidence also is against the application of section 84.

JUDGMENT.

SADASIVA AIYAR, J.—The appellant has been convicted of murdering his wife by stabbing her in 2 or 3 places on her person. The two stabs given on the side of the abdomen brought on peritonitis and she died of the wounds 5 days after she was sent to the hospital.

No motive for the offence has been established. The woman herself in her complaint. Exhibit I, and in her statement (Exhibit H to the Sub Magistrate) stated that about 1½ years before the date of the occurrence, which was on the 21st July 1918, her husband was insane, threw the domestic pots here and there and had his hands and legs chained for some months. She also stated that for about 4 days before the occurrence her husband was out of senses, speaking to himself, weeping and abusing his wife and children. But it is not proved that his mind was so affected as to prevent him from knowing the nature and consequences of his acts and though he seems to have stabbed his wife in a fit of homicidal mania, I am unable to say that he is free from criminal responsibility for his act, having regard to the law as laid down by this Court in *Queen Empress* v. *Venkatasami* (1) and by the Calcutta High Court in *Queen-Empress* v *Kader Nasyer Shah* (2). I shall, however, while following these cases, and confirming the conviction and the sentence of transportation for life, direct (as directed by the learned Judges who decided those cases) that the proceedings be forwarded to His Excellency the Governor in Council for any action which His Excellency may think fit to take under the powers given to the Local Government by section 401, Criminal Procedure Code.

ODGERS, J.—I agree. It is impossible in face of the medical evidence to say that the accused falls within the purview of section 84, Indian Penal Code The evidence is that the doctor had the accused under his observation for about a week in August 1918 and was unable to say that the accused showed any signs of insanity whatever. He admitted, however, that he was also unable to say what the state of the accused's mind might have been in July 1918 when the crime was committed. It is also, in my opinion, a fact to be borne in mind that the accused was in hiding for 20 or 25 days after the commission of the offence.

I agree with my learned brother that

(1) 12 M. 459; 1 Weir 42; 4 Ind. Dec. (N. S.) 669.
(2) 23 C. 604; 12 Ind. Dec (N. S) 401.

the facts of this case are governed by the cases in *Queen Empress* v. *Venkatasami* (1) and *Queen-Empress* v. *Kader Nasyer Shah* (2) which he has referred to, and I concur in the order proposed by him.

M. C. P.

Conviction confirmed.

PATNA HIGH COURT.
CRIMINAL REVISION No. 228 OF 1919.
August 5, 1919.
Present:—Mr Justice Jwala Prasad
GOURI DUTT—PETITIONER
versus
GOBIND SINGH AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 144, 145, 146—Dispute as to immovable property—Right doubtful—Order under s. 144, whether proper—Procedure—Notice to opposite party, whether necessary—Successive orders under s. 144, whether competent.

Where the right or possession of the parties is not free from doubt and there is a danger of disturbance of public tranquillity on account of both the parties asserting their right and possession over the lands in question, it is inequitable to take action under section 144 of the Criminal Procedure Code to restrain one party as against the other, the virtual effect of which would be to usurp the functions of the Civil Court and to decide the right and title over the disputed land including the right of possession. [p. 830, col. 2; p. 841, col. 1.]

Where the right of a party is clear and there is a threatened invasion of that right by another party, a temporary order under section 144 of the Criminal Procedure Code might be useful and effective. Similarly under section 107 of the Code where parties are in the wrong, they can be bound down in order to prevent a breach of the peace. But where there is a doubt as to the right of the parties to be in possession of immoveable property, the only effective remedy is that provided by section 145 of the Code, under which if the Magistrate after due enquiry comes to the conclusion that one of the parties is in clear possession, he will uphold its possession until it is evicted in due course of law, and if on the other hand the Magistrate finds it difficult to decide which of the parties is in actual possession, he has got a remedy to prevent a breach of the peace under section 146 of the Code by attaching the subject-matter of the dispute. [p. 831, col. 1.]

Successive orders under section 144 of the Criminal Procedure Code condemned. [p. 831, col. 1.]

An order passed under section 144 of the Criminal Procedure Code without serving notice on the opposite party to show cause is liable to be set aside. [p. 831, col. 2.]

Criminal revision against the order of the Deputy Commissioner, Ranchi, refusing to set aside under clause (4), section 144, Criminal Procedure Code, the order, dated the 27th June 1919, of the Sub-Divisional Magistrate, Ranchi.

Messrs. *Manuk*, *P. K. Sen*, *C. C. Das* and *S. N. Palit*, for the Petitioner.

Mr. *K. B Dutt* and Rai *Guru Saran Prasad*, for the Opposite Party.

JUDGMENT.—The petitioner in this case purchased certain properties in execution of a rent decree, dated the 7th June 1918, under section 208 of the Chota Nagpur Tenancy Act (VI of 1908) read with section 11 of the Rent Recovery Act (VIII of 1865). The petitioner obtained delivery of possession of the tenure on various dates between the 30th March to 14th April 1919. We are concerned with the delivery of possession of a village called Kuru, which was effected on the 30th of March.

In that village there are certain lands called the Manjhias lands which correspond more or less to the proprietor's private lands in this part of this country. The judgment debtor, Thakur Madan Mohan Nath Sahi, had created an under-tenure in respect of the entire village including the Manjhias lands in favour of his wife, the opposite party in this case. The name of *Musammat* Nirmal Kuar stood recorded in the Record of Rights in 1905 in respect of the said under tenure, though prior to that in 1904 in a certain civil suit the said lady was declared to be only *farzidar* for the judgment-debtor.

After the delivery of possession the Police reported that there was a danger of a breach of the peace on behalf of both the parties, each trying to cultivate and sow the Manjhias lands in village Kuru in question. On the 18th June 1919 the Magistrate issued an order against the opposite party "forbidding them to go near the Manjhias lands at Kuru or to disturb the possession of the first party over these lands in any way." That order was passed under section 144 of the Code of Criminal Procedure.

GOURI DUTT v. GOBIND SINGH.

Thereafter the opposite party filed a petition, objecting to the notice being issued against them and praying that a notice under section 144 should rather be issued on the petitioner. In that petition it was stated that the master of the first party Rai Bahadur Baldeo Das Birla was never delivered *khas* possession of the village Kuru, nor did the *nazir*, as a matter of fact, deliver possession according to law. Upon that petition the Magistrate directed notice to issue upon the petitioners "to be present with their documentary evidence on the 19th June 1919."

After an adjournment the case was ultimately taken up on the 25th June, on which date the arguments were heard and the Magistrate directed the *khatian* of the village to be filed.

On the 27th June the Magistrate after looking into the documentary evidence that was on the record passed an order cancelling the notice under section 144 that was already issued and served against the opposite party, and in its stead directed that an order under section 144 "be issued against the auction-purchaser's agent and manager forbidding them to interfere with *Musammat* Nirmal Kuar's possession over the Manjhias lands of Kuru in any way."

The Deputy Commissioner was then moved to set aside the order under clause (4) of section 144, but without any success. The petitioner has, therefore come to this Court and contends that the order of the Magistrate under section 144 against the petitioner was without jurisdiction. It appears to me that the contention of the petitioner must prevail.

The tenure in question was sold under the aforesaid Chota Nagpur Tenancy Act and the Rent Recovery Act. Section 16 of the latter Act clearly declares that the sale of tenure under that Act will be free from all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives, or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it, his representatives or assignees.

The under-tenure in question was not created by the judgment debtor in favour of his wife under any express authority in writing by the Maharaja of Chota Nagpur, who created this tenure in favour of the judgment debtor. The effect, therefore, of this section is that the petitioner had purchased the tenure free from the under tenure that was created by the judgment-debtor. This view is accepted by the learned Deputy Commissioner, who held that the incumbrance was rendered void *ipso facto* by reason of the sale to the auction-purchaser, the petitioner in this case, and the learned Deputy Commissioner answered the issue raised by him for determination.—"Was the auction-purchaser, *i.e.*, the first party at the time of delivery of possession put in direct possession of the Manjhias lands of Kuru or not?"—in favour of the petitioner and against the opposite party. The result of this finding is that that petitioner was put in possession of the lands free from the under-tenure in question by the Civil Court in execution of a writ issued by that Court. The question, therefore, for the Deputy Commissioner was whether the petitioner had the right to enforce the possession delivered to him by the Court as against the opposite party, who claimed to be in possession by virtue of the under-tenure created by the judgment-debtor. The effect of the order of the Deputy Commissioner is to restrain the petitioner from reaping the fruits of the auction-purchase followed by the delivery of possession by the Court. He has been asked to abstain from interfering with the possession of the opposite party over the lands in dispute. It cannot possibly be contended that the petitioner, in going over the lands and trying to exercise possession thereon by virtue of the writ of delivery of possesion, did commit any wrongful act, or that the opposite party, in spite of their right in the under-tenure having ceased to exist by virtue of the sale, could be lawfully engaged in exercising their possession over the lands as against the petitioner. If the right or possession of the parties be not free from any doubt and there be a danger of disturbance of public tranquillity on account of both the parties asserting their right and possession over the lands in question, it would certainly be inequitable to take action under section 144 and to restrain one party as against the other, the virtual effect of which would be

to usurp the functions of the Civil Court to decide the right and title over the disputed land including the right of possession.

Again, in the circumstances of the dispute in respect of the right of possession of the disputed land a temporary order under section 144 is not an effective and sufficient remedy. The learned Deputy Commissioner has already perceived that, and he justified his action on the ground that the temporary order under section 144 "defines the position of the parties and will for this reason, when the order runs out by lapse of time, serve to prevent a breach of peace even then." If the Deputy Commissioner contemplates successive orders under section 144 after the lapse of every two months, the procedure has been condemned by the Courts. The power of a Criminal Court under Chapter XI of the Code of Criminal Procedure is intended to be exercisable and when the right of a party is clear and there is a threatened invasion of that right by another party, a temporary order under section 144 might be then useful and effective. But it is obvious from the very nature of the dispute between the parties in this case that such an order cannot possibly be effective, for after the sowing of the crops the dispute and the danger to the peace will again re-appear after two months. Similarly under section 107 when parties are in the wrong they can be bound down in order to prevent a breach of the peace for trying to commit a wrongful act. But when there is a doubt as to the right of the parties to be in possession of the immovable property, as in this particular case, the only effective remedy is that provided by section 145, under which if the Magistrate after due enquiry comes to the conclusion that one of the parties is in clear possession, he will uphold his possession until he is evicted in due course of law and if on the other hand the Magistrate finds it difficult to decide which of the parties is in actual possession, he has got a remedy to prevent a breach of the peace under section 146 by attaching the subject matter of dispute. The right of the petitioner to the possession of the lands in this case was created by the delivery of possession. Whether the under-tenure created by the judgment-debtor became void or voidable in favour of the opposite party under section 16 of the Rent Recovery Act cannot possibly be decided under section 144 of the Code of Criminal Procedure.

The order is again open to objection, as there was no notice served upon the petitioner to show cause against the order to be made at the instance of the opposite party. The notice under section 144 was served upon the opposite party in pursuance of the order of the 18th June. After that the Magistrate could only set aside or rescind that order under clause (4) of section 144. The Magistrate could not at that stage pass an order under section 144 against petitioner without giving him an opportunity of showing cause against the order.

Taking all the circumstances of the case into consideration I set aside the order of the Magistrate as being without jurisdiction, leaving the Magistrate to take action under the law if there be still an apprehension of a breach of the peace.

Order set aside.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 526 OF 1919.
September 17, 1919.
Present:—Mr. Justice Ryves.
PHOOL SINGH AND OTHERS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Further enquiry, order directing—Notice to accused whether necessary.

Before directing further enquiry under section 437 of the Criminal Procedure Code, the District Magistrate ought to give notice to the persons against whom he proposes to pass orders to show cause. [p. 832, col. 1.]

Criminal revision against the order of the District Magistrate, Agra, dated the 7th August 1919.

Mr. *Sarkar Bahadur Johari*, for the Applicants.

PEDAKANTI CHINNA NAGADU, *In re.*

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case a Magistrate of the first class took proceedings under section 110 of the Code of Criminal Procedure against five persons. He ordered security to be taken from two and directed that the three others should be discharged under section 190 of the Indian Penal Code. The two against whom the order was made appealed to the District Magistrate. He set aside all the proceedings of the learned Magistrate and ordered a re trial of the whole case, *i.e*, the case of the men who were discharged as well as of those who were bound over. He did this apparently without giving the three persons, who were not before him, an opportunity of showing cause against such an order. I would call the learned Magistrate's attention to the ruling of this Court in *Kharga* v. *Emperor* (1). It was laid down in that ruling that a Magistrate, before taking proceedings under section 437 of the Criminal Procedure Code, should give notice to the persons against whom he proposes to pass orders to show cause. I, therefore, set aside the order of further enquiry so far as it concerns Phool Singh, Desraj and Zaharya. If the Magistrate is of opinion that further action should be taken, he will do so after giving these persons an opportunity of showing cause.

Let the record be returned.

Order set aside.

(1) 22 Ind. Cas. 183; 36 A. 147; 12 A. L. J. 167; 15 Cr. L. J. 39.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 229 OF 1919:
CRIMINAL REVISION PETITION No. 189 OF 1919.

September 12, 1919.

Present:—Mr. Justice Seshagiri Aiyar.

In re PEDAKANTI CHINNA NAGADU, AND OTHERS —ACCUSED—PETITIONERS.

Criminal Procedure Code Act V of 1898), s. 345—Composition of offence, whether permissible after judgment—Appellate Court, whether bound to give effect to composition.

The composition of an offence is permissible only up to the time of the judgment, and not after. After conviction there can be no composition without the leave of the Court, and an Appellate Court is not bound to recognise and give effect to an agreement which the parties might enter into after the conviction of the accused.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Cuddapah, in Criminal Appeal No. 16 of 1919, preferred against the conviction and sentence by the Court of the Sub Divisional Magistrate, Gooty, in Calendar Case No. 3 of 1919.

Dr. T. C. Kurup, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER —Section 345, clause (5), of the Criminal Procedure Code is conclusive on this question. It lays down that, after conviction, there can be no composition without the leave of the Court. It is in consequence of this provision that the Calcutta High Court points out, *Aslam Meah* v. *Emperor* (1), that composition is permissible only up to the time of the judgment and not after. The only point before me is as to whether the Sessions Judge was wrong in having refused to set aside the conviction because the parties entered into an agreement before him. I think he is right in having refused to recognize the composition. The petition, therefore, fails and is, therefore, dismissed.

M. C. P.

Petition dismissed.

(1) 46 Ind. Cas. 528; 45 C. 816; 22 C. W. N. 744; 19 Cr. L. J. 752; 28 C. L. J. 261.

HUKUM CHAND *v.* RAJA RAN BAHADUR SINGH.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 226 OF 1917.

June 4, 1919.

Present.—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

Seth HUKUM CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAJA RAN BAHADUR SINGH AND ANOTHER—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—Civil Procedure Code (Act V of 1908), O XXIII, r. 3—Lis pendens, doctrine of, applicability of, where suit terminated by compromise—Compromise, Court, whether bound to record—Chota Nagpur Encumbered Estates Act (VI B. C. of 1876), ss 3, 9, 17, 19—Rules framed by Lieutenant-Governor under s. 9, rr. 5, 16—Estate under control of Manager—Holder of estate, whether can grant permanent lease—Lease, power to grant—Commissioner, whether can grant lease—Deputy Commissioner, power of, to control Manager, extent of—Powers of Manager, construction of—Power to grant lease, whether includes power to enter into contract to lease—Contract, when completed—Letters and documents containing agreement, construction of.

The doctrine of *lis pendens*, as embodied in section 52 of the Transfer of Property Act, applies to transfers during the pendency of a suit, even when that suit is terminated by a compromise decree; but in such cases the Court should be satisfied that the compromise is not a collusive arrangement entered into with the object of defeating a purchaser. [p. 841, col. 2.]

Where a transfer is made *pendente lite* under the authority of the Court within the terms of section 52 of the Transfer of Property Act, and subsequently the original parties to the suit arrive at a compromise, the Court before recording the compromise must consider whether it is a *bona fide* one or merely colourable with the object of preventing the transferee from setting up such defence to the action as might otherwise be open to the original defendant. If there is a real and substantial defence to the claim, the compromise is not a lawful agreement within the meaning of Order XXIII, rule 3 of the Civil Procedure Code, and the Court should refuse to record it and to pass a decree in accordance with the terms thereof. [p. 842, col. 1.]

By virtue of the provisions of section 3 of the Chota Nagpur Encumbered Estates Act, so long as an estate is under the control of the Manager, the holder of the estate is incompetent to mortgage, charge, lease or alienate his immoveable property or any part thereof, and his action in the matter may be ignored. [p. 842, col. 2.]

The mere fact that by virtue of the provisions of rule 16 of the rules framed by the Lieutenant-Governor under section 9 of the Chota Nagpur Encumbered Estates Act, the power to grant leases vested in a Manager under section 17 of the Act is subject to the sanction of the Commissioner, does not in itself give the Commissioner power to grant a lease without consulting the Manager at all, much less can the Commissioner, unknown to the Manager, bind him by an agreement compelling him to exercise his statutory powers. [p. 844, col. 1.]

Section 9 of the Chota Nagpur Encumbered Estates Act contemplates that the Manager may be either the Deputy Commissioner himself or some one else. In the latter case the powers of the Deputy Commissioner are confined, by rule 5 of the rules framed by the Lieutenant-Governor under section 19 of the Act, to a general control over the management of another person. To say that in such a case the Deputy Commissioner may treat the Manager as non-existent and exercise his powers himself would be to extend the scope of the rule beyond its legitimate meaning. [p. 844, col. 1.]

The powers granted by the Chota Nagpur Encumbered Estates Act to a Manager should be construed as strictly as the powers of guardians and managers of minors. [p 845, col. 1.]

It is not essential to the proper exercise of a statutory power to grant a lease that the person having this power should also have power to enter into a contract to lease. [p. 845, col. 1.]

The power to grant leases given to a Manager by section 17 of the Chota Nagpur Encumbered Estates Act does not include the power to enter into an executory contract to grant a lease [p. 845, col. 1.]

If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction, whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the conditions are unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the mere formal document may be ignored [p. 845, col. 2.]

Appeal from a decision of the Additional Subordinate Judge, Hazaribagh, dated the 24th July 1917.

Sir *Rash Behary Ghosh* (with him Messrs. *Hasan Imam, Sultan Ahmad, Sushil Malhar Mullick* and *S. N. Bose*), for the Appellants.

Sir *B. C. Mitter* (with him Messrs. *K. B. Dutt, B N. De*, and *Mohammad Fakhruddin*), for the contesting Respondent.

Mr. *Manuk*, for the Raja of Palganj.

JUDGMENT.—This is an appeal from a judgment and decree of the Additional Subordinate Judge of Hazaribagh, dated the 24th July 1917, dismissing the plaintiffs' suit for specific performance of a contract, alleged to have been entered into on behalf of the Raja of Palganj to grant a permanent lease of Paresnath Hill to the Digambari community of Jains in India.

The suit was instituted on the 5th September 1913 in the names of Dhannu Lal Agarwalla and Parmesti Das Serowgee, as plaintiffs suing on behalf of themselves

and as representatives of the entire Digambari Jain community of India. Both these gentlemen died about a year after the suit was instituted. The present plaintiffs thereupon applied under the provisions of the Civil Procedure Code (Order I, rule 8) to be made parties, and by an order of the lower Court, dated the 1st February 1915, their names were added to the record as plaintiffs and the suit proceeded.

At the time when the suit was instituted the defendant's estate was being administered by Babu Krishna Chandra Ghosh, who had been appointed Manager of the Palganj Raj under the provisions of the Chota Nagpur Encumbered Estates Act (Bengal Act VI of 1876), and the defendant was sued through the said Manager as his representative and guardian. Babu Krishna Chandra Ghosh, having ceased to act as Manager, Babu Janki Nath Gupta was appointed in his place, and by an order of the 2nd February 1915 his name was substituted on the record as Manager and guardian in place of the former Manager.

The events leading up to the present suit are referred to at some length in the pleadings and a short history of the same is set out in the judgment now under appeal. It is convenient to refer again shortly to the circumstances under which the agreement sought to be enforced came to be made. The range of hills known as Paresnath Hill lies in the Hazaribagh District and runs roughly from east to west. It has a central range about a mile and a quarter long with outlying spurs, a part of which is Government property. The greater part of the Hill, however, is claimed as part of the Palganj Zemindari. For many years this Hill has been an object of adoration by the Jains who hold an Ekrarnama from the father of the present Raja of Palganj agreeing to grant them such lands on the Hill as they may need for the purpose of building temples. Indeed, at one time they went so far as to claim the Hill as their own under *sunnads* granted by Akbar and Ahmed Shah. These, however, were found by the Calcutta High Court to have been spurious documents. A number of temples have in the past been erected along the crest of the central range and many pilgrims resort there for worship, and in the course of time the Jains have come to regard the locality as a sacred adjunct to the performance of their religious observances and keenly resent its use or occupation by others for purposes which are repugnant to their religious views and which they regard, rightly or wrongly, as an interference with their vested rights.

In the year 1907 the Government of India approved a scheme submitted by Mr. Carey, then Deputy Commissioner of Hazaribagh, for opening a sanitarium and residential buildings for Europeans on the western spurs of the range and on its northern slopes, leaving the crest of the central range for the Jains whose temples at present occupy that site. This scheme met with strong opposition from both the Sitambari and Digambari sects of the Jain community, which resulted in the intervention of Sir Andrew Fraser, then Lieutenant-Governor of Bengal, who took a personal interest in the matter and endeavoured to bring about a settlement which would be satisfactory to all parties. In August 1907, he visited the Hill accompanied by the leading representatives of the Jains of both sects and held a *darbar* at Madhuban, when he suggested that the Jains should themselves purchase the Raja's interest in the Hill. This suggestion appears to have commended itself to the Jains, and in September of the following year, after some further negotiations, a conference was held at Ranchi with a view to settling terms. This was a task of some magnitude, as there were many interests to be considered. Certain lease-holders had vested interests, the Sonthal tribes claimed the right of hunting wild animals over the whole of the Hill, the Zemindar of Nawagarh claimed the southern slopes as part of his Zemindari, and other claims and encumbrances of a public and private nature had to be considered. Meantime some correspondence passed between the Government of Bengal and the Government of India on the subject, and the latter had expressed their approval of the suggestion that the central hill should be leased to the Jains. The conference at Ranchi was attended by Sir Andrew Fraser, Mr.

(afterwads Sir William) Duke, Chief Secretary to the Government of Bengal, Mr. Macintosh, Commissioner of Chota Nagpur, the Raja of Palganj, and representatives of the Digambari and Sitambari Jains. Certain proposals and counter-proposals were made at this meeting, but it terminated without any settlement being come to. Negotiations, however, still continued between Sir Andrew Fraser and the representatives of the Jains. Two proposals were suggested, one a temporary arrangement terminable when the estate should be restored to the Raja, and the other a permanent arrangement granting a permanent lease at a fixed rental in addition to premium, certain rights being reserved to the Raja. It may be mentioned here that the Sitambari Jains already held leases of certain plots on the Hill the rental of which was Rs. 1,500 per annum, and it was that sect which had the option of taking further plots for the purpose of building temples under the agreement with the late Raja above referred to. Their desire apparently was to obtain complete control and exclusive rights over the whole Hill, including the jungles, villages, and existing lessees. Sir Andrew Fraser would not consent to this scheme, as appears from his letter of the 7th October 1908 addressed to Maharaj Bahadur Singh (Exhibit 19). Subsequently, on the 20th October 1908, Pandit Mohan Krishna Dar, representing the Digambaris, wrote to Sir Andrew Fraser requesting him to use his influence to bring about a settlement on what the writer considered a just and reasonable basis, stating the terms he was prepared to offer for a permanent lease, namely, Rs. 50,000 premium and a rental of Rs. 12,000 annually, including the Rs. 1,500 payable by the Sitambaris. Further correspondence then followed between Sir Andrew Fraser and the original plaintiffs as the accredited representatives of the Digambaris, and on the 3rd November 1908 the latter wrote offering on behalf of the Digambari Jain community and without prejudice to their rights to take a permanent lease of the whole Hill subject to existing leases paying Rs. 50,000 by way of premium (a cheque for which sum was tendered), and an annual rental of Rs. 12,000, the right of cutting timber in the jungles being reserved to the Raja. On the 25th November Sir William Duke wrote in reply detailing the terms which the Lieutenant-Governor would be prepared to accept. These were, with slight modifications, the terms already offered on behalf of the Digambaris. Any excess over and above a limit of Rs. 2,000 which should become payable in future on account of existing leases was to be added to the annual rental of Rs. 12,000, and the mineral rights on the Hill were to be retained entirely by the Zamindar. The demarcation of the Hill was to be made by the Deputy Commissioner and was to exclude the villages in the plain. These terms were prefaced by the following remark:—

"Without discussing the precise character of the rights and ownership of the Zamindar of Palganj over the Paresnath Hill, it is proposed that in deference to the wishes which you and other Jains have expressed the ownership should be limited by a distinct agreement in the following respect."

The letter ended thus:—

"I am to request that you will state clearly and definitely whether you accept these terms and conditions. I am also to request that you will state whether you are to be the contracting parties with the Court of Wards and whether in that capacity you represent the Digambari Jains only or the Jains in general.

"On hearing from you that you accept these terms and who the contracting parties on your behalf will be, the Lieutenant-Governor will give orders to have the agreement drawn up by the Government Solicitor in consultation with any lawyer whom you choose to name."

On the 26th November the original plaintiffs wrote acknowledging the letter of the previous day and adding:—

"We are very thankful to His Honour for his kind and sympathetic consideration of the offer made by us without prejudice on behalf of the Digambari Jains of India. We shall esteem it a great favour if you will kindly permit us to modify the terms of agreement as set forth in paragraph 2, clauses (1) to (6) of your favour. The terms as set forth by you are given below and the modifications prayed for by us are shown in italics. In the margin we

have indicated, in brief, some of the reasons which have induced us to make the aforesaid modifications."

Then follow the proposed terms and the modifications which were not of a substantial character. The letter concludes in this way:—

"We hereby accept the terms modified as above, provided that a short agreement embodying these terms be prepared and executed by (1) the Deputy Commissioner or such other officer representing the Court of Wards as is authorised to sign such agreement, (2) the Raja of Palganj, and (3) ourselves as representing the Digambari Jains.

"The permanent lease and other documents may hereafter be prepared as suggested by you and in those documents it would be better if you would kindly allow to join us at least two other representatives of our sect, to wit, Seth Manick Chand of Bombay and Lala Devi Sahay of Ferozepur."

The only modification of the proposed terms which calls for remark was the first which stipulated "A permanent lease of the whole Hill will be granted to the Digambari Jains, subject to the terms and conditions and reservation hereinafter contained."

The proposed terms having contemplated a grant to the Jains generally and not to the Digambari sect, attention is drawn to this because one of the points urged in argument by the respondent was that a community such as the Digambari Jains, not being a legal entity, could not be the grantees of a lease.

On the 30th November 1908, Sir William Duke replied to this letter, stating:—

"I am directed to acknowledge the receipt of your letter, dated the 26th November 1908, and to say that the Lieutenant Governor has been pleased to accept the modified terms of agreement as set forth therein. I am to enclose herewith for your information a copy of letter No. 4791, dated the 30th November 1908, to the Solicitor to the Government of India, and to request you to nominate a lawyer in consultation with whom the draft agreement may be prepared."

The letter to the Government Solicitor, No. 4791, a copy of which was enclosed was as follows:—

"I am directed to state, for information, that the Lieutenant-Governor has been pleased to sanction the grant to the Digambari Jains of a permanent lease of the Hill known as the Paresnath Hill, in the District of Hazaribagh, owned by the Zamindari of Palganj on the conditions mentioned below:—

"(1) A permanent lease of the whole Hill will be granted to the Digambari Jains, subject to the terms and conditions and reservations hereinafter contained, so that the Hill may be protected from every thing repugnant or opposed to the feelings or the religious tenets of the Jains.

"(2) This lease is to be subject to the existing leases and arrangements, but the income derived from these existing leases and arrangements shall go to and be received by and be assigned over to the Digambari Jains, provided that any amount payable on account of these leases over and above Rs. 2,000 shall be added to the annual payment of Rs. 12,000 referred to below.

"(3) The Digambari Jains have paid by a cheque Rs. 50,000 (fifty thousand) by way of premium and no further premium will be demanded.

"(4) The Digambiri Jains will also pay an annual sum of Rs. 12,000 by way of rent, this sum of Rs. 12,000 will include the Rs. 1,500 now annually payable by the Sitambari Jains.

"(5) The Palganj Zemindar shall be entitled only to the premium and the rent aforesaid and excess over Rs. 2,000 as mentioned in clause (2), as also to the rents of sub-leases under clause (7). He shall also be entitled to cut the jungle according to the necessity of himself and of his present estate, such cutting to be done in accordance with rules to be framed by the Deputy Commissioner with the sanction of the Commissioner, regulating the kind of timber or wood to be cut, and the time, conditions, and circumstances of the cutting. The right to minerals on the Hill shall be retained entirely by the Zamindar, but no steps shall be taken for the prospecting for minerals or for their working, collecting, securing or removal without the order of the Deputy Commissioner passed with the sanction of the Commissioner and without the consent of the Jains; such consent only to be withheld

when anything repugnant to the religious feelings of the Jains is proposed. Beyond this the Zemindar will have no other right, interest, claim or control over any part of the aforesaid Hill, as long as the stipulated annual payment is duly made.

"(6) The demarcation of the Hill shall be made by the Deputy Commissioner and shall exclude the villages on the plain so as to render it more convenient to deal with the existing leases and rights.

"(7) The Digambari Jains will not be entitled to grant any sub-lease with regard to any piece or parcel of land not now covered by the aforesaid subsisting leases without the consent of the Zemindar of Palganj in writing, and the rents from such sub-leases shall go to the said Zemindar of Palganj.

"I am to request you to draw up, in consultation with any lawyer whom the Jains may choose to name, a draft agreement embodying the above terms which have been accepted by the Digambari Jains for execution by (1) the Deputy Commissioner of Hazaribagh as Manager of the Palganj Estate now managed by the Court of Wards under the Chota Nagpur Encumbered Estates Act, (2) the Raja of Palganj, and (3) Babus Dhannu Lal Agarwala and Parmesti Das Serowgi as representing the Digambari Jains."

The terms set out in the above letter were those already agreed to between the plaintiffs and Sir Andrew Fraser and they contain the agreement of which specific performance is sought. The agreement embodying these terms was never in fact drawn up or executed, but a draft lease was prepared by the Government Solicitor and forwarded to the plaintiffs' Solicitors in January 1909.

In August 1909 it was decided to make a survey and prepare a Record of Rights of the area to be leased which had not up to that time been delimited, with a view to obtain the requisite particulars for the grant. This took some time, and disputes arose as to the line of demarcation, the Digambaris representatives contending that the Hill extended further into the plain including several villages lying therein outside the demarcation line laid down by the Deputy Commissioner; and before the Survey Report was completed the Government of Bengal, acting on instructions from the Government of India, informed the plaintiffs' Solicitors that the arrangement arrived at for a settlement would not be carried through. This decision was conveyed in a letter from the Government of Bengal to the plaintiffs' Solicitors on the 6th September 1910 in the following terms:—

"GENTLEMEN,—I am directed to state that on behalf of the Raja of Palganj, whose estates are under the management of the Court of Wards, this Government agreed to the grant to the Digambari sect of the Jains of a lease of the Paresnath Hill in the district of Hazaribagh on certain conditions proposed in a letter, dated the 26th November 1908, from your clients, Seth Parmesti Das Serowgi and Babu Dhannu Lal Agarwalla. Having regard, however, to the preferential claims of the Sitambari community the Government of India, to whom the matter was reported, do not feel justified in giving effect to the offer of settlement made by this Government. I am, therefore, to request that you will be so good as to inform your clients that the arrangement proposed in November 1908 has fallen through and that the Accountant-General, Bengal, has been asked to refund them with interest at 4 per cent. (the Bank rate of fixed deposits) the sum of Rs. 50,000 which they had paid as premium."

This decision was, no doubt, arrived at in consequence of a report made by Mr. John Reid, the Settlement Officer of the Chota Nagpur Division, on the 3rd June 1910 (Exhibit D1) in which he stated that the grant of the proposed lease to the Digambari Jains would result in serious differences and disputes between them and their rivals, the Sitambaris, who were in possession of the existing temples and had preferential rights over the Hill in case they wished to erect new temples. The Digambaris, on the other hand, had no such rights and were not in possession of any temples of their own. In dealing with what he considered would be the immediate result of granting the proposed lease Mr. Reid reported that, "The Digambari Society would proceed to erect new *tonks*, some of them possibly adjacent to the already existing *tonks* which are managed by the Sitambaris. The Sitambaris would of course object and would

fall back on their rights under the agreement of 1872. To enforce their legal rights they would, no doubt, resort to violence, and very likely the site of every proposed new *tonk* would be the scene of a riot of greater or less magnitude. I understand that it is not the local authorities but the Local Government who propose to sanction the lease of the Hill to the Digambari Jains. In that case the latter authority would be put in the extremely invidious position of having sanctioned an agreement, the result of which must necessarily be rioting, possibly of a serious character. With this prospect in view, if there is any doubt of the legality of the proposed lease it is evidently one which cannot be carried through."

There can be no question that these two rival branches of the Jain community entertain feelings of hostility towards each other, and the conclusions arrived at by Mr. Reid may possibly have been justified. However that may be, the Government of Bengal definitely refused to proceed further in the matter. At that time Sir Andrew Fraser's term of office as Lieutenant-Governor had come to an end. The appellants refused to accept the cheque and interest tendered in the letter of the 6th September 1910, and on the 5th September 1913 instituted this suit claiming specific performance of the contract mentioned or alternatively damages against the defendant.

Various defences were pleaded in the written statement. The most important of these may be summarised thus: –

(1) That the defendant's estate was at all material times vested in a Manager under the Chota Nagpur Encumbered Estates Act, 1876, by section 3 of which the defendant was incompetent to charge, lease or alienate his immoveable property or to enter into any contract which might involve him in pecuniary liability, and if, and in so far as he had purported to do so by himself or through others, such contract was invalid. None of the persons conducting the negotiations had any authority to enter into a binding contract.

(2) That under the Act the only person having power to deal with the defendant's property was the Manager, and even his powers derived from section 17 of the Act did not include the power of entering into an agreement to grant a lease.

(3) That no binding agreement was entered into, and that what took place was mere negotiation, all parties thereto contemplating the necessity of ascertaining the exact legal rights of all persons interested in the Hill before a lease could be granted, no date being fixed for the commencement of the demise.

(4) That the parties were fully aware that none of the persons conducting the negotiations had authority to enter into a binding agreement, and that the plaintiffs agreed only to be bound in the event of a short agreement embodying the terms being prepared and executed by such person or persons as were authorised to sign such agreement, and that this was never done.

(5) That Sir Andrew Fraser was acting solely in an executive capacity and had no authority to enter into a contract binding upon the defendant or his estate.

(6) That negotiations were not conducted on the basis of obtaining the highest value for the property.

(7) That the contract should not be enforced on the ground of public policy.

The Additional Subordinate Judge of Hazaribagh, before whom the case came for trial, dismissed the suit, being of opinion that none of the officers who conducted the negotiations with the plaintiffs was competent to make the agreement in question, and that it had, therefore, no operation in law. His judgment was based mainly upon the interpretation of the provisions of the Chota Nagpur Encumbered Estates Act. By section 3 of that Act the proprietor of an estate vested in a Manager under the Act, so long as that management continues, is incompetent to mortgage, charge, lease, or alienate his immoveable property or any part thereof. The powers vested in the Manager by section 17 include the power to demise all or any part of the property under his management for any term of years or in perpetuity to take effect in possession in consideration of any fine or fines or without fine and reserving such rents and under such conditions as may be agreed upon. By an amending Act of 1909 what is now known as clause 18B was added. This was not in

operation at the date of the agreement now under consideration. It provides as follows:—

"Subject to the sanction of the Commissioner, the Manager shall have power to enter into any contract or to execute or relinquish any lease or counterpart of any lease or to take any action not otherwise provided for in this Act which in his opinion is necessary for the proper care and management of the property."

It must be borne in mind that the Manager in whom the estate was vested at the date of the agreement was Babu Krishna Chandra Ghosh. This gentleman was no party to the agreement, and, so far as the evidence goes, there is nothing to shew that he was even consulted during the negotiations and before the agreement was entered into. It is also quite clear that the Raja of Palganj, although he may be taken to have been throughout a consenting party, had no power to deal with his estate. The learned Judge came to the conclusion that Sir Andrew Fraser, the Lieutenant-Governor of Bengal, had no functions at all in the matter connected with the granting of the lease; that the Commissioner and the Deputy Commissioner were authorised by the rules framed under section 19 of the Act to sanction leases to be given by the Manager alone, and considered that they could by clear implication dictate terms to the Manager, but could not demise themselves and far less make a binding contract to lease; that the only person authorised to grant a lease under the Act was the Manager and nobody else. Having arrived at that conclusion his judgment proceeds in this way:—

"The question, therefore, resolves itself into this:—Whether the power to lease provided in section 17 necessarily implies a power in the Manager to contract for it as well."

He then considered the arguments addressed to him on this question and arrived at the conclusion that the power to lease granted by the Act did not necessitate the power to enter into a binding contract to lease. The fact that the latter power had been conferred upon the Manager by the amending Act of 1909 (section 15B) indicated to him that before the passing of the amending Act such power had been excluded and he came to the conclusion that none of the officers who took part in the negotiation was competent to make the agreement in question and, therefore, that it had no operation in law and he dismissed the suit.

It is not very clear from these findings whether the learned Judge dismissed the suit solely on the ground that the Manager had no power to enter into an executory contract to grant a lease, or whether he also based his decision upon the ground that even if such power existed, the Manager was no party to the agreement. Having arrived at the conclusion that the suit must fail on the ground above referred to, he thought it unnecessary to determine the other issues; but, in view of an appeal, he recorded his findings on those issues on the assumption that the agreement in question should be held to be a competent one. He considered that the agreement was a concluded agreement and not a mere negotiation contemplating further steps before it should have a binding effect. He further thought that Sir Andrew Fraser, in bringing about a settlement which involved questions of public policy of considerable magnitude, must be supposed to have been acting in his executive capacity because he had no statutory power to deal with the matter, and that his action was, therefore, subject to the control of the Government of India; that he had obtained the sanction of the Government of India to settle only the central range, and that his subsequent scheme leasing the whole range was not submitted to or approved by the Government of India who refused to sanction it; that Sir Andrew Fraser was under a misapprehension that the Digambari sect represented the majority of the Jain community and possessed the greater number of shrines on the Hill, which was not the fact, and that he conducted the whole negotiations in an extremely partial manner without enquiring into the preferential rights and privileges of the rival sect of Sitambaris, and that the effect of giving the Hill to the Digambaris would be to put the estate under a disadvantage and to throw the two rival sects into unavoidable conflict to the detriment of the estate. In view of these facts and circumstances he considered that he would not have been prepared to decree specific performance of the contract. On the question of damages

he came to the conclusion that assuming there was a binding contract and specific performance was not enforced, damages would have to be allowed only nominally as the actual amount spent could not be ascertained by the evidence adduced.

By the time the case came on for hearing on appeal before this Court, the Palganj Estate had ceased to be administered by a Manager and the Raja had been restored to the possession and enjoyment of the property under clause 12 of the Chota Nagpur Encumbered Estates Act, a notification to that effect having been published in the Bihar and Orissa Gazette, dated the 11th December 1918. The Raja, it appears, was at that time quite prepared to carry out the agreement of the 30th November 1903 and grant the appellants a lease on the terms therein mentioned. He accordingly presented a petition, dated the 24th February 1919, praying the Court to pass a decree under Order XXIII, rule 3, of the Civil Procedure Code, in accordance with the terms arrived at by a compromise between himself and the plaintiffs, which terms are set out in the petition. By this compromise the Raja admits the appellants' claim for specific performance of the contract for a perpetual lease of the Hill upon the terms and stipulations of the agreement on which the claim is based; the appellants give up their claim for interest, mesne profits, damages and costs, and undertake to bear the costs of all litigation that may arise out of the present litigation as well as the costs of an appeal, if any, to His Majesty in Council from the final decree in this case. This application was opposed by learned Counsel on behalf of Nagarseth Kasturibhai Manibhai, representing the Sitambari Jains, who had been added as a respondent to this appeal under the following circumstances:—

In the year 1911 the proprietor of the Nawagarh Zemindari, commonly known as the Raja of Nawagarh, instituted a suit against the Raja of Palganj through his Manager and guardian Krishna Chandra Ghosh in whom the estate was then vested as defendant, claiming a declaration of title to the southern half of Paresnath Hill. The Raja of Nawagarh, who unlike his neighbour of Palganj, is an adherent of the Sitambaris was successful in his suit before the Subordinate Judge of Hazaribagh. An appeal (No. 551 of 1914) was preferred against that judgment to the High Court on behalf of the Raja of Palganj and came before this Court in January 1918. Pending that appeal the Raja of Nawagarh entered into an agreement with a representative of the Sitambaris to grant him or his nominee a permanent lease of his interest in the Hill. The policy of the Manager and those associated with him in the management of the Palganj Estate also favoured the transfer of the Raja of Palganj's interest in the Hill to the Sitambaris, the Government of India considering that they had preferential claims over their rivals, the Digambaris. In fact, the sanction of the Commissioner of Chota Nagpur had already been obtained on the 6th October 1917 under section 13B of the Act to transfer the Raja's rights to the Sitambaris. The result was that when the appeal in the Raja of Nawagarh's suit came before this High Court in 1918 the parties to that litigation, although disputing as to their respective rights and interests in the Hill, were both anxious to transfer those rights, whatever the extent of them, to the representatives of the Sitambaris who, in their turn, were apparently prepared to pay each of the contesting parties the price they were willing to accept for a transfer of their respective interests. In these circumstances, a purchaser being found who was willing to take over from the disputants their joint interest in the Hill without further determination of their respective rights and interests *inter se*, a compromise was arrived at between them, when the appeal in that suit was partly heard, and on the 4th February 1918 a compromise petition setting out the terms agreed to by the parties and approved by the Sitambaris was ordered to be filed and the parties were ordered to carry out the terms of the compromise, the appeal standing over for final orders. By the compromise it was provided that both parties should transfer, the one by a conveyance and the other by a permanent lease, their right, title and interest in Paresnath Hill to the representatives of the Sitambaris upon terms already settled bet-

ween them; that all questions of ownership and possession of the respective parties should remain undetermined as between the parties; but that, in order to settle the extent of the interest to be transferred by the Raja of Nawagarh, the boundary between the Hill and Nawagarh Pargana to the south should be determined by a competent Survey Officer to be appointed by the Court. The conveyance and lease contemplated in the said compromise were then prepared and subsequently executed by Janki Nath Gupta, who had succeeded Krishna Chandra Ghosh, as Manager of the Palganj Estate and the Raja of Nawagarh, respectively, transferring their interests in the Hill to Nagarseth Kasturibhai Manibhai in his individual capacity and as representing the Sitambari community of Jains. The Raja of Palganj was personally opposed to this settlement, and when the matter came again before the Court for final orders on the 8th March 1918, he petitioned the Court complaining of the bargain made by the Manager on his behalf with the Sitambaris, and asking the Court to recall the order made on the 4th February, and not to pass a final decree in the terms of the compromise. At the same time a similar petition was presented on behalf of the Digambari Jains, who had previously made an unsuccesful application to be added as parties in that suit. The Raja's petition was rejected both on the ground that he had no control over the management of his estate at that time and also on the merits, he having, it appeared, agreed personally with the Sitambaris on more than one occasion in 1912 and 1913 to grant them a permanent lease of the Hill. The Digambaris' petition was also rejected, although the Court consented to hear them through Counsel. The Court then ordered a decree to be passed in the terms of the compromise and ordered the conveyance and lease, copies of which were filed, to be executed and registered. The Court also observed that the terms of the conveyance by the Manager of the Palganj Estate safeguarded the interests of the Digambaris in so far as they provided that the conveyance should be subject to any order which might be passed by this Court in the present appeal. In the same conveyance the purchaser representing the Sitambaris covenanted to take all necessary steps to get his name substituted in place of that of the Raja of Palganj as respondent in the present appeal and, at his own expense, to defend the action and indemnify the vendor and the Palganj Estate against all costs and damages arising out of the litigation after the 1st January 1918. The purchaser, after execution of the conveyance, accordingly applied to this Court on the 7th August 1918 to have his name substituted in place of that of the Raja of Palganj as respondent, when it was ordered that the name of Nagarseth Kasturibhai Manibhai be added as a respondent in the appeal, the name of the original respondent being also left on the record.

The question which now arises is whether we ought, in the circumstances just mentioned, to record the compromise of the 24th February 1918, and pass a decree in accordance with the terms thereof. The appellants rely upon the provisions of Order XXIII, rule 3, and say the Court has no option in the matter once the compromise is satisfactorily proved, as in this case, and ought to pass a decree in accordance therewith. They further contend that the respondent Nagarseth Kasturibhai Manibhai is a purchaser *pendente lite* and takes subject to the rights of the appellants under the decree now asked for. It is true that the purchase on behalf of the Sitambaris was, by the terms of the conveyance and with the approval of the Court which sanctioned that conveyance, made subject to any order which might be made in the present litigation. It is also true that the doctrine of *lis pendens*, as embodied in section 52 of the Transfer of Property Act, applies to transfers during the pendency of a suit even when that suit is terminated by a compromise decree; but in such cases the Court should be satisfied that the compromise is not a collusive agreement entered into with the object of defeating the purchaser. It must be taken that the compromise entered into by the Manager of the Palganj Estate in Appeal No. 551 of 1914 and the conveyance made in pursuance thereof are binding on the Raja of Palganj and his estate to the same extent as if the latter had been himself the contracting party. There was, therefore, an implied obligation on the transferror not to derogate

from the grant. It was contemplated also that the purchaser should be substituted in the present appeal as respondent in place of the Raja and indemnify the latter against all liability he might incur by an adverse decision therein. In such circumstances to deny the purchaser the right of defending the present action by setting up any defence that would be open to the Raja of Palganj would be to work a manifest injustice if there is any real defence to the suit. The transfer made to the contesting respondent was made under the authority of the Court within the terms of section 52 of the Transfer of Property Act, and one of the terms was that it should be subject to any order passed in the present appeal. The object of this was clearly to preserve the existing rights of the Digambaris which were then *sub judice*, but not to enlarge those rights by putting it in their power to defeat the transfer by a collusive arrangement with the transferror. It seemed to us, therefore, necessary to consider whether the compromise we are now asked to record was a *bona fide* one or merely colourable with the object of preventing the contesting respondent from setting up such defence to the action as might otherwise be open to the original defendant. It is contended that the compromise is a reasonable one, as the questions to be determined are doubtful and may not end in this Court and the result may be to saddle the Raja of Palganj with heavy costs and possibly damages even if specific performance be not decreed. This argument did not commend itself to us, as there is an undertaking by the purchaser to indemnify the Raja against all liability arising from such a contingency, and it is not suggested that the purchaser's financial resources are inadequate for that purpose. It seemed to us that if there is a real and substantial defence to the claim, the compromise we are asked to record would not in the circumstances already mentioned be a lawful agreement within the meaning of Order XXIII, rule 3, and without considering the case on the merits we were not prepared to record it and pass a decree in accordance with the terms thereof. We accordingly decided to hear the appeal on the merits.

The main questions which were argued before us were, (1) whether the agreement relied on was made by persons who were competent to deal with the Palganj Estate at all; (2) whether the Manager of the Estate, assuming him to be a contracting party, had power to enter into an agreement to execute a lease as ancillary to his statutory power to grant a lease; and (3) whether there was a completed agreement upon which a suit for specific performance could be based. These were the points towards which the arguments were mainly directed, but it was further contended by the contesting respondent that the suit, as framed, was not maintainable because the alleged contract was made either with the Digambari Jains as a body or with certain individuals. In the former case no suit was maintainable by the Digambaris, who are not a legal entity. In the latter case the individuals were dead and their legal representatives were not substituted in their place, and even if they claimed as trustees for the Digambaris, there was nothing to shew that the substituted plaintiffs were appointed trustees in place of the original plaintiffs.

The first of the above points involves a consideration of some of the provisions of the Chota Nagpur Encumbered Estates Act, and in dealing with this question it is necessary to determine who in fact were the actual parties to the agreement. So far as the Raja of Palganj is concerned, he may be taken to have been a consenting party and to have authorised Sir Andrew Fraser to enter into a contract on his behalf, but it is clear from section 3 of the Act that, so long as the estate was under the control of the Manager, the Raja was incompetent to mortgage, charge, lease or alienate his immoveable property or any part thereof, and his action in the matter may be ignored. According to Sir William Duke's evidence it was Sir Andrew Fraser who directed the whole course of the negotiations, acting on his own responsibility and forming his own decisions. It is also clear from the documentary evidence that the representatives of the Digambaris throughout were treating with Sir Andrew Fraser, and, so far as appears from the evidence, never once approached the Manager of the Palganj Estate. The reason for this is not far to seek. Sir Andrew Fraser was Lieutenant Governor of Bengal. The matter was one which the Government

was likely to consider as involving questions of policy in the government of that Presidency. If the Manager of the Estate had been asked to grant a lease, he would probably have refused to commit himself until he was satisfied that his action in the matter had the approval of the Local Government. The Digambaris, no doubt, felt confident that if they obtained the formal sanction of the Lieutenant-Governor to their scheme the rest was merely a question of routine, and that for all practical purposes the sanction of the Lieutenant-Governor meant the consent of the Manager and the consequent grant of the lease. Unfortunately for the appellants, however, the Lieutenant-Governor was not himself competent to exercise the statutory powers vested in the Manager. Had the suit been one against Sir Andrew Fraser for breach of warranty of authority different considerations would arise, which it is not necessary to consider. The suit is against the Raja of Palganj through his Manager, who alone at the material time had power to grant a lease of the property. The management of the estate was vested in the Manager under section 2 of the Act. His duties are defined in section 4 and the following sections. They consist mainly in the collection of rents and profits and the disposal of them for certain purposes, which in some cases require the approval of the Commissioner. He must also enquire into and settle debts and liabilities due from the estate, machinery for which is provided involving judicial enquiries with appeals from his decisions in certain cases to the Deputy Commissioner and Commissioner. His powers are enumerated in Part V of the Act. They include certain powers connected with his duties, and section 17 provides:

"Subject to the rules made under section 19 the Manager shall have power to demise all or any part of the property under his management for any term of years or in perpetuity to take effect in possession in consideration of any fine or fines or without fine and reserving such rents and under such conditions as may be agreed upon."

Section 18 gives him power in certain cases with the sanction of the Commissioner to raise money by mortgage, sale or loan in order to pay the debts of the holder or charges on the property. Section 18B, which was enacted after date of the agreement sued on, is set out at length in an earlier part of this judgment.

By section 19 the Lieutenant-Governor may make rules consistent with the Act to regulate certain matters therein specified and generally for the guidance of officers in all matters connected with the enforcement of the Act and such rules, when made, shall have the force of law. Rule 5 says:—

"Wherever the Manager appointed under the Act is not the Deputy Commissioner of the district, the Deputy Commissioner will (subject to such orders consistent with the provisions of this Act as the Commissioner may from time to time issue) exercise a general control over the management of all the properties in his district."

Rule 16 makes the power of the Manager to grant a lease under section 17 subject to the sanction of the Commissioner if the lease exceeds a term of four years.

The appellants contended that it was impossible to believe that even if the Manager were not a formal party to the agreement his consent and acquiescence had not been obtained by Sir Andrew Fraser, and that it ought, therefore, to be assumed. We are unable to draw any such inference. From the evidence of Sir William Duke as to the manner in which the negotiations were carried through by Sir Andrew Fraser, I think it is much more probable that the Manager's opinion was never asked. The only evidence urged in support of this argument consists of two documents which came into existence long after the date of the agreement. The first is a note signed by the Manager and dated the 6th February 1909, [Exhibit 34 (1)] giving certain information required by the Solicitors with a view to preparing the lease. The second is a letter from Ganga Charan Balav, the Forester of the Palganj Estate, addressed to the Manager, Encumbered Estates, Hazaribagh, dated the 25th January 1910, (Exhibit 50) stating that the cadastral survey of the Hill had commenced and requesting sanction for two assistants. There is nothing in either of these documents which would warrant the assumption that the Manager had delegated his powers under the Act to Sir Andrew Fraser

even assuming he had power to do so which, to say the least, is a violent assumption in the case of statutory powers.

It was next contended that Sir Andrew Fraser, at all events, consulted and discussed the matter with the Commissioner of Chota Nagpur (Mr. McIntosh) and the Deputy Commissioner of Hazaribagh (Mr. Radice), and, as the Manager was by the rules just mentioned subject to a general control by the Deputy Commissioner and could only grant a lease of this description with the previous sanction of the Commissioner, it was quite sufficient if the consent of these gentlemen should be established. We think it may be assumed from Mr. McIntosh's telegram of the 6th November 1908 (Exhibit 21) that he and the Deputy Commissioner assented to the terms eventually arranged between Sir Andrew Fraser and the representatives of the Digambaris. We are unable to hold, however, that because the power to lease vested in the Manager by the Statute requires the sanction of the Commissioner, this in itself gives the Commissioner power to grant a lease without consulting the Manager at all, much less that the Commissioner may, unknown to the Manager, bind him by an agreement compelling him to exercise his statutory powers. It remains to consider whether the Deputy Commissioner, by reason of rule 5 referred to, which imposes upon him the duty to "exercise a general control over the management of all the properties in his district," can, in like circumstances, dispense with the functions of the Manager and himself exercise the powers vested by the Statute in the Manager. In our opinion such was not the intention of the rule. The Statute contemplates (see section 9) that the Manager may be either the Deputy Commissioner himself or someone else. In the latter case the powers of the Deputy Commissioner are given by the rule and are confined to a general control over the management of another person. To say that he may treat the Manager as non existent and exercise his powers himself would, we think, be to extend the scope of the rule beyond its legitimate meaning. Section 21A gives the Board of Revenue control and supervision over the orders and proceedings of the Commissioner and Deputy Commissioner and affords some light on the meaning of the word control. It could hardly be contended that the Board of Revenue could exercise the functions of the Commissioner.

It was lastly contended on this part of the case that the Manager must be taken at least to have ratified the agreement. It is sufficient to say that we have looked in vain for any evidence of ratification. The two documents [Exhibits 34 (1) and 50] already referred to were relied on as indicating acquiescence by the Manager and an attitude of mind from which ratification might be inferred. We do not think any such inference can be drawn. It follows from these findings that the plaintiffs' suit must fail and the appeal be dismissed. But as the other two points were argued at some length before us, we think it desirable to record a decision on those points also.

On the second point it was contended for the respondent that the rule whereby equity aids the defective exercise of a power by a tenant for life so as to bind the remainderman can have no application to powers created by Statute. The foundation of the equitable doctrine would appear to be based upon the view that in most cases the donor of the power cannot have intended that the lack of a seal or the omission of some legal formality not necessarily known to him should defeat the exercise of the power by the grantee, if it otherwise expresses the paramount intention of the donor. But to aid the powers granted by Statute for similar reasons would be to treat the Legislature as *inops consilii* (See Farwell on Powers, 3rd Edition, pages 394-5). The appellants contend, however, that the rules governing the powers of tenants for life or other limited owners can have no application in a case like the present where the Manager, though appointed by Statute, must be regarded as for the time being in the shoes of the owner, who would undoubtedly have been bound by an executory contract to grant a lease had he remained in control and possession of his estate. This argument, in so far as it denies the analogy between the position of the Manager and that of a tenant for life, has much to commend it. But it appears to us that the decision of the question must depend upon whether a

statutory power of leasing can, by the canons of construction relating to Statutes, be read as including the power to contract to grant a lease. It was contended that such power was a necessary and essential adjunct to the power to grant a lease, and should, therefore, be read into the Statute. It does not appear to us to be essential to the proper exercise of a power to lease that the lessor should also have power to enter into a contract to lease. Even in the case of guardians and managers of minors it has been distinctly laid down by the Judicial Committee that it is not within their competence to bind the minor's estate by a contract for the purchase of immoveable property [*Mir Sarwarjan* v. *Fakhruddin* (1)] The contract in that case was found to be for the benefit of the minor, and it would presumably have been within the competence of the Manager to purchase. In our opinion the powers granted by Statute to managers of an encumbered estate should be at least as strictly construed. We are unable to hold that the power to grant leases given to the Manager by the 17th section of the Act included the power to enter into an executory contract like the present, and this question in our opinion should be decided against the appellants.

The third question is, whether there was a completed agreement upon which a suit for specific performance can be based. The terms offered by the appellants on the 26th November 1908 were undoubtedly accepted by Sir Andrew Fraser on the 30th November. But the respondents contend that the appellants' consent to those terms was conditional and that the conditions were never fulfilled. The conditions were those enumerated in the concluding paragraphs of the letter of the 26th November already quoted. The instructions sent to the Government Solicitors on the 30th November also show that Sir Andrew Fraser intended these conditions to be complied with, although it is noticeable that he treated the Deputy Commissioner of Hazaribagh as the Manager of the Estate, when in fact this was not the case. This misapprehension on his part may account for the fact that the real Manager took no part in the negotiations. Another inaccurate statement in the same part of the same letter is that the estate was being managed by the Court of Wards. It seems probable that the appellants were aware on the 26th November that an agreement by Sir Andrew Fraser alone might not be sufficient legally to bind the estate, and, therefore, stipulated that before they themselves should be bound a formal agreement should be prepared and executed by the proper officer authorised to deal with the estate as well as by the Raja of Palganj and, lastly, themselves.

There is a long series of decisions, beginning with *Ridgway* v. *Wharton* (2) in 1857 up to modern times, the effect of which is stated by Lord Parker (as he afterwards was) in the case of *Von Hatzfeldt Wildenburg* v. *Alexander* (3). "It appears to be well settled by the authorities," says that learned Judge, "that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

The present case appears to us to fall within the first alternative of the first class of cases considered by Lord Parker, where the law will not enforce the contract because the condition subject to which the consent is given is not fulfilled. For the reasons already mentioned, we think the proper construction of the agreement is that the appellants were quite willing to agree to a lease on the terms mentioned provided the Manager of the estate would execute a formal agreement on those terms. We do not lose sight of the fact that this point only arises on the assumption that the Manager

(1) 13 Ind. Cas. 831; 39 I. A. 1; 39 C. 232; 21 M. L. J. 1156; 16 C. W. N. 74; (1912) M. W. N; 22; 9 A. L. J.33; 15 C. L. J. 69; 14 Bom. L. R. 5; 11 M. L. T. S (P. C.).

(2) (1857) 6 H. L. C. 238; 27 L J. Ch. 46; 4 Jur. (N. S.) 173; 5 W. R. 804; 29 L. T. (o. s.) 390; 108 R. R. 88; 10 E. R. 1287.

(3) (1912) 1 Ch. D. 284; 81 L. J. Ch. 184; 105 L. T. 434.

was bound by the acts of Sir Andrew Fraser, a hypothesis which, as already stated, we are unable to accept. But even so the circumstances were peculiar, and whatever may have been the real reason it seems to us that the appellants regarded the execution of the formal agreement by the Manager as a condition precedent to their own consent. That condition has so far been unfulfilled. The formal agreement was never prepared, much less executed by the persons named. It was argued, however, that the condition imposed was one introduced in favour of the appellants, and that they would be entitled to waive it, and had in fact waived it as their subsequent conduct in connection with the survey and other matters shewed. The case of *Hawksley* v. *Outram* (4) was relied on for this proposition. In that case a term was introduced into a contract which was clearly in favour of the purchaser alone. It bound the vendor of a business not to carry on a similar business within a certain radius. It was found to be in restraint of trade and, therefore, unenforceable. It was held by the Court of Appeal that the purchaser in whose favour the clause was interested could waive it and claim performance of the contract omitting the objectionable clause. That case is merely an authority for the proposition that where a completed contract provides for the insertion in a contemplated conveyance or lease of terms which cannot legally be enforced, either party may waive this part of the bargain if those terms are solely for his benefit, and claim specific performance of the rest of the contract. It was not decided upon the question of whether an agreement had been come to but whether a concluded agreement could be enforced. It is difficult to see how the principle there enunciated can be applied to the facts of the present case, where the question is whether there was a completed contract by which both parties were bound. If one party says: "I agree to certain terms provided a certain condition shall hereafter be fulfilled," and the other party consents, in our opinion it does not lie within the competence of either party to waive the condition without the consent of the other. But even if the principle referred to in *Hawksley* v. *Outram* (4) can apply to a case like the present, we think the condition insisted on by the appellants was not one which was for their benefit alone. This question was considered in *Lloyd* v. *Nowell* (5). There the plaintiff wrote a memorandum which he signed and sent to the defendant in the following terms:—

"Subject to the preparation by my Solicitor and completion of a formal contract, I am willing to sell to you lease of 365 Camden Road, for a term of twenty-eight years at a rent of £110 per annum, you paying me £500 premium for same and also paying the cost of new lease.—£100 paid (and receipt hereby acknowledged) as conditional deposit. The balance to be paid 1st day of January 1895, and possession given on completion. Plants and conservatory flowers to be included in price named."

The defendant on receiving it wrote thereon "Accepted" and subscribed his name. The defendant, having afterwards refused to complete, the plaintiff sought specific performance. It was there held that such a stipulation was not for the benefit of the vendor alone. It was equally to the advantage of the purchaser to see and consider the formal contract and to have the position defined before final acceptance. It was further held that the stipulation as to the preparation by the Solicitor and completion of a formal contract was one which was a condition precedent to consent. "That provision," said Kekewich, J., "seems to me to go to the root of the contract, and not to be such a stipulation as the vendor may waive, for the purpose of insisting on performance of the contract without it." In our opinion the same reasoning applies with equal force to the present case, and there is in the circumstances which have arisen no complete and binding agreement which can be enforced. It was argued that Sir Andrew Fraser and those associated with him had themselves waived the stipulation by allowing the survey to proceed and allowing the Solicitors to prepare a draft lease. It is sufficient to say we can see no force in this contention. The Solicitors' instructions were to prepare a draft agreement embodying the terms stipulated. Why this was not done, but a draft lease prepared, does not appear, but a perusal of the draft shews that there

(4) (1892) 3 Ch. D. 359; 62 L. J. Ch. 217; 2 R. 60; 67 L. T. 804.

(5) (1895) 2 Ch. D. 744 at p. 747; 64 L. J. Ch. 744; 13 R. 712; 73 L. T. 154; 44 W. R. 43.

remained much to be done by way of delimiting the area to be leased. There had already been disputes about the delimitation laid down by the Deputy Commissioner, and it would require more convincing evidence than anything we can find in the record to prove that there was a mutual waiver of any of the stipulations in the agreement.

Whether a suit would lie on behalf of the Digambari sect of Jains by the substituted plaintiffs in a representative capacity it is not necessary, having regard to the above findings, to decide. But it seems to us that it is extremely doubtful whether the Digambaris as a body acquired any right to sue which could be enforced on their behalf by the present plaintiffs under the provisions of Order I, rule 8. The rule deals with procedure only and creates no substantive rights of suit. The Digambari Jains are not a legal entity. The substituted plaintiffs are not the legal representatives of those with whom the contract was originally made, and, unless it can be shewn that all the Digambari Jains individually acquired rights under the contract, a suit brought on their behalf by individuals in a representative capacity would not lie. We do not wish to base our decision on the determination of this question nor is it necessary to do so, but for the reasons already given on the other points we think this appeal should be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

CIVIL REVISION PETITION No. 1212 OF 1918.

October 1, 1919.

Present :—Sir Abdur Rahim, KT., Officiating Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

GADI NEELAVENI—PLAINTIFF—PETITIONER

versus

MARAPPAREDDIGARI NARAYANA REDDI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. IX, r. 13—Application to set aside ex parte *decree—Jurisdiction to vacate decree apart from provisions of rule—Inherent power of Court, scope of, extent of.*

A Court has no power apart from the provisions of rule 13, Order IX, of the Civil Procedure Code to set aside an *ex parte* decree made by itself. [p. 851, cols. 1 & 2.]

Somayya v. *Subbamma*, 26 M. 599 and *Muruga Chetty* v. *Rajasami*, 14 Ind. Cas. 823; 22 M. L. J. 284 at p. 296 (1912) M. W. N. 332; 11 M. L. T. 280, overruled.

Venkatarama Aiyar v. *Nataraja Aiyar*, 18 Ind. Cas. 360; 24 M. L. J. 235; 13 M L. T. 140; (1913) M. W. N. 165, followed.

Per *Abdur Rahim, Offg. C. J.*—Most of the cases where the Court exercises its inherent power relate to cases of an incidental or ancillary character, though it is not to be understood that the inherent power of the Court is limited to such cases, for that would be unduly limiting the scope of section 151 of the Civil Procedure Code. But there is no inherent power in a Court to set aside an *ex parte* decree by summary procedure and the power of the Court in that connection is limited to the circumstances mentioned in Order IX, rule 13, Civil Procedure Code. The inherent power of the Court should be exercised not capriciously or arbitrarily, but *ex debito justitiæ* on sound general principles and not in conflict with the intentions of the Legislature. [p. 851, col. 1; p. 850, col 2]

Per *Oldfield, J.*—Although statutory enactments, expressed in affirmative language, may sometimes be construed as having a negative implication, such implication must be a necessary and reasonable one. It is impossible to presume that the provisions of Order IX, rule 13, of the Civil Procedure Code contain an imperfect statement of the law on the very definite topic with which the rule deals, *viz.*, the provision of a summary procedure for the re-opening of *ex parte* proceedings. [p. 851, col. 2.]

Per *Seshagiri Aiyar, J.*—Section 151, Civil Procedure Code, must be construed, not as empowering a Court to exercise powers which it never possessed, but as preserving to it those powers which it has been in the habit of exercising and which, by oversight or failure to specify, have not been particularised in the Statute. The section has been introduced for the simple reason that no Code can exhaustively deal with the procedure for exercising every power which a Court of justice is competent to exercise, and the language of the section shows that it should be availed of only where a power which has been exercised has not been provided in the Code. [p. 853, cols. 1. & 2.]

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif at Tirupati, in Civil Miscellaneous Petition No. 244 of 1918, in Original Suit No. 623 of 1917.

FACTS.—On an application to set aside a decree passed *ex parte*, the Judge ordered that though he was not satisfied with the explanations given in the affidavit, he was setting the *ex parte* order aside having

regard to the amount at stake and the relations of the parties, etc.

On application in revision against the order before Seshagiri Aiyar and Odgers, JJ.

Mr. *N. Chandrasekhara Aiyar*, for the Petitioner.—The Code of Civil Procedure is exhaustive of what it deals with. The only provision for cancelling orders passed *ex parte* is contained in Order IX, rule 13. There is no power outside it. But there is a conflict of decisions in this Court following upon a dictum of Bhashyam Ayyangar, J., in *Somayya* v. *Subbamma* (1), *Gopala Row* v. *Maria Susaya Pillai* (2) follows *Somayya* v. *Subbamma* (1). But see *Durga Bakhsh* v. *Mahabir* (3) and *Venkatarama Aiyar* v. *Nataraja Aiyar* (4). See also *Muruga Chetty* v. *Rajasami* (5), *Adayapadi Ramanna Udpa* v. *Krishna Udpa* (6), *Karuppayee* v. *Chinna ammal* (7).

Messrs. *V. Ramadoss* and *T. Kumaraswamiah*, for the Respondent.—The Courts have been given inherent power for the express purpose of affording relief where the technicalities of the sections do not strictly permit. See *Nalludaroo* v. *Hari Kissen Rathi* (8), *Debi Bakhsh Singh* v. *Habib Shah* (9), *Lalta Prasad* v. *Ram Karan* (10) (Civil Miscellaneous Appeal No. 156 of 1918.)

Farther a Court is not bound to pass an *ex parte* decree. And so if the Court is satisfied that the nature of the case would prohibit such an adjudication, the Court will be perfectly justified in rectifying what would otherwise be a mistake of the Court.

ORDER OF REFERENCE TO A FULL BENCH.

The facts are not in dispute. An *ex parte* decree was passed in the suit. The defendant applied to have it set aside under Order IX, rule 13, Civil Procedure Code. The District Munsif found that the allegations in the affidavit were not true. In effect, his finding would not have enabled him to set the decree aside under rule 13. He, however, held that as the amount involved was heavy and as a person who stood surety for the defendant on a previous occasion refused to continue to be surety, the decree should be set aside.

Against this order a civil revision petition under section 115, Civil Procedure Code, has been preferred to this Court. Mr. Chandrasekhara Aiyar contended that a Court has no power apart from the provisions of rule 13 to set aside an *ex parte* decree. Mr. Ramadoss, on the other hand, argued that the conditions mentioned in the rule are not exhaustive and do not restrict the inherent power of the Court to set aside *ex parte* decrees.

In this Court, the view contended for by the learned Vakil for the respondent is supported by *Somayya* v. *Subbamma* (1) and *Adayapadi Ramanna Udpa* v. *Krishna Udpa* (6). There are observations in *Muruga Chetty* v. *Rajasami* (5) and in *Gopala Row* v. *Maria Susaya Pillai* (2) which support the view taken in *Somayya* v. *Subbamma* (1). On the other hand, there is a considered judgment of this Court by two Judges in *Venkatarama Aiyar* v. *Nataraja Aiyar* (4) which dissents from *Somayya* v. *Subbamma* (1). *Karupayee* v. *Chinnaammal* (7) is also inconsistent with *Somayya* v. *Subbamma* (1). We have refrained from discussing decisions of the other Courts, as in our opinion it is desirable that there should be consistency on a question of procedure in the same Court. In these circumstances and with a view to enunciate for the benefit of the Mofusil Courts a clear and consistent view on the question, we think it desirable that the following question should be referred for the opinion of the Full Bench.

"Has a Court power, apart from the provisions of rule 13, Order IX, Civil Procedure Code, to set aside an *ex parte* decree passed by itself?"

This petition came on for hearing on the 26th and 27th of August 1919 in pursuance of the Order of Reference to the Full Bench.

(1) 26 M. 599.
(2) 30 M. 274; 17 M. L. J. 225.
(3) 11 Ind. Cas. 344; 14 O. C. 111.
(4) 18 Ind. Cas. 360; 24 M. L. J. 235; 13 M. L. T. 140; (1913) M. W. N. 165.
(5) 14 Ind. Cas. 823; 22 M.L.J. 284 at p. 296; (1912) M. W. N. 332; 11 M. L. T. 280.
(6) 25 Ind. Cas. 450; 27 M. L. J. 167.
(7) 25 Ind. Cas. 191; 16 M. L. T. 101; 1 L. W. 537.
(8) 48 Ind. Cas. 961.
(9) 19 Ind. Cas. 526; (1913) M. W. N. 563; 40 I. A. 150 at p. 154; 35 A. 331; 17 C. W. N. 829; 11 A. L. J. 625; 18 C L. J. 9; 15 Bom. L. R. 640; 25 M. L. J. 148; 14 M. L. T. 33; 16 O. C. 194 (P. C.).
(10) 14 Ind. Cas. 187; 34 A. 426 at p. 428; 9 A. L. J. 666.

GADI NEELAVENI v. MARAPPAREDDIGARI NARAYANA REDDI.

Mr. *N. Chandrasekhara Aiyar*, for the Petitioner.—There is no scope for the exercise of inherent power, if any, when there is an express remedy provided by the Code. A decree is passed *ex parte* owing to the non-appearance of the defendant, and sufficient cause for non-appearance alone would justify a Court in setting such decree aside. *Venkatarama Aiyar* v. *Nataraja Aiyar* (4). In *Somayya* v. *Subbamma* (1) such extra power to set aside *ex parte* orders and decrees is held to exist. It has been approved in *Gopala Row* v. *Maria Susaya Pillai* (2). See also *Adayapadi Ramanna Udpa* v. *Krishna Udpa* (6). *Esmail Ebrahim* v. *Haji Jan Mahomed* (11) following the case in *Manilal Dhunji* v. *Gulam Husein* (12) dissents from *Somayya* v. *Subbamma* (1). *Karuppayee* v. *Chinnaammal* (7) conflicts with *Gopala Row* v. *Maria Susaya Pillai* (2).

Inherent power is not to be exercised when there is an express remedy provided by Statute. *Muthiah Chettiar* v *Bawa Sahib* (13). The essence of a Code is to be exhaustive on what it declares is the law. *Gokul Mandar* v. *Pudmanund Singh* (14). Inherent power is to be exercised only in matters not dealt with by the Code. *Hukam Chand Boid* v. *Kamalanand Singh* (15). See also *Tyeb Beg Mahomed* v. *Allibhai* (16), *Bibi Tasliman* v. *Harihar Mahto* (17), *Fakhr-ud-din* v. *Ghafur-ul-din* (18), *Lalta Prasad* v. *Ram Saran* (10). *Nalladuroo* v. *Hari Kissen Rathi* (8) follows *Debi Bakhsh Singh* v. *Habib Shah* (9) where, however, the power invoked was different in kind. See also Civil Revision Petition No. 495 of 1915 (unreported).

In the present case, the application purports to have been made under Order IX, rule 13. There is no invocation of inherent power.

Messrs. *V. Ramadoss* and *T. Kumaraswamiah*, for the Respondent.—The passing of a decree *ex parte* on the non appearance of the defendant is not obligatory on the Court. The word in rule 6 of Order IX is 'may', thereby leaving the matter to the discretion of the Court. Hence the reversal of an *ex parte* decree or order so passed is also within the discretion of the Court.

Section 108 of the Code of 1882 has been held to contemplate cases other than those specifically mentioned in it. *Somayya* v. *Subbamma* (1). Order IX, rule 13, states the same rule without change. *Muruga Chetty* v. *Rajasami* (5). It does not cover all cases of non-appearance. For instance, a party's Pleader is not a voluntary agent of the client. The non-appearance of such Pleader cannot be taken as the non-appearance of the party, who cannot compel the Pleader to appear.

[SESHAGIRI AIYAR, J. referred to *Gopala Row* v. *Maria Susaya Pillai* (2).]

Express invocation of inherent power is unnecessary, its exercise being in the Court's discretion.

OPINION.

ABDUR RAHIM. OFFG. C. J.—The question referred to us in this case, which is in these words: "Has a Court power, apart from the provisions of rule 13, Order IX, Civil Procedure Code, to set aside an *ex parte* decree passed by itself?" has been fully discussed before us and I shall shortly express my opinion. Upon an application made to him under Order IX, rule 13, Civil Procedure Code, the District Munsif, while holding that it was not proved that the summons was not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, set aside the *ex parte* decree passed against the respondent, observing "looking, however, to the heaviness of the amount involved and the relationship subsisting between the parties and looking at the unwillingness of the present surety to continue his obligation, I shall allow the petition as a special case and give him a chance of contest." I should say that, even if the Court had inherent jurisdiction to set aside an *ex parte* decree on grounds other than those mentioned in rule 13, it could have no jurisdiction to do so arbitrarily and on fanciful grounds, such as those mentioned in the District Munsif's judgment. Section 151 says: "Nothing in this Code shall be deemed to limit or otherwise

(11) 10 Bom. L. R. 904.
(12) 13 B. 12.
(13) 26 Ind. Cas. 46; 27 M. L. J. 605; 1 L. W. 933.
(14) 29 C. 707; 4 Bom. L. R. 793; 6 C. W. N. 825; 29 I. A. 196 (P. C.); 8 Sar. P. C. J. 323.
(15) 38 C. 927; 3 C. L. J. 67.
(16) 31 B. 45; 8 Bom. L. R. 803
(17) 9 C. W. N. 81; 32 C. 253 (F. B.).
(18) 23 A. 99; A. W. N. (1901) 1.

affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court." An order, such as in this case, could not, by any stretch of language, be described as being necessary for the ends of justice or to prevent abuse of the process of the Court. This section, as is well known, was inserted in the Code of 1908 in accordance with a number of decisions in which the inherent power of the Court *ex debito justitiæ* was recognised.

Order IX, rule 13, provides a special summary remedy for a particular class of cases mentioned therein, *i. e*, those in which summons was not duly served on the defendant or in which he was prevented for any sufficient cause from appearing when the suit was called on for hearing; and the jurisdiction is limited to the Court by which the decree was passed. To hold that such a remedy can be extended to cases other than those mentioned would be going against the clear intention of the Legislature and cannot be brought within the scope of any inherent power recognised by section 151 or the rulings on the subject.

The opposite view was propounded, so far as it appears, for the first time by Bhashyam Aiyangar, J., in *Somayya* v. *Subbamma* (1), approved by Sundara Aiyar, J., in *Muruga Chetty* v. *Rajasami* (5), and also to some extent supported by what appears to be a casual dictum of White, C. J., in *Gopala Row* v. *Maria Susaya Pillai* (2). On the other hand a Division Bench of this Court in *Venkatarama Aiyar* v. *Nataraja Aiyar* (4), consisting of Sankaran Nair, J., and myself, dissented from the ruling of Bhashyam Aiyangar, J., and there is really nothing useful to be added to the reasons given in Sankaran Nair, J.'s judgment, in which I concurred.

So far as there was any attempt made in *Somayya* v. *Subbamma* (1) to construe the provision of the Civil Procedure Code, it seems to me that to read the first part of the rule, that the defendant against whom an *ex parte* decree is passed may apply to the Court by which the decree was passed for an order to set it aside, as conferring a jurisdiction to pass such an order in cases other than those mentioned in the rest of the section is apparently fallacious and unsound. The main argument of Bhashyam Aiyangar, J., is based upon grounds of hardship in certain class of cases mentioned in the judgment and which in his opinion would not be covered by Order IX, rule 13. It has been pointed out in *Venkatarama Aiyar* v. *Nataraja Aiyar* (4) that in all those cases remedy could be obtained either by appeal or by review.

The question of inherect jurisdiction of the Court was elaborately discussed in *Hukam Chand Boid* v. *Kamalanand Singh* (15). There Woodroffe, J., has collected a number of cases in which the Court's inherent power has been exercised. He says: "It has thus been held that, although the Code contains no express provision on the matters hereinafter mentioned, the Court has an inherent power *ex debito justitiæ* to consolidate; postpone pending the decision of a selected action; and to advance the hearing of suits; to stay on the ground of convenience cross-suits; to ascertain whether the proper parties are before it; to enquire whether a plaintiff is entitled to sue as an adult; to entertain the application of a third person to be made a party; to add (section 32 not being exhaustive) a party; to allow a defence *in forma pauperis*; to decide one question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorise a Judge to do what in this matter was justice and for the advantage of the parties; to remand a suit in a case to which neither section 562 nor section 556 applies; to stay the drawing up of the Court's own orders or to suspend their operation, if the necessities of justice so require; to stay, apart from the question whether the case falls within section 545, the carrying out of a preliminary order pending appeal; to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stay; to apply the principles of *res judicata* to cases not falling within sections 13 and 14 of the Code and so forth." (See page 932.) There is no instance, so far as I am aware, of an *ex parte* decree being set aside upon an application made for that purpose in cases other than those coming under rule 13 of Order IX. I do not say that that is a conclusive argument against the existence of such a power, but it is cer-

tainly significant to show that this does not stand on the same footing as the cases mentioned. Most of the cases where the Court exercised its inherent power related to orders of an incidental or ancillary character. I do not, however, wish to suggest that the inherent power of the Court mentioned in section 151 is to be limited to cases in which it can be shown to have been already exercised, for that would be unduly limiting the scope of section 151. But I have no hesitation in holding that there is no inherent power in a Court to set aside an *ex parte* decree by summary procedure, but that the power of the Court in such connection is limited to the circumstances mentioned in Order IX, rule 13. I am, therefore, of opinion that the ruling in *Somayya* v. *Subbamma* (1) is wrong as held in *Venkatarama Aiyar* v. *Nataraja Aiyar* (4) and the answer to the question referred to the Full Bench must be returned in the negative.

OLDFIELD, J.—That our Courts possess inherent power is recognized in section 151, Civil Procedure Code. But the exercise of the power in the particular form in which it is invoked, must be justified in each case in the manner authorized by authority. To justify it directly by reference to a previous course of actual instances of its exercise with or without the endorsement of appellate tribunals will seldom be possible, when it is disputed; and generally the legitimacy of its exercise must be tested with reference to the principles, which authority has prescribed. Those principles have been laid down in judgments, which have so far met with no criticism and which I respectfully follow, by Woodroffe and Mookerjee, JJ., in *Hukam Chand Boid* v. *Kamalanand Singh* (15) and *Nanda Kishore* v. *Ram Golam Sahu* (19), as being that the inherent power shall be exercised, not capriciously or arbitrarily, but *ex debito justitiæ* on sound general principles and not in conflict with the intentions of the Legislature. I may refer also at this point to my judgment in *Muthiah Chettiar* v. *Bawa Sahib* (13).

To apply this to the present reference, I look in vain for any mention of general principle in the authorities relied on by respondent; and necessarily so, when the whole argument in them is directed towards supporting the exercise of the Court's power by reference to the special hardship of the circumstances in the particular case before it. In one of the three cases relied on by respondent in which the matter was considered fully, *Lalta Prasad* v. *Ram Karan* (10), the Court, in exercising its inherent power to pass orders necessary for the ends of justice, attempted no further definition of any general principle as covering its action In the others, *Somayya* v. *Subbamma* (1) and *Aadyapadi Ramanna Upda* v. *Krishna Udpa* (6), the hardship to the party and the merits of the case he was debarred from advancing were statedly the only tests applied.

The second condition above referred to for the exercise of the inherent power, the absence of conflict between such exercise and the Statute Law, was, no doubt, considered at length in *Somayya* v. *Subbamma* (1), the conclusion being against the importation into sections 103 and 108 of the Code then in force, corresponding with the present Order IX, rules 8 and 13, of negative words to the effect that the Court shall not set aside a decree passed *ex parte* except in cases, in which the party or his Vakil was prevented by sufficient cause from appearing. The principle relied on is that, although statutory enactments, expressed in affirmative language, may sometimes be construed as having a negative implication, such implication must be a necessary and reasonable one. But as regards necessity it must be remembered that "the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and on any matter specifically dealt with by it the law must be ascertained by interpretation of the language used by the Legislature" [per Woodroffe, J., in *Hukam Chand Boid* v. *Kamalanand Singh* (15)]. It is, in my opinion, impossible to presume that the rules under consideration contain an imperfect statement of the law on the very definite topic, with which they deal, the provision of a summary procedure for the re-opening of *ex parte* proceedings.

(19) 18 Ind. Cas. 207; 40 C. 955; 16 C. L. J. 508.

GADI NEELAVENI *v.* MARAPPAREDDIGARI NARAYANA REDDI.

And in fact, with all respect for the opinion of the learned Judges responsible for the decisions of this Court last referred to, there is nothing unreasonable or inconvenient in this conclusion. Bhashyam Aiyangar, J., attached weight to the absence of any means of displacing an unjust *ex parte* decision, if the inherent power could not be utilised for the purpose. But I think that he overestimated the frequency, with which review proceedings would be barred by Order XLVII, rule 2; he certainly overlooked the possibility of a suit by the aggrieved party, when his absence was due to the fraud of his opponent: *vide Khagendra Nath Mahata* v. *Fran Nath Roy* (20); and he must have been misled by the decisions in *Gilkinson* v. *Subramania Ayyar* (21) and *Caussanel* v. *Soares* (22), which were afterwards overruled by *Sadhu Krishna Ayyar* v. *Kuppan Aiyangar* (23), into making the erroneous statement that the circumstances in which the *ex parte* decree was obtained could not be considered in an appeal against it. As regards hardship resort to the Court's inherent power is unnecessary when, as it seems to me, the wording of rules 9 and 13 is wide enough to cover all ordinary cases of default, including those instanced by Bhashyam Aiyangar, J., in which the circumstances of a failure to appear are in question; and it may be suggested that in them the matters referred to by him, the merits of the defaulter's case (if indeed they can safely be assumed at that stage in the proceedings) and the grave consequences of an *ex parte* disposal, can in fact be considered in order to an estimate of the honesty of the allegations as to the existence of sufficient cause. But in cases, in which the existence of a sufficient cause for the default is not alleged or is disproved and those matters alone are in question, I do not see how they can justify interference, if uniformity and certainty are to remain the foundations of our procedure.

Taking this view, I concur in the opinion proposed in the judgment just delivered.

(20) 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.).
(21) 22 M. 221.
(22) 23 M. 260.
(23) 30 M. 54; 1 M. L. T. 268; 16 M. L. J. 479 (F.B.)

SESHAGIRI AIYAR, J.—The very full discussion which this case has received has made it clear to me that we must overrule *Somayya* v. *Subbamma* (1) and *Muruga Chetty* v. *Rajasami* (5). In both these decisions the reasons given for holding that there must be a power outside Order IX, rule 13, *ex debito justitiæ* are not convincing. For a defendant against whom a decree *ex parte* has been passed the following remedies are open:—(1). He can bring a suit to set aside the decree if there has been any fraud in the obtaining of it [see *Radha Raman Shaha* v. *Pran Nath Roy* (24) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (20)]. (2) He can prefer an appeal against the decree itself; there can be no doubt that the powers of the Appellate Court are large enough to enable it to set aside the *ex parte* decree if there has been a miscarriage of justice. The Appellate Court is not confined to the grounds mentioned in Order IX, rule 13, in dealing with the matter. (3). The aggrieved party can file an application for review; and the grounds for such an application would be wider than those covered by rule 13. (4). He can also file an application as provided by rule 13 to set aside the *ex parte* decree. The second clause, "or when he was prevented by any sufficient cause from appearing when the suit was called on for hearing," is comprehensive enough to cover most cases of default of appearance. A suggestion was made that the default of a guardian of a minor defendant will not be covered by this clause. There is no reason for limiting the language of the clause in that way. Further, there is the authority of *Kesho Pershad* v. *Hirday Narain* (25) against this suggestion. Analysing what has been said by the two learned Judges in *Somayya* v. *Subbamma* (1) and *Muruga Chetty* v. *Rajasami* (5) it seems to me that nothing that they suggest as a possible grievance will not be covered by any of the four classes of remedies mentioned by me. I am, therefore, of opinion that there is no reason for invoking the inherent power of the Court in respect of this matter.

On the question of a Court possessing

(24) 28 C. 475 (P. C.); 5 C. W. N. 757.
(25) 6 C. L. R. 69.

such a power I have great doubts. It was held by Lord Macnaghten in *Rangoon Botatoung Company Limited* v. *Collector, Rangoon* (26) that a right of appeal must be given by the Statute and should not be inferred from the inherent power of an Appellate Court. In this Court and in other High Courts it has been held that a right of review is not inherent in the Court but must be given by the Statute. A right to set aside an *ex parte* decree belongs to the same category as an appeal or a review. Because in either case the effect of entertaining the proceeding is to vacate a decree which has been obtained by one of the parties to the suit. To interfere with such a substantial right, it is not enough to invoke the inherent power of a Court. It was argued that as it has been held in a case to which I was a party, following *Abdul Karim Abu Ahmed Khan* v. *Allahabad Bank Limited* (27), that there is an inherent power of remand, it must be logically held that there is an inherent power to set aside *ex parte* decrees. I do not think that the two positions are *pari materia*. A right of remand is implied in the right to hear the appeal. An Appellate Court which has got jurisdiction to reverse the judgment of the lower Court must have power to set it aside and to direct a new trial. It is because of the idea that this power of remand is implied in the right of appeal that the Legislature in the Act of 1882 by section 564 put restrictions upon that inherent power. By the Act of 1908 that restriction was removed. Therefore, the possession of an inherent power to remand does not argue that there is a power to set aside an *ex parte* decree on grounds other than those mentioned in Order XIII. Moreover, I am clear that section 151 must be construed, not as empowering a Court to exercise powers which it never possessed, but as preserving to it those powers which it has been in the habit of exercising and which by an oversight or by failure to specify have not been particularised in the Statute. Section 151 has been introduced for the simple reason that no Code can exhaustively deal with the procedure for exercising every power which a Court of Justice is competent to exercise; and the language of the section shows that it should be availed of only where a power which has been exercised, has not been provided for in the Code. As was pointed out by the Judicial Committee in *Gokul Mandar* v. *Pudmanund Singh* (14), the essence of a Code is to be exhaustive upon the matters for which it provides. This language was employed no doubt with reference to section 13 of the Code of Civil Procedure. It is equally applicable to Order IX, rule 13. The Legislature has provided a mode by which *ex parte* decrees can be set aside. As I pointed out already, there is no necessity for invoking the principle of the remedy *ex debito justitiæ*, because in all conceivable cases, excepting a case like the present in which the lower Court has made no attempt to conform itself to any rule or precedent, the party aggrieved can obtain justice by resorting to the proper procedure.

As regards cases in the other High Courts I do not propose to deal with them at any length. In *Tyeb Beg Mahomed* v. *Allibhai* (16), to which Jenkins, C. J. was a party, it was held that a Small Cause Court had inherent power in cases of eviction to set aside *ex parte* decrees. I do not think that decision covers the present case. On the other hand in *Manilal Dhunji* v. *Gulam Husein* (12) and in *Esmail Ebrahim* v. *Haji Jan Mahomed* (11) a different view was taken. *Fakhr ud din* v. *Ghofur-ud-din* (18) was a case of an appeal and not of an application. In *Lalta Prasad* v. *Ram Karan* (10) one would have thought that the application could be sustained on the grounds mentioned in rule 13. *Bibi Tasliman* v. *Harihar Mahto* (17) is another case in which it was not necessary to have appealed to the inherent power of the Court. But none of them are cases in which the question of setting aside an *ex parte* decree directly arose. In *Hukam Chand Boid* v. *Kamalanand Singh* (15) the learned Judges point out that there was by the practice of the Court an inherent power which should not be regarded as having been taken away by the Code of Civil Procedure. That is a typical instance

(26) 16 Ind. Cas 188; 40 C. 21; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 6 L. B. R. 150; 39 I. A. 197 (P. C.).

(27) 41 Ind Cas 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49.

of the application of section 151 of the Code. Speaking for myself, I am zealous of preserving the inherent power of the Court to render justice between party and party. But I am clear that where there is no proof that the power has been exercised by Courts, and where the Legislature has given that power with limitations, Courts are not at liberty to disregard the limitations. For these reasons I am of opinion that *Venkatarama Aiyar* v. *Nataraja Aiyar* (4) takes the right view of Order IX, rule 13, and that the answer to the question must be in the negative.

It is necessary, however, to state that the question relates only to applications for setting aside *ex parte* decrees and not to any other remedy which a party may have.

M. C. P.

Answered in the negative.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1079 OF 1917.

December 20, 1918.

Present :—Mr. Justice Fletcher and Mr. Justice Walmsley.

MAHENDRA NATH CHATTERJEE—DEFENDANT No. 1—APPELLANT

versus

LALIT MOHAN DATTA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Hatchita executed in lieu of old one, effect of.

Where a borrower executes a *hatchitta* in respect of a debt in substitution of one previously executed in respect of the same debt, the *hatchitta* so executed amounts to a fresh acknowledgment within the meaning of section 19 of the Limitation Act.

Appeal against the decree of the Additional District Judge, Hooghly, dated April 24, 1917, confirming the decree of the Subordinate Judge, Howrah, dated June 29, 1914.

Babus *Mahendra Nath Roy* and *Manmatha Nath Roy*, for the Appellant.

Dr. *Duarkanath Mitter* and Babu *Rishindranath Sarkar*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the first defendant against the decision of the learned Additional District Judge of Hooghly, dated the 24th April 1917, affirming the decision of the Subordinate Judge of Howrah. The point raised in the appeal is this: Whether the *hatchitta* in question was in this case a fresh acknowledgment under the terms of section 19 of the Indian Limitation Act; and, if it was not, namely, if it was given after the period of limitation had expired, whether it was a fresh promise to pay within the meaning of section 25 (3) of the Indian Contract Act? It is obvious that the second question can only arise in the event of the first one being decided in favour of the appellant. Now, what the learned Judge of the lower Appellate Court has found is this, that there was, in fact, an intermediate *hatchitta* between the original *hatchitta* and the *hatchitta* of 1308. That is quite clear and the learned Judge, in my opinion, has held that that *hatchitta* was in the ordinary course handed over to the defendant, and that it was being withheld by him. It is quite clear that what the learned Judge meant by his judgment was that that *hatchitta*, if produced by the defendant, would not have supported his case, and, therefore, he held that the present *hatchitta* of 1308 was a fresh acknowledgment within the meaning of section 19 of the Indian Limitation Act. If those facts are right, it is not disputed, having regard to the decision of the Privy Council in the case of *Maniram Seth* v. *Seth Rupchand* (1), that the present *hatchitta* was a fresh acknowledgment within the meaning of section 19 of the Indian Limitation Act. In that view, the present appeal fails and must be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

(1) 33 C. 1047 at p. 1057; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A 165 (P. C. .

NEMANNAKUDRE v. ACHMU HENGASU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1284 OF 1918.

August 26, 1919.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

NEMANNAKUDRE—DEFENDANT No. 2—APPELLANT

versus

ACHMU HENGASU AND OTHERS—PLAINTIFFS AND DEFENDANT No. 1—RESPONDENTS.

Aliyasantana *Law*—Ejaman, *removal of, suit for—Jurisdiction of Court—Declaration of unfitness of next senior member and appointment of one lower down, validity of—Grounds for removal.*

In a suit for the removal of the *ejaman* of an *Aliyasantana* family the Court has jurisdiction not only to remove him for good reasons but also to declare the next man to be unfit and pass on the succession to his junior. [p 857, col. 1; p 855, col. 2.]

The jurisdiction to remove the *ejaman* is founded on his forfeiture of his office on gross misconduct rendering him unfit for it [p. 857, col. 1.]

Moral unfitness is an equally good reason for exclusion as mental or physical deficiency. [p. 856, col. 1.]

Cheria Pangi Achan v. *Unnalachan*, 38 Ind. Cas. 513; 32 M. L. J. 323; (1917) M. W. N. 185; 5 L. W. 392; 21 M. L. T. 329, not followed.

Second appeal against the decree of the Court of the Subordinate Judge, South Kanara, in Appeal Suit No. 217 of 1917 (Appeal Suit No. 184 of 1917 on the file of the District Court), preferred against the decree of the District Munsif, Udipi, in Original Suit No. 133 of 1916.

FACTS.—Suit (1) for the removal of the 1st defendant from the Ejamanship of an Aliyasantana family in South Kanara, (2) for a declaration that the 2nd defendant, who is the next senior member, is unfit to be the Ejaman, and (3) that the first plaintiff is entitled to become the Ejaman. The lower Appellate Court gave a decree. The second defendant alone appealed.

Mr. *K. P. Lakshmana Rao*, for the Appellant.—The Courts cannot grant a declaration denying a right which a person has by birth to succeed as Ejaman of an Aliyasantana family, when the prior Ejaman dies or renounces or is removed from his Ejamanship. The principle enunciated to this effect in *Cheria Pangi Achan* v. *Unnalachan* (1) in regard to Karnavans of Malabar Tarwads applies to a case like this. By granting such declarations, the Courts would be framing a scheme of management for the family and disturbing the natural order of devolution. The Courts have no such powers. See *Pazhavathil Mavilaputhia Veetil Chindan Nambiar* v. *Kunhi Raman Nambiar* (2).

Secondly, a suit for removal or for a declaration of unfitness can lie only if the defendant has assumed office. Section 42 of the Specific Relief Act is not intended to be used for prospective declarations: 11 M. L. J. (Journal portion) 129 at p. 136. In *Kunhan* v. *Sankara* (3) the Karnavan was removed for a misconduct of his while an Anandravan.

Strong reasons must be proved before a person can be deprived of his birthright. Nothing has been shown in the present case.

Mr. *B. Sita Rama Rao*, for the Respondents.—It is found as a fact that the appellant persisted in ignoring the rights of the other members of the family including the plaintiffs. That has been held to be sufficient for the removal of a Karnavan. *Thimmakke* v. *Akku* (4).

JUDGMENT.

SPENCER, J.—The first point argued in this second appeal has not been taken in the appellant's grounds of appeal, but as it involves a question of principle, and as it strikes at the root of the jurisdiction of the Courts if the appellant succeeds on it, we have allowed it to be argued.

I agree with my learned brother that what the Courts were asked to do in this suit was not to frame a scheme or to exercise any undefined authority of selecting the most suitable person to manage the affairs of this family, but to remove the present Ejaman for mismanagement and at the same time to declare that the next in order of seniority was unfit to hold the vacant office, and I fail to see any reason for supposing that Civil Courts have no power to grant such a declaration.

Speaking for myself, I am averse to putting any narrow limitations on the power of Courts to do all that is needful to settle the disputes of the parties in all civil matters that come up to be adjudicated upon. To hold otherwise would be to deprive these

(1) 38 Ind. Cas. 513; 32 M. L. J. 323; (1917) M. W. N. 185; 5 L. W. 392; 21 M. L. T. 329.

(2) 45 Ind Cas. 26; 41 M. 577; 34 M. L. J. 400; (1918) M. W. N. 283; 23 M. L. T. 316; 7 L. W. 543 (F. B.).

(3) 14 M. 78.

(4) 7 Ind. Cas. 153; 34 M. 481; (1910) M. W. N. 293; 8 M. L. T. 159.

tribunals of authority to make a final settlement of opposing contentions. In *Pachavathil Mavilaputhia Veetil Chindan Nambiar* v. *Kunhi Raman Nambiar* (2) the Full Bench had no doubt about the Civil Court's power to remove from the Karnavanship for misfeasance a person who had attained the position by a course different from the ordinary course, namely, by a family agreement.

In *Kunhan* v. *Sankara* (3) acts of misfeasance committed before the appellant became *de jure* Karnavan were held to be a sufficient cause for removing him, the learned Judges observing "whether the misfeasances were committed either solely or in conjunction with another, in either case the interest of the Tarwad requires that the management of its affairs should not be entrusted to him."

Moral unfitness seems to me to be an equally good reason for exclusion as mental or physical deficiencies.

On the second point, the findings of the lower Courts, as I understand them, are that the 2nd defendant was guilty of fraud and collusion and as these are findings of fact which we must accept, the result is that the declaration of unfitness follows as a natural consequence. The second appeal is dismissed with costs.

KRISHNAN, J.—This second appeal arises from a suit brought by the plaintiffs as members of an Aliyasantana family to remove the 1st and 2nd defendants as unfit from the management of the affairs of the family and to appoint the 1st plaintiff as Ejamanthi and give her possession of the family properties. Defendants had denied that plaintiffs were members of their family and had in 1905 in conjunction with their mother, now deceased, divided all the family properties among themselves by a registered partition deed, excluding the plaintiffs altogether, and had dealt with them, each with his share as his own. Though the 1st defendant was the Ejaman and the 2nd defendant was the senior Anandravan of the family at the date of suit, they did not look upon themselves as members of an undivided family at all but each managed the properties he obtained on partition. Hence the form of the prayer to remove both of them from the management.

The learned Subordinate Judge gave a decree as prayed for. The 2nd defendant alone has appealed to us, and it is contended on his behalf that Courts have no power to interfere with the right of the senior Anandravan to succeed when the Karnavan is removed and that in any case there are no proper grounds for excluding the 2nd defendant from Ejamanship in this case.

The first contention is a general one and it is sought to be supported by an observation of Sadasiva Aiyar, J., in *Cheria Fanji Achan* v. *Unnalachan* (1), where the learned Judge quoted with approval some passages from an article in XI M.L.J. (Journal portion) 129 at p. 136. The effect of those passages is no doubt to show that the Court has no power to exclude the eldest Anandravan from succeeding when a Karnavan is removed. But it may be pointed out that the learned Judge's remarks are *obiter dicta* and with all respect to the learned Judge I am unable to accept his view.

To understand the bearings of the question raised, it may be useful to consider how the Court acts in removing a Karnavan: That a Court can remove a Karnavan for good reason is well established by numerous decisions beginning from the decision of the Sudder Adalat in 1 Sud. Dec. 118 and is not now disputed. The authorities do not, however, make it clear on what basis the power is founded. It seems to me, however, that it is based on the theory that the institution of Karnavanship in a Tarwad is intended for the benefit of the Tarwad and the continuance of a Karnavan in office is dependent on a proper discharge by him of his obligations to the family. When he fails to do his duties and his retention in office becomes injurious to the interests of the Tarwad, he forfeits his office. But as he could not be removed by act of parties without his own consent, the aid of the Court is sought to do it by its decree. If the right to Karnavanship is an absolute right inherent in the eldest member and is independent of his obligations, it is difficult to see how the breach of those obligations can affect the right, whatever other remedies there may be. I do not consider that the removal of a Karnawan for his misdeeds is by way of punishment at all. The Civil Court will hardly be the tribunal for it. The Court adopts the remedy of removal as necessary to protect the interests of the Tarwad. It is true that it is not ever

failure to perform an obligation that would lead to the removal of a Karnavan but only such misconduct as would make it necessary in the interests of the Tarwad to have him removed. As observed in *Kunhan* v. *Sankara* (3), the question to be kept in view is whether the interests of the Tarwad require that the management of its affairs should not be entrusted to him. The jurisdiction to remove him seems to me really to be founded upon his forfeiture of his office on gross misconduct rendering him unfit for it.

If this view is right, I do not see any difficulty in Courts declaring, on the prayer of the parties, that the next person is unfit to assume the office of Karnavan. If circumstances exist which show that he could not or would not perform his obligations to the family, why should not the Court prevent him from assuming office if it is in the interests of the family to do so? It is easy to suggest conditions when the senior Anandravan may be totally unfit to become a Karnavan. He may be an idiot or a lunatic or, in the words of Dr. Ormsby in his "Outlines of Marumakkathayam Law", "a person physically or mentally incapable of conducting the affairs of the Tarwad or he may be of so depraved moral character that the interests of the Tarwad may require that its affairs should not be entrusted to him." Is the Court then to tie its hands and allow him to become the Karnavan? I think not. To hold that the Court has no power in such a case to exclude him will be to nullify the very object of removing the obnoxious Karnavan. I consider that in the same manner that the Court can remove a Karnavan it can, in the same suit, declare the next man to be unfit and pass on the succession to his junior.

It is quite true that the senior Anandravan succeeds to the office of Karnavan by virtue of his seniority and not by any appointment to it. But his rights are no higher than those of the Karnavan who is in office and who is entitled to continue in it till his death: nevertheless Courts have felt no difficulty in removing him from office. It is mere hypercriticism to say that the Court has no power to appoint a Karnavan and, therefore, it cannot choose a person for the office. This is no doubt strictly so, but what the Court does is not to appoint any person it likes but the person next in rank to the Karnavan and the excluded senior member or members that person really succeeds by virtue of his position on the exclusion of his seniors, and his appointment is really a superfluity. The question whether a power to exclude exists does not depend on the existence of a power to appoint, for it is conceded that a power to remove a Karnavan exists, though the power to appoint him may not.

The most important objection to excluding the senior man from Karnavanship is that in doing so you judge from his conduct as a junior member his unfitness to be a Karnavan without allowing for the possibility that he may turn over a new leaf when he is given the responsibilities of the Karnavan's office. No doubt there is force in this argument, but I do not consider that it necessarily applies in every case or that it necessarily tells against the existence of the power to exclude. It shows that great care should be taken in judging of such a person's unfitness and that the power of exclusion should be used only sparingly and only when it is clearly necessary to do so in the interests of the Tarwad. Each case has to be judged on its own facts and no hard and fast rules can be laid down.

The Courts have in many cases exercised the right of considering the fitness of the person who will succeed on the removal of the Karnavan and have barred his succession when there is good reason to do so. No doubt a senior man should not be passed over in favour of his junior on any ground of preferance on account of the greater fitness of the latter, but only on the ground of his own unfitness. Where, however, good grounds exist, I am not prepared to say that the Courts have acted beyond their powers in barring the succession of the next senior man when removing the Karnavan from office. The first contention of the appellant, therefore, fails.

The next contention is one on the merits. The 2nd defendant is found to have conspired fraudulently with his brother in denying the membership of the plaintiffs and excluding them from all participation in the enjoyment of the Tarwad properties. He has, in fact, by getting up the partition deed, attempted to put an end to the family itself and he has taken the family properties which fell to his share as his

own and subsequently alienated some of them to strangers. His conduct was thus entirely against the interests of the Tarwad and there is no indication that he is likely to behave properly in the future. In these circumstances I am not prepared to say that the lower Courts were wrong in removing him along with his brother.

The second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2792 OF 1915.

June 14, 1919.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Martineau.

HARBANS LAL, MINOR, THROUGH HIS MOTHER *Musammat* KIRPA DEVI—PLAINTIFF—APPELLANT

versus

ATRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom or Personal Law—Brahmins—Presumption—Burden of proof—Criteria *for determining whether a community follows custom—Brahmins of Kungiana, Tahsil and District Ludhiana.*

In a case of disputed succession or alienation on the ground of custom, the universal rule is that a Brahmin is presumed to be governed by his personal law, and if he alleges a custom contrary to the rules of that law, he is bound to prove by cogent and clear evidence that he is governed by such custom. [p 859, col. 2.]

The question of custom is, primarily, a question of fact and in each case has to be decided with reference to the particular circumstances alleged and proved. [p. 859, col. 2.]

The most important *criteria* for determining whether a particular community has adopted and follows agricultural custom are,—

(*a*) whether the particular community forms a compact agricultural community by itself;

(*b*) whether their source of livelihood is solely or almost solely agricultural;

(*c*) whether the members of the community have given up their old customs under the personal law and have adopted the customs of their agricultural neighbours in matters of alienation and succession. [p. 860, col. 1.]

The Brahmins of Kungiana, Tahsil and District Ludhiana, are governed by Hindu Law in matters of alienation and succession. [p. 861, col. 2.]

Nanak Chand v. *Basheshar Nath*, 3 P. R. 1908; 16 P. W. R, 1908; 94 P. L. R, 1908, distinguished.

Second appeal from the decree of the District Judge, Ludhiana, dated the 5th August 1915, reversing that of the Subordinate Judge, 1st Class, Ludhiana, dated the 1st December 1914, decreeing the claim with costs.

Mr. *Manohar Lal*, for the Appellant.

Lala *Mehr Chand Mahajan* for Lala *Jagan Nath*, for the Respondents.

JUDGMENT.

ABDUL RAOOF J. (*June* 12, 1919).—The facts which have given rise to this second appeal may be stated as follows :—Harbans, minor son of Krishna, Brahmin, the plaintiff in the case, and Chetu Brahmin, defendant No. 1, are admittedly descended from a common ancestor. Kahna and Atra, defendants Nos. 2 and 3, are Jats and mortgagees of certain lands from the defendant No. 1. Chetu held certain lands situated in a village called Kungiana which had descended to him from his ancestors. Out of this land he mortgaged 15 *bighas* 14 *biswas* 1½ *biswansis* to defendants Nos. 2 and 3 under a deed, dated the 4th of September 1913. The plaintiff, alleging himself to be a collateral of Chetu, having a reversionary right in the property, brought the present suit on the ground that Chetu, being a sonless proprietor, could not make a transfer so as to be binding on the plaintiff after his death. He prayed for a decree that the mortgage deed shall not be binding on him. It was further alleged by him that the land was ancestral and that Chetu had no necessity to borrow Rs. 2,600 and make the mortgage affecting the interest of the plaintiff. Chetu admitted the claim, which was contested by the other defendants on the following grounds, namely, that the father of the plaintiff having been adopted by Jhaban, he had ceased to be the reversionary heir of Chetu; that the plaintiff and the mortgagor, being Brahmins, were governed by the ordinary Hindu Law and were not entitled to take advantage of the customary law applicable to agriculturists; that Chetu, being a full proprietor, had unrestricted, power of alienation; and that the mortgage had been executed for valid necessity and on payment of full consideration. The ancestral character of the land was admitted and the fact of the plaintiff being the next reversioner was also admitted, but as stated above, his right to institute the suit as the reversion-

ary heir of Chetu was denied on the ground that his father had been adopted by Jhaban.

The principal issue in the case was whether the plaintiff and Chetu were governed by agricultural custom and whether the plaintiff could maintain the suit. The other important issue was whether the mortgage had been made for necessity and consideration. These are the two issues with which we are concerned in this appeal. Almost all the other questions arising in the case are no more of any importance, nor were they raised or discussed before us at the hearing.

The Court of first instance on the first issue came tc the conclusion that the plaintiff and Chetu were governed by agricultural custom in matters of alienation and succession. On the question of necessity and consideration it held that necessity had been established to the extent of Rs. 1,100 out of Rs. 2,6C0 said to have been borrowed under the mortgage. It accordingly gave a declaratory decree in favour of the plaintiff to the effect that on the death of Chetu, the mortgage in favour of defendants Nos. 2 and 3 shall not be binding on the plaintiff except to the extent of Rs. 1,100, on payment of which he shall be entitled to get possession of the mortgaged land as the reversionary heir of Chetu.

From this decree Atra and the sons of Kahna deceased, namely, Hira and Sardara, appealed to the lower Appellate Court impleading the plaintiff and Chetu defendant as respondents to the appeal. The lower Appellate Court, having taken a different view from that of the first Court on the first issue, set aside the decree of that Court and held that plaintiff was not entitled to succeed and that his suit must be dismissed. On the other points raised before it the lower Appellate Court generally agreed in the decision arrived at by the Court of first instance. His suit having been dismissed, the plaintiff has come up to this Court in second appeal and has filed the necessary certificate required by the Punjab Courts Act. Three pleas have been taken in the memorandum of appeal. The first which is the most important plea raises the question of custom and the remaining two pleas raise questions as to two items of consideration, namely, Rs. 500 out of Rs. 1,400 and Rs. 70,

On the question of custom elaborate arguments have been addressed to us on both sides and a large number of cases have been cited and discussed. The question of custom is primarily a question of fact and in each case has to be decided with reference to the particular circumstances alleged and proved. The authorities cited, therefore, can hardly be said to be an absolute guide for the decision of this particular case. No doubt certain guiding principles are laid down in the reported cases which will help us in arriving at a conclusion in this case with reference to the facts admitted or proved. One principle appears to be clearly enunciated in almost all the reported cases, namely, that in a case of disputed succession or alienation on the ground of custom the universal rule is that a Brahmin is presumed to be governed by his personal law and if he alleges a custom contrary to the rules of that law, he is bound to prove by cogent and clear evidence that he is governed by that custom. Having this principle before our mind we have to see in this case whether the plaintiff has succeeded in establishing that Chetu and he are governed by the customary rule relating to alientions by agriculturists and they are no more subject to Brahmanic law in this respect. Close to the village Kungiana in which the land in dispute is situated there is a village called Rangian where according to the plaint Chetu and plaintiff reside. The history of the colony of Brahmins to which the plaintiff and Chetu belong appears to be this. A Brahmin, whose name is unknown came and settled in the village and took possession of a part of the area. He was turned out by the Rajputs and the area remained uncultivated for a time. In Sambat 1869 when Maharaja Ranjit Singh became the ruler the area was restored to one Harkishan Singh Brahmin with the help of the authorities and he was left in possession of three ploughs. It appears from the facts found that the descendants of Harkishan Singh have continued to cultivate this area, which has been known for some time as Brahmin Majra. On the evidence it is clear that some of the Brahmins have their houses in Mauza Rangian and live there while a few of them possess houses in Kungiana where their agricultural land is situated,

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The area of the land is almost 100 *bighas*. These being the circumstances under which the small Brahmin community has been living, it is to be determined whether they have adopted and followed the agricultural customs of their agricultural neighbours, the Jats, who own and cultivate almost the entire village Kungiana.

The learned Judges of the Chief Court, in deciding the numerous cases reported in the several volumes of the Punjab Record, have tried to set out various *criteria* for the decision of questions of this kind and have applied them to the special facts of those cases. The most important of those *criteria* are :—(*a*) whether the particular community forms a compact agricultural community by itself ; (*b*) whether their source of livelihood is solely or almost solely agriculture ; (*c*) whether the members of the community had given up their old customs under the personal law and had adopted the customs of their agricultural neighbours in matters of alienation and succession. We refer only to some of the incidents, which are by no means exhaustive. Of course, the most important piece of evidence in a case would be the evidence of actual instances showing the exercise of rights according to the recognised custom of agriculturists.

In this case, however, this class of evidence is wholy wanting. From the evidence it appears that the Brahmins have been in the habit of making transfers by way of sales and mortgages, but no instance has been quoted in which a suit for setting aside an alienation was ever brought. There being no direct evidence of this kind, we have to decide the question in dispute with regard to circumstantial evidence establishing one or more of the *criteria* set out in the several reported cases. One single circumstance has been very strongly relied upon on behalf of the plaintiff in this case, namely, that the Brahmins of Kungiana have been earning their livelihood through agriculture and their *patti* has been recognised as a separate *patti* under the name of Brahmin Majra. There is no doubt that in the *jamabandi* of the village the *patti* is described as above; but it has not been proved that they have their own *lambardars*. According to the evidence the community is very small and the area cultivated by it is insignificant. Necessarily, therefore, they have continued to supplement their income from Brahmanic dues known as *dirt* received from their *jajmans*. They still wear the sacred thread called the *janeo*. In addition to this there is a statement made by the mother of plaintiff which goes to show that the father of the plaintiff was adopted by one Jhaban and in consequence of this adoption he did not get a share in his natural father's property. This is a very strong piece of evidence to show that the Brahmins have continued to be governed by their personal law (Dharam Shaster).

The Court of first instance, relying upon the decision in *Nanak Chand* v. *Bisheshar Nath* (1), decided the question in favour of the plaintiff. That was a very strong case, the facts of which were entirely different from those of the present case. We find no similarity between the two cases. In that case a mass of documentary evidence was filed showing that the Brahmins of Gurdaspur had actually adopted the agricultural custom. The learned Judges who decided the case went into the evidence thoroughly and came to the conclusion that independently of the reported authorities there was clear evidence that the Brahmins in that case had adopted and acted upon the agricultural custom of the other agricultural communities. At page 22 of the report, we find the following passage: "The facts and considerations set out above, when taken collectively, warrant the conclusion that Sarsut Brahmans of Gurdaspur must be treated as agriculturists, and that the *onus* which lies upon the plaintiffs of proving that in matters of inheritance they are governed not by Hindu Law but by custom is, under the circumstances of the case, comparatively light. It now remains to be seen whether the onus has beendischarged."

Having made this remark, the learned Judges proceeded to deal *seriatim* with the documentary evidence in the case and refer to the entries in the *wajib-ul-arz* of the Mauza, to the *riwaj-i-am* of the Tahsil prepared at the settlement, to the statement of custom as embodied in the English Abstract of the Customary Law of Gurdaspur,

(1) 3 P. R. 1903; 16 P. W. R. 1908; 94 P. L. R. 1903

and finally to the specific instances of exclusion of daughters and their sons by collaterals in matters of succession.

This class of evidence unquestionably was very strong and the learned Judges came to the conclusion that the plaintiffs had succeeded in discharging the burden which lay upon them. The plaintiff in this case has not produced any such evidence in support of his case. This ruling, therefore, has no application to this case. A large number of rulings have been quoted and discussed in the judgment of the lower Appellate Court and we do not think it necessary to go over the ground in our judgment. We will, however, refer to two of the cases cited by the learned Counsel of the respondents, which in our opinion fully apply to the facts of this case. The facts of the case reported in *Gangu* v. *Kanshi Ram* (2) are thus stated at page 86*:—

"It is not denied that the plaintiffs' family owns only 152 *kanals* of the total village area, 4,158 *kanals*; that they are entered in the settlement record as *malikan maqbuza*, having no share in the *shamilat*, and that they are not entirely dependent upon agriculture, but that they derive part of their income from the offerings made at a Gurdwara in the village which is in charge of the plaintiffs' family."

It was urged by the appellants' Pleader in that case that the lands belonging to the Sodhi Khatris in the village were constituted into a separate *patti* known as Patti Sodhi, and that this showed that they formed a compact community of their own and must be presumed to have adopted the customs of the Sikh Jats among whom they had settled.

The learned Judge who decided the case, however, held that the so-called Patti Sodhi consisted of the small area of 152 *kanals* only, and the mere fact of this *patti* being recorded separately in the settlement papers was insufficient to prove that the Sodhi Khatris had adopted agricultural custom with all its incidents. In this case also the Brahmins are *malikan-i-maqbuza*, have no share in the *shamilat*, and have another source of income for their livelihood. The mere fact that their *patti* known as Brahman Majra is recorded as a separate *patti* in the *jamabandi* cannot prove that the Brahmins have adopted the agricultural custom with all its incidents as to alienation and succession to the exclusion of their personal law.

In the case reported as *Harnam Singh* v. *Hardei* (3) at page 156* the learned Judge on the facts of the case made the following remark, which is fully applicable to the present case:—

"Though these Sodhis have held land in the village for nearly 90 years, they did not come in with the founders, they are only *qabza maliks*, they number only five families, holding 160 acres of land out of a village area of 3,000 acres. Then there is no positive evidence one way or the other whether they live solely by agriculture; one would imagine it would be difficult for five families to live on the profits of so small an area as that stated above."

These facts were very similar to facts established in this case and the learned Judge came to the conclusion that the plaintiffs in that case failed to establish that they had adopted the agricultural custom and had abandoned their own personal laws.

Taking the findings of the lower Appellate Court and the above circumstances into our consideration we have also arrived at the same conclusion. We hold that the view taken by the lower Appellate Court was a right view. In this view it is not necessary to decide the question of legal necessity and consideration, as to which both the Courts below have arrived at a concurrent finding, and this finding has not been seriously contested before us. We, therefore, dismiss the appeal with costs.

MARTINEAU, J. (*June* 14, 1919).—I concur, and I may refer also to the following passage from *Tulsi Ram* v. *Nathu* (4) on page 23† of the report: "The Brahmans in this village whose number is very small form but a small part of the village population, and it is not at all clear that they are members of the compact

(2) 9 Ind. Cas. 649; 28 P. R. 1911; 72 P. W. R. 1911; 80 P. L. R. 1911.

*Page of P. R. 1911.—*Ed.*

(3) 10 Ind. Cas. 335; 43 P. R. 1911; 137 P. L. R. 1911; 86 P. W. R. 1911.

(4) 39 Ind. Cas. 93; 5 P. R. 1917.

*Page of P. R. 1911.—*Ed.*

†Page of P. R. 1917.—*Ed.*

village community of the Hindu Jats, who are doubtless governed by customs. It is quite possible that these Brahman families have been influenced in matters of succession and alienation by the customs of their Jat neighbours, but even so it is for the plaintiffs to prove by satisfactory evidence to what extent they have been influenced in this direction." Those remarks are applicable here. The plaintiff has to show how far the Brahmans of the village with which this case is concerned have adopted the customs of their agricultural neighbours. He has failed to show that they have adopted any of those customs, and I agree, therefore, with my learned brother that the appeal must fail.

Appeal dismissed.

MADRAS HIGH COURT.

APPEALS AGAINST APPELLATE ORDERS NOS. 6 AND 7 OF 1919.

July 28, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Burn.

S. M. MYDEEN ROWTHER—DEFENDANT No. 1—RESPONDENT No. 1——APPELLANT IN A. A. O. No 6 OF 1919.

S. M. MOHAMAD MEERA ROWTHER —DEFENDANT No. 2—RESPONDENT No. 2— APPELLANT IN A. A. O. No. 7 OF 1919

versus

P. S. HAJI MUHAMMAD ABDUL ABDUL GAFFUR ROWTHER AND OTHERS —PLAINTIFFS NOS. 2, 3, 5 AND 6— RESPONDENTS.

Civil Procedure Code (Act V of 1903), ss. 11, 48 (2) —Execution of decree, application for, after 12 years from date of decree—Limitation, saving of—Force or fraud long anterior to application, whether saves limitation—Plea of fraud or force, absence of, in last execution application, effect of - Res judicata.

A decree-holder, availing himself of the plea of force or fraud under section 48 (2), Civil Procedure Code, as saving limitation in respect of an execution application made after 12 years after date of decree, is not restricted to proving that the fraud or force occurred within 3 years of the application. He is entitled to the benefit of the proviso even if the fraud or force was long anterior in date. [p. 863, col. 1.]

Seshachalam Chetti v. *Rajam Chetty*, 8 M. L. J. 203, not approved.

Venkayya v. *Raghavacharlu*, 22 M. 320; 8 M. L. J. 79; 8 Ind. Dec. (N. S.) 228 and *Abdul Khadir* v. *Ajiyar Ahammad*, 12 Ind. Cas. 679; 22 M. L. J. 35; 10 M. L. T. 413; (1911) 2 M. W. N. 434; 35 M. 670, followed.

Mohsin Ali v. *Masoom Ali*, 11 Ind. Cas. 672; 34 A. 79; 8 A. L. J. 1020, approved.

The failure to plead the saving of the limitation bar in an application for execution will not operate as *res judicata* for a subsequent application. [p. 863, col. 1.]

Appeals against the orders of the District Court, Tinnevelly, in Appeal Suits Nos. 91 and 95 of 1918, preferred against the order of the Court of the District Munsif, Tinnevelly, in Execution Petition No. 453 of 1917, in Original Suit No. 97 of 1905.

FACTS appear from the judgment.

Mr. *K. Ramachandra Aiyar*, for the Appellant.—The lower Appellate Court erred in issuing the warrant. The force or fraud relied on under section 48 (2), Civil Procedure Code, as saving limitation was long anterior to the date of the last application. The decree-holder is not entitled to the benefit of the provision. *Seshachalam Chetti* v. *Rajam Chetty* (1).

In the earlier application, *i. e.*, on 11th April 1917, this was not pleaded. The omission to plead operates as *res judicata*. In that application leave was asked to amend. The Appellate Court held it was a fresh application which was barred. Then the decree-holder should have relied on section 48 (2).

Mr. *M. D. Devadoss*, for the Respondent in No. 6.—Section 48 (2), Civil Procedure Code, does not limit the time within which the fraud or force occurred. If it was at some time within 12 years after the decree, there is no bar. See *Venkayya* v. *Raghavacharlu* (2), *Abdul Khadir* v. *Ajiyar Ahammad* (3).

It was not necessary for plaintiffs to have mentioned that they relied on section 48 (2) when they made the last application for execution.

JUDGMENT.—The decree under execution was passed on 2nd March 1905.

(1) 8 M. L. J. 203.

(2) 22 M. 320; 8 M. L. J. 79; 8 Ind. Dec. (N. S.) 228.

(3) 12 Ind. Cas. 679; 22 M. L. J. 35; 10 M. L. T. 413; (1911) 2 M. W. N. 434; 35 M. 670.

REAJADDI SARKAR v. GANGA CHARAN.

The present application for execution was made on the 4th October 1917, clearly more than 12 years after the date of the decree. The question is whether the bar is saved by the operation of clause (2) of section 48 of the Civil Procedure Code. The lower Appellate Court held in favour of the decree holder.

Mr. Ramachandra Aiyar for the appellant contended, first, that the respondent is barred by *res judicata* from presenting the application under execution On the 11th April 1917 the decree holder applied to the Court to allow him to convert an execution application filed by him for the arrest of the judgment debtor into one for the attachment of his property. In the Appellate Court it was held that the application to amend was a fresh application and that in that view it was barred by limitation. The learned Vakil contends that it was open to the decree-holder to have pleaded in that application that he was prevented by force or fraud from filing his application earlier and that this failure operates as *res judicata* now. Even granting that to execution applications all the disabilities which attach to a plaintiff failing to plead are applicable, we are clear that, when an applicant wants his application to be treated as one in time, it cannot be said that he ought to have pleaded that there was fraud or force which prevented him from applying in time. We overrule this contention.

The second point was that the fraud which was pleaded in extenuation of the failure to apply in time was a long time anterior to the date of the last application and that consequently the decree holder is not entitled to the benefit of clause (2) of section 48. Even granting that the rigid test insisted on by Mr. Justice Shephard in *Seshachalam Chetti* v. *Rajam Chetty* (1) is the proper one, we are of opinion that the application to arrest the judgment-debtor on the 14th February 1916 satisfied that test. The matter was not disposed of till March 1917. Further in *Venkayya* v. *Raghavacharlu* (2) impliedly and in *Abdul Khadir* v. *Ajiyar Ahammad* (3) Mr. Justice Sundara Aiyar expressedly did not act on the view taken by Mr. Justice Shephard. We are inclined to agree with the view taken in the later cases. We are supported by *Mohsin Ali* v. *Masoom Ali* (4) in our conclusion.

We think the lower Appellate Court is right and dismiss Civil Miscellaneous Second Appeal No. 6 of 1919 with costs and Civil Miscellaneous Second Appeal No. 7 of 1919 without costs.

M. C. P.

Appeals dismissed.

(4) 11 Ind. Cas. 672; 34 A, 20; 8 A. L. J. 1020.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1439 OF 1918.

July 4, 1919.

Present:—Mr. Justice Newbould.

REAJADDI SARKAR—DEFENDANT—APPELLANT

versus

GANGA CHARAN BHATTACHARJYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s 32—Recitals in documents not inter partes, *admissibility of—Objection to admissibility not taken in trial Court, whether can be taken in Appellate Court.*

Recitals in documents not *inter partes* are ordinarily irrelevant, unless the statements in the documents can be brought within the conditions of section 32 of the Evidence Act. Statements in documents not *inter partes* limiting the interest of the executants by declaring the boundaries of certain land fall within section 32, clause (3), of the Evidence Act, and are, therefore, admissible in evidence if the conditions necessary to bring section 32 into operation are proved. [p. 864, col. 1.]

Where no objection is taken in the first Court to the admission in evidence of documents not *inter partes*, objection cannot be taken in appeal that it has not been proved that the conditions exist which make section 32 applicable. [p. 864, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Jessore, dated the 20th of April 1918, reversing that of the Munsif, 2nd Court at Narail, dated the 14th of March 1917.

Babu *Girija Prasanno Roy Choudhury*, for the Appellant.

Babu *Prokash Chandra Mazumdar*, for the Respondents.

JUDGMENT.—In the suit out of which this appeal arises the plaintiff No. 1 sought to recover possession of a plot of land after

establishment of his title as lessee under the original plaintiffs Nos. 2 to 7. The plaintiffs Nos. 5 and 6 at first denied having granted any leasehold interest to plaintiff No. 1 and were then made defendants Nos. 10 and 11. Subsequently they compromised the suit with the plaintiffs. The plaintiffs claimed the land as being included in a Beel named Singhdoori Beel. The principal defendant No. 1 contested the suit, alleging that the land did not appertain to Singhdoori Beel, but to Danga land of the Beel appertaining to a *jama* which he held under the owner of a Niskar tenure.

The main question in the case is one of parcel or no parcel, and on that the finding of the lower Appellate Court is conclusive unless it can be shown that in coming to that finding he committed an error of law.

The judgment is attacked on two grounds. The first is that certain documents relating to lands on the border of the land in suit, which were executed by persons who are no parties to this litigation, have been wrongly admitted in evidence. There were several of these documents filed on behalf of the plaintiffs, some of which were admitted without objection and some after objection. The law as regards the relevancy of documents of this nature appears to be that the general rule is that recitals in documents not *inter partes* are ordinarily irrelevant, as was held in the case of *Brajeshware Peshakar* v. *Budhanuddi* (1) which was followed in the case of *Rahimjan Bibi* v. *Imanjan Bibi* (2). But there is an exception to this general rule if the statement in the documents can be brought within the conditions of section 32 of the Evidence Act, and it has been held that statements in such deeds limiting the interest by declaring the boundaries fall within clause 3 of section 32 and are, therefore, admissible in evidence, if the conditions necessary to bring section 32 into operation are proved. Of the cases which support this view the earliest cited is *Rajah Leelanund Singh* v. *Lakhputtee Thakoorain* (3) and the latest is *Abdullah* v. *Kunja Behari Lal* (4). It has also been held that when no objection is taken in the first Court to the admission of documents of this sort in evidence, objection cannot be taken in appeal that it has not been proved that the conditions exist which make section 32 applicable. *Ambar Ali* v. *Lutfe Ali* (5).

Applying these principles, I hold that Exhibits 7, 8, 9, 10, 11 and 12, which have been relied on by the lower Appellate Court as evidence in the plaintiff's favour, should have been treated as irrelevant. But I do not think it necessary to remand the case for re-hearing on that ground. On behalf of the appellant my attention was drawn to an unreported case, Second Appeal No. 1795 of 1911 decided on the 16th April 1913 by Mr. Justice Harington and myself, and in that case, after holding that the document made between the parties who are not parties to the suit, which contained a statement with regard to the land in dispute, had been wrongly admitted in evidence, we nevertheless held that as there was other evidence to support the finding of the Judge it was unnecessary to remand the case for re-hearing on this ground. In the present case there appears to be ample evidence to support the finding of the lower Appellate Court on the question at issue. There are documents, Exhibits 3 and 13, of similar nature to those which I hold to have been wrongly treated as admissible and other documentary and oral evidence to which reference is made in the judgment. I do not think that so much importance would have been given to the statements in the documents Exhibits 7 to 12 that if they had been omitted from consideration the learned Subordinate Judge would have come to a different conclusion on the issue of parcel or no parcel.

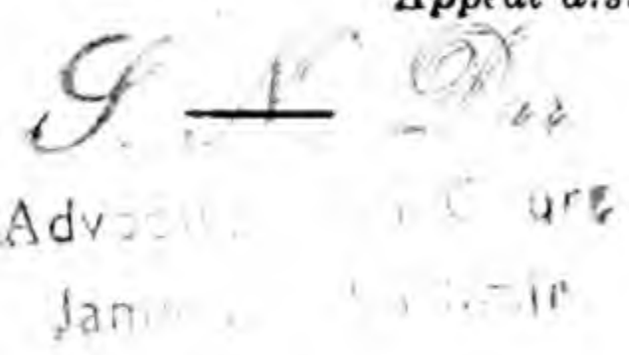
The second point taken in this appeal is that the plaintiff has failed to prove his title to the whole 16 annas leasehold interest. There appears to be no substance in this contention. It is based on the fact that at one time two of the plaintiff's lessors, who were subsequently made defendants Nos. 10 and 11, denied the plaintiff's leasehold right under them. It is true that by their subsequent compromise they could not give the plaintiff a right which would entitle him to a decree if he had not that right at the time when he instituted the suit. But the question of the plaintiff's right as lessee depends on the evidence as a whole. If the lease on which the plaintiff relies is found to be genuine

(1) 6 C. 268; 7 C. L. R. 6.
(2) 15 Ind. Cas. 698; 17 C. L. J. 173.
(3) 22 W. R 231.
(4) 12 Ind. Cas. 149; 14 C. L. J. 467; 16 C. W. N. 252.
(5) 41 Ind. Cas. 116; 25 C. L. J. 619; 21 C. W. N. 996; 45 C. 159.

he obtains thereby an interest in the whole 16 annas. The dispute between him and defendants Nos. 10 and 11 is quite unconnected with the dispute between him and the defendant No. 1. If his case against defendant No. 1 failed on the merits, the compromise would give him no advantage. If he succeeded in establishing his case as against defendant No. 1, all that the compromise did was to give the defendants Nos. 10 and 11 benefit of the decree obtained by plaintiff No. 1, which they would otherwise have lost on being transferred from the category of plaintiffs to that of defendants.

The appeal fails on both the points urged and is dismissed with costs.

Appeal dismissed.



LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 72 OF 1919.

July 21, 1919.

Present:—Mr. Justice Martineau.

PARBHU RAM—PLAINTIFF—APPELLANT

versus

TEK CHAND—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 109—"Transferee of any interest," meaning of—Person entitled to immediate reversion, whether can give notice to quit—Landlord, whether bound to inform tenant of assignment—Assignee of landlord's interest, whether can give notice to quit.

The words "transferee of any interest" in section 109 of the Transfer of Property Act include the term lessee. [p. 866, col 1.]

The rule of English law that the person entitled to the immediate reversion of the demised premises is the proper person to give notice to quit is applicable to India. [p. 866, col 1.]

Manikkam Pillai v. *Rathnasami Nadar*, 43 Ind. Cas. 210; 6 L. W. 689; 33 M. L. J 684; (1917) M. W. N. 837 followed.

In a suit for recovery of rent and ejectment from the house it appeared that the defendants were monthly tenants of a house belonging to one *H*. On the 1st October 917 *H*. leased the house to the plaintiff, who on the 10th February 1918 gave defendants a notice to vacate the house before the 6th March. The defendants refused to recognise plaintiff as their landlord:

Held, that the plaintiff was entitled to serve the defendants with a notice to quit the house and that it was not necessary for the landlord to inform the defendants that he had leased the house to the plaintiff. [p. 866, col. 1.]

Second appeal from the decree of the District Judge, Ambala, dated the 12th January 1919, varying that of the Munsif, 2nd Class, Ambala, dated the 28th June 1918, decreeing the claim

Lala *Mehr Chand Mahajan* for Lala *Jagan Nath*, for the Appellant.

Lala *Balwant Rai*, for the Respondent.

JUDGMENT.—The defendants are monthly tenants in a house belonging to Hari Pershad. The latter leased the house to the plaintiff on the 1st October 1917. The plaintiff on the 16th February 1918 gave the defendants a notice to vacate the house before the 16th March. The defendants replied that they had no knowledge of the plaintiff's lease, and that they did not recognize him as the landlord. Then at the plaintiff's instance the owner of the house sent a notice to the defendants on the 23rd March to quit the house in a week. As the defendants did not comply with the notice, the plaintiff brought the present suit for ejectment and for Rs. 79-12-0 on account of rent. The first Court passed a decree for ejectment and for Rs. 17-14-6 on account of rent. On the defendants' appeal the District Judge altered the decree for rent to one for Rs. 19-2-0, and dismissed the claim for ejectment. The plaintiff has appealed to this Court.

The only question is as to the validity of the notice given by the plaintiff on the 16th February 1918, as it is not contended on his behalf that the notice given by the landlord on the 23rd March to quit the house in a week was a valid one. The learned District Judge holds that the defendants were not obliged to accept any one as their new landlord without due intimation from the old landlord, and that they were, therefore, entitled to treat the notice of the 16th February as a nullity. This is not a correct view. It is laid down on page 1701 of Gour's Law of Transfer, 4th Edition, that no notice is required to be given of an assignment, and Counsel for the respondents has not cited any authority to the contrary.

As to the right of the plaintiff to give the defendants notice to quit, this appears to be clear from section 109 of the Transfer of Property Act. A lease of immoveable property is, as is defined in

section 105, a transfer of a right to enjoy such property, and section 109 provides that if the lessor transfers the property leased or any part thereof or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights of the lessor as to the property transferred.

It has also been held in *Manikkam Pillai* v. *Rathnasami Nadar* (1) that the rule of English law that the person entitled to the immediate reversion of the demised premises is the proper person to give the notice to quit is applicable to India, and that the words 'transferee of any interest" in section 109 of the Transfer of Property Act include the term lessee.

Counsel for the respondents relies on the words "in the absence of a contract to the contrary" in section 109, and contends that by the terms of the plaintiff's lease, it was only his lessor who could have the tenant ejected, and that, therefore, he alone, and not the plaintiff, could give notice to the defendants to quit. I do not agree with this contention. The material words in the lease executed by the plaintiff are:— "*Jo kirayadar is wakt abad hain un se makan khali karane ka aur kiraya wasul karne ka mujh ko ikhtiyar hoga, agar koi makan khali na kare to malik ko khali karakar dena hoga, aur in makanat ka main wuh kiraya lene ka mustahik hunga jo kirayadar se milega, aur khali karane ke bad ziyadati kiraya ka aur tabdili kirayadaran ka mujh ko ikhtiyar hoga.*" The first sentence clearly gives the plaintiff the right to eject the tenants, and that right is not taken away by the second sentence, which gives the plaintiff the further right, where a tenant refuses to quit, of calling upon the owner to eject him.

I hold, therefore, that the plaintiff was entitled to serve the defendants with a notice to quit the house, and that it was not necessary for the landlord to inform the defendants that he had leased the house to the plaintiff.

It is argued finally for the defendants that the notice, in order to be valid, must be for a period expiring at the end of the month of the tenancy, that it is not shown that the tenancy ended on the 15th of the month, and that, therefore, the notice given to the defendants on the 16th February to quit the house before the 16th March was not a valid notice. The defendants are, however, not entitled to set up this defence now, as they did not set it up at the trial. Had the plea been raised at the trial, the plaintiff might have been able to prove that the defendants' tenancy ended on the 15th of the month.

The notice must be held to be valid, and I accordingly accept the appeal and give the plaintiff a decree for the ejectment of the defendants from the house in addition to the decree for Rs. 19-2-0 passed by the lower Appellate Court. The defendants will pay the plaintiff's costs in proportion to the decree in the first Court, and full costs in the lower Appellate Court and this Court.

Appeal accepted.

(1) 43 Ind. Cas. 210; 6 L. W. 689; 33 M. L. J. 684; (1917) M. W. N. 837.

PRIVY COUNCIL.

APPEAL FROM NAGPUR JUDICIAL COMMISSIONER'S COURT.

July 28, 1919.

Present:—Lord Atkinson, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

AMRITRAO AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUKUNDRAO AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Separation—Intention to separate, effect of.

The unequivocal and unmistakeable manifestation by a member of a joint Hindu family, by his words or conduct, of a fixed or determined intention to become separate is sufficient to effect the separation of his title and the severance of his interest, although division of possession, or partition by metes and bounds, does not take place, or though there be no separation in food and dwelling. [p. 867, col. 2]

A separating member of such a family may of his own free will accept as his share as small a portion of the joint property as seems good to him, and renounce all claims to the rest. [p. 868, col. 1.]

Appeal from the decision of the Officiating Additional Judicial Commissioner, Central Provinces, Berar Jurisdiction, dated the 8th

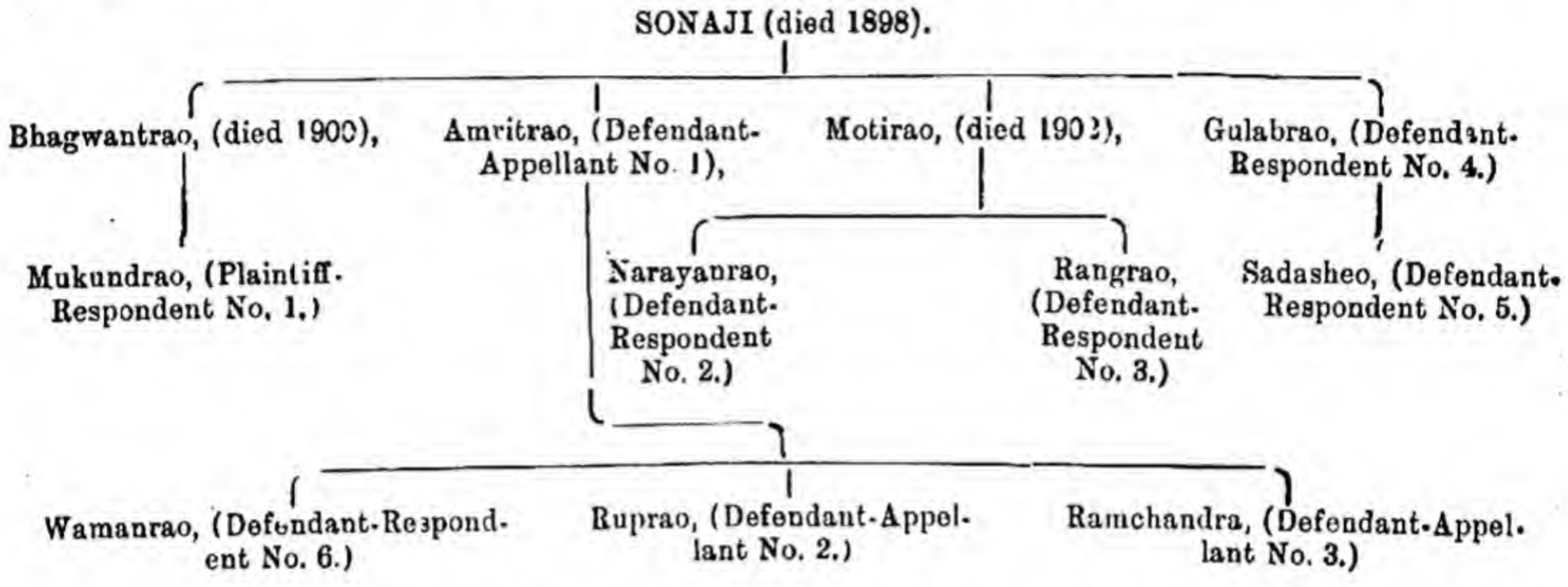
September 1913, modifying a decree of the Second Additional District Judge, East Berar, dated the 26th February 1912.

Mr. *De Gruyther*, *K. C.*, and Mr. *Dube*, for the Appellants.

JUDGMENT.

LORD ATKINSON.—This is an appeal from a decree, dated the 8th September 1913, of the Officiating Additional Judicial Commissioner (Mr. J. Mittra), modifying a decree, dated the 26th February 1912, of the Second Additional District Judge, East Berar.

To make the evidence and contentions put forward in the case intelligible, it is necessary, especially as the respondents unfortunately do not appear before the Board, to set out as a preliminary the pedigree of the principal appellant Amritrao. It is not disputed that it is correctly set forth in the following table :—



The family of Sonaji was a joint Hindu family governed by the Mitakshara Law.

Sonaji's second son, Amritrao, was evidently a man of enterprise. He and the other appellants contend that he separated completely and effectually from his family in or about the year 1870, twenty-seven or twenty-eight years before his father's death in 1898, and that after his separation he acquired by his own exertions the property, considerable for him, described in Schedule B attached to the plaint in the action out of which the appeal has arisen. He claims this as his own. The effort of his youngest brother Gulabrao and of the descendants of his younger brother Motirao, if not of the plaintiff in this suit, who is the adopted son of the eldest son of the family, Bhagwantrao by name, is to establish that the aforesaid property in Schedule B is, in reality, the property of the joint family, on the ground that he, Amritrao, never completely and effectually separated from his family, and that the wealth which he subsequently acquired is merely an accretion of the portion of the family property, whether his full share of it or not, of which he obtained the possession and enjoyment at the time of the alleged separation. It is obvious that if this latter contention were established the plaintiffs, the descendants of Motirao, Amritrao's brother, and his youngest brother Gulabrao would become entitled, each to one fourth, of the property Amritrao claims as his own. The significance and effect of all Amritrao's action, and his efforts, after the year 1870, to acquire property depend upon the question whether he then effectually separated himself from his family or not. That is the dominant, if not indeed the crucial, question in the case. It is admitted that no regular deed of partition was executed at the time of this alleged partition, for the reason given, not unnatural if true, that the family then owned no land which needed to be divided, but even if this were not so, it is well established that the unequivocal and unmistakeable manifestation by a member of a joint Hindu family by his words or conduct of a fixed or determined intention to become separate is sufficient to effect the separation of his title and the severance of his interest, although division of possession, or partition by metes and bounds, does not take place, or though there be no separation in food and

dwelling. And of course a separating member of such a family may of his own free will accept as his share as small a portion of the joint property as seems good to him, and renounce all claims to the rest.

The pleadings in the action out of which this appeal has arisen are, having regard to the grounds of the decision of the Judicial Commissioner, worthy of attention.

Originally Amritrao and his three sons were not made defendants. They were added at the instance of Gulabrao. In the first paragraph of the plaint it is stated that Amritrao took some fields as his share and became separate thirty years before the date of the institution of the suit in the year 1907; that he had no right whatever to the joint property and that after his separation his three brothers remained joint. In paragraph 2 it is further stated that since the previous year Gulabrao and his grandson Sadasheo took possession of the entire property, *i. e.*, the joint property mentioned in Schedule A, and denied the plaintiffs' claim thereto. The relief prayed is first the partition of this latter property, and then by amendment, presumably after the addition of Amritrao and his sons as defendants, if the property in his possession should be held by the Court to be joint, partition of the property described in both Schedules A and B.

It is clear from this that the claim to the property described in Schedule B was put forward by Gulabrao and not, in the first instance, by any other of the parties litigant. But he is not content, apparently, with merely increasing the amount of the family property by having the property in his brother's possession brought in as part of it. He aims in addition at decreasing the number of sharers, and consequently increasing the amount of his own share, and accordingly in his written statement, paragraph 3, he alleges that the plaintiff's adoptive father separated from his father Sonaji before he, Gulabrao, or the defendants Nos. 1 and 2, the sons of Motirao, were born. The defendants Amritrao and his two sons filed their written statement in the month of February 1910, in paragraph 5 of which they allege that Amritrao had separated from his father about forty years previously; that at the time he separated there was no family property to be divided, and that he then got nothing; that no portion of the property of which he was now possessed is ancestral property, and that all the property he holds was acquired by him after his separation. Upon these pleadings the two following issues, amongst others, were settled by the Additional District Judge:—

"5. (*a*) Did Amritrao (defendant No. 5) separate from his father Sonaji, 40 years ago, as alleged; and is the estate now in possession of defendant No. 5 and his sons the self-acquired property of defendant No. 5?

"(*b*) If it be not his self-acquired property, is not that estate liable to be brought into hotch-potch?"

The Additional District Judge in over four closely printed pages of the record examines the evidence, oral and written, bearing on these issues in minute detail and with considerable acumen.

In paragraph 18 of his judgment he deals with the nature of Amritrao's interest in a field called Akhar situated at Nagarwadi and comes to the conclusion that it can be safely stated that the lands at Nagarwadi in the possession at the date of the suit of Amritrao were never owned by his father Sonaji. As the nature of Amritrao's interest in this field is, in their Lordships' view, apparently, the pivot on which the judgment of the appellate tribunal turns, it is necessary to examine the evidence touching it:—

It is proved that Sonaji first lived at the village of Khed, that he then went to live at Udkhed and from thence went to live at Nagarwadi, where he continued to reside for twenty years, for the whole or most of the period with his four sons, and then returned to the village of Khed leaving Amritrao behind him at Nagarwadi. The landed property in Schedule B consists of seven fields at Daharur, five fields at Nagarwadi, three fields and four houses at Khed and three houses at Nagarwadi. The other property consists of cattle, implements of husbandry, Khand-Juar and gold amounting to Rs. 500, and household furniture, etc. It is proved, indeed is not disputed, that this field Akhar stood in the revenue records in 1870 and still stands in the name of Amritrao. It is likewise not disputed that there is no documentary evidence to show that Sonaji

ever acquired any lands at Nagarwadi. A witness named Hari, however, was examined on behalf of Amritrao. He stated in his evidence-in chief that he was, when examined on the 26th September 1911, about 62 years of age. He would, therefore, be about 21 years of age in the year 1870. He then states he was only 12 years old when he came to Nagarwadi, which was then not inhabited; that twelve to fifteen families then came from Khed, Sonaji and his family amongst them; that Sonaji went back to Khed taking Motirao and Gulabrao with him, but that Amritrao, then 30 years old, continued to live at Nagarwadi, that soon after Sonaji left for Khed, Amritrao purchased a field called Bablicha from the witness's uncle for Rs. 700, and that fifteen years after Sonaji left Amritrao purchased from the witness's cousin another field called Vadicha and built a big house at Nagarwadi and two Gayavadas adjoining it.

On cross-examination, however, the witness said that Amritrao and his father lived in the same house at Nagarwadi; that they owned one field called Akhar there; that they cultivated it; that they had two bullocks; that Sonaji was the Patel of the village, that the site of the Gayavada did not belong to Sonaji, and that Sonaji, so long as Amritrao was there, used to visit him at Nagarwadi, but that the latter never went to Khed; and that the fields above mentioned were never sold in his presence.

In cross-examination on behalf of Gulabrao and his son Sadasheo, the witness said: "I do not know of any partition between Sonaji and defendant No. 5, *i. e*, Amritrao; the latter has got fields at Dasoor. I do not know what fields Sonaji had or Bhagwantrao had or Gulabrao has."

There is some apparent inconsistency between this witness's evidence in chief and on cross-examination; but it appears to their Lordships that the real weakness of his evidence lies in this that, while he may be testifying truly as to events which he saw or was acquainted with, his testimony as to the title of, or interests of these persons in the property they cultivated or were in possession of or inherited is perfectly worthless, especially as a separation may be effected by a fixed intention clearly expressed by the member of a family who desired it, Sonaji and his son Amritrao were on friendly terms. The latter was evidently prospering in his business. There was nothing unnatural in the father assisting the son in the cultivation of this field Akhar, though he, the father, had no interest whatever in it. Yet from this statement by the witness Hari, uncorroborated by any evidence whatever, that the father and son owned this field which they cultivated together, the Judicial Commissioner comes to the conclusion that the field was family property. Not only does he do this, but taking that fact as established, he proceeds to hold that fields Nos. 1, 6 and 70 of Dasoor owned in 1870 and thenstanding in Amritrao's name were also in the same position and then treating them as the nucleus as family property, he apparently concludes that all the valuable property included in Schedule B has been acquired by the use and enjoyment during subsequent years of this nucleus, and is, therefore, an accretion of it, partaking of its character as family property.

It appears to their Lordships that these are not sound or legitimate conclusions from the facts proved.

The District Judge in paragraphs 20 and 21 of his judgment finds that during Sonaji's lifetime he and his son Amritrao had different *khatas* with the same creditors, that on the former's death his *khatas* were continued in the names of Motirao and Gulabrao and not of Amritrao (Exhibit 5 D-3 proves this), that when the creditors sued for the recovery of the debts Amritrao was not made a defendant, and that it was clear that Amritrao was separate in food, residence and dealings from Sonaji and his brothers, while the dealings of Sonaji and his sons Motirao and Gulabrao were joint. And he further finds in favour of Amritrao and his sons, (1) cesser of commensality, (2) separation in residence and food for many years, (3) separate money transactions, and separate and exclusive dealing with the property in their possession. In paragraph 26 he ultimately finds that Amritrao separated from his father about 1870, that the property in his possession and that of his sons is his self-acquired, and is not liable to be brought into hotch-potch on a partition between the plaintiff and the defendants from Nos. 1 to 4 —these are: Narayanrao Motirao, Rangrao Motirao, Gulabrao Sonaji and

Sadasheo Gulabrao. This last triple finding is in entire accord with the evidence given by Motirao and Gulabrao in a suit instituted in the year 1900 in the Judicial Commissioner's Court on the death of Bhagwantrao, in which the plaintiff in the present action and Amritrao both claimed the Patelki of Nagarwadi, which had been recorded in the name of the eldest brother, then recently deceased. Motirao on the 24th of July 1900, in the course of his evidence, stated on oath that the only ancestral property his father left consisted of two fields and the Watan, that Amritrao took his share and separated. And Bhagwantrao himself and Gulabrao kept the share together. That the Watan should be transferred to Mukundrao by right of adoption. Gulabrao, in the course of his evidence, stated: "The deceased, Motirao, and myself were living together, and Amritrao was separate from us."

This is also in accord with the evidence, given by the present plaintiff and his three uncles in a suit instituted in the Revenue Court in July 1901, in which the plaintiff in the present suit claimed to be registered as the Deshmuki Watan. The evidence runs as follows:—

"Amritrao stated as follows:—'I am separate. Motirao, Gulabrao and the deceased were joint. Deshmukhi may be recorded in my name in the place of the deceased.'

"Motirao stated as follows:—'Amritrao is separate and all of us are joint. The name of the adopted son may be entered in the Deshmukhi register.'

"Gulabrao stated:—'My statement is the same as that of my brother Motirao.'

"Mukundrao (plaintiff) stated:—'Bhagwantrao Deshmukh is dead. He has no legitimate son. I am his adopted son. He has no wife. He has three real brothers, namely, Amritrao, Motirao and Gulabrao. Amritrao is separate and all of us are joint.'"

Again in mutation proceedings instituted in November 1900 by the plaintiff in the present suit claiming to have recorded in his name a field, Survey No. 2, situated in Mauza Indoor, 16 *bighas* in extent of which his adopted father was the *khata*-holder, both he and Amritrao repeat the assertion that the latter was separate and his three brothers were joint. As to the field of Akhar, the Judicial Commissioner seems to have attached little weight to all this evidence, and relied in preference on that of the witness Hari. This has been already dealt with. Their Lordships are quite unable to concur with him in the view taken upon this point.

Having come to the conclusion on the evidence of Hari that this field, though standing in the name of Amritrao in the revenue records, was family property, he proceeds to determine what other property similarly recorded was in reality the property of the family. And he finds that fields Nos. 1, 6 and 70 at Dasoor were owned if not acquired in 1870, but that they were uncultivated lands and it was alleged could be acquired for nothing. Then he finds there were three fields at Nagarwadi which Amritrao claimed to have bought about the year 1870. No witness gives any evidence as to any of these fields, similar or at all to the effect of Hari's evidence. In reference to the field Akhar, yet the learned Commissioner says:—

"The conclusion I have come to in reference to this field weakens any presumption that might have been made in respect of these Dasoor fields from the fact that they stand in Amritrao's name in the revenue records."

and then states his conclusion and the grounds of it in the following passage of his judgment, p. 190:—

"Three of the fields he claims to have bought. These are Nagarwadi fields all acquired about the year 1870. The rest of the fields meaning the Dasoor fields were, according to him, acquired at settlement. In my opinion it was for Amritrao to prove clearly that the fields acquired in 1870 were acquired after his father left Nagarwadi, notwithstanding that the fields stood in his name. For I have shown that another field acquired in 1870 was joint property though standing in his name. I am inclined to think that the field at Indoor and the Akhar field would be a sufficient nucleus after defraying the expenses of the family for the acquisition of the rest of the property as it was acquired from time to time. At any rate if as I presume all the fields acquired in 1870 to be joint property—that would be

amply sufficient for the acquisition of the others. Now Amritrao says that he dealt in cotton. But I find no sufficient proof on the record to show that he did so in the early seventies."

In their Lordships' view this reasoning would have been entirely faulty even if it had been satisfactorily established, which it has not been, that the field Akbar was the property of the joint family.

If the fact be as the plaintiff, his natural father and his two uncles have in effect declared, that in 1870 Amritrao took his share and separated from the family leaving his three brothers joint, then no such burden of proof as is in this paragraph indicated rests upon him. The suggestion that the surplus income from the field at Indoor and the field at Akbar, after defraying the expenses of the family, was sufficient even by its most profitable use to acquire all the property in Schedule B appears to their Lordships to be quite fanciful.

The learned Commissioner then endeavours to discount the sworn evidence of Motirao in the two suits instituted in 1900 and 1901 to the above effect already mentioned. He says that this witness no doubt used the word "separated" in its technical sense but that he, the Commissioner, had formed the opinion that the statement was apparently made because Amritrao was living separate and holding property which he had claimed to be his exclusive property, and "that the plaintiff in the earlier stages of the present suit and his father believed that the property in the possession of Amritrao was the latter's self-acquisition in the profits of which they had not participated." That was a *bona fide* mistake to make when Amritrao was living in a different village holding property solely in his own name. It was just one of those mixed questions of fact and law on which one is apt to make a mistake. The father of this family, Sonaji, lived till 1898, Motirao till 1902 and Bhagwantrao till 1905. It appears to their Lordships that under these circumstances it is quite impossible to suppose that it was not perfectly well known in the family whether in fact Amritrao separated from it in the technical sense or not. The learned Commissioner does not indicate precisely on what grounds he bases his excuse for Motirao's erroneous testimony. Their Lordships are quite unable to concur in his opinion on this point.

The learned Commissioner then proceeds to deal with the evidence of the prime instigator of this litigation so far as it touches the property described in Schedule B—Gulabrao. This witness does not condescend to say that he made a mistake on a mixed question of law and fact when he swore distinctly on the 24th July 1900 that he himself and his deceased brother Motirao were living together and Amritrao was separate from them, and again on the 29th July, when he swore that his statement was the same as that of his brother's, Motirao, which was to the effect that Amritrao was separate and all of them were joint. On the contrary, he admits he made these statements. He deliberately contradicts them, but he neither explains them, nor excuses himself for having made them on the ground that he was mistaken as to the facts or on any other ground whatever. He now swears: "Though all the defendants, Amritrao, Motirao, are joint, they hold different fields in their respective names." And again: "There was no partition between Amritrao, Motirao, and myself; we were all joint. We took fields in our names as we found it convenient to do so."

In the face of this deliberate contradiction by Gulabrao on oath of his two earlier statements to be found at pages 78 and 86 of the record, it is not without some surprise that one reads the statement of the learned Commissioner at page 193 of the record to the effect, that this witness had not committed himself to a definite statement of facts which could *prima facie* preclude him from arguing the appeal. The learned Commissioner states further that he was not prepared to hold the somewhat summary record of the witness' statement in Exhibit P 2 (78) as a clear statement of facts which disentitled him to relief, that his later statement in P 5 (86) is certainly in accordance with his present statement, which amounts to saying this that the statement, "Motirao and myself were living together and Amritrao was separate from us" is in accordance with the statement that "Amritrao, Motirao and

myself are joint, there was no partition between us."

Their Lordships take an entirely different view. They think that Gulabrao is a wholly unreliable, if indeed not a deliberately false witness, and that the natural meaning of the statements he made in 1900 and 1901 is that Amritrao, having separated from his family, the property he had acquired was his own, not that of his family. The appellant Amritrao has on every occasion made the same case. Their Lordships accept, as did the learned District Judge, his explanation of the lease to his father of his field at Dasoor. He stated that he was at the time he gave his evidence in this suit, the 26th of April 1911, about seventy-five years of age. From the year 1870 till then, he has asserted ownership over the property mentioned in Schedule B as it was acquired, and also over the property by the aid of which it was acquired. Those who dealt with him in his business transactions treated him as acting and entitled to act for himself alone, his debts being his own separate debts and not the joint debts of himself and others. In the course of years, from 1870 till the institution of the present suit in 1907, none of the members of his father's family ever asserted a legal claim to a share of his increasing wealth. They would not have done so now but for the inconsistent conduct of the discredited and unreliable witness Gulabrao. He took advantage of a suit having been rightly instituted for the partition of the property, mentioned in Schedule A, to cause the plaint to be amended by adding Amritrao and his three sons as defendants, and to claim partition of the property in their possession described in Schedule B. The District Judge held that the original plaintiff Mukundrao was entitled to such a decree as he claimed as to the property in Schedule A, but was not entitled to it as to the property in Schedule B. The Judicial Commissioner modified the decree by deciding that the plaintiff was entitled to a fourth share, not only of the property mentioned in Schedule A, but also of the immoveable properties mentioned in Schedule B. Neither the plaintiff nor Gulabrao have appeared before their Lordships to support the decree of the Judicial Commissioner, hence the necessity of dealing at length in this judgment with the evidence and the grounds of the learned Commissioner's judgment. Their Lordships clearly are of opinion that the decision of the latter was wrong and should be reversed, and the decision and decree of the District Judge were right and should be restored, and that the costs incurred by the added defendants in the appeal before the Judicial Commissioner and before this Board should be paid by the respondents Gulabrao and Sadasheo. And they will humbly advise His Majesty accordingly.

Appeal accepted.

Solicitor for the Appellants :—Mr. *E. Dalgado.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 869 AND 1068 OF 1909.

July 7, 1911.

Present :—Mr. Justice Mookerjee and Mr. Justice Carnduff.

A. WHYTE—APPELLANT

versus

BHAIRAB MAJI—RESPONDENT.

Landlord and tenant—Kabuliyat, *suit for rent on basis of—Coercion, plea of—Burden of proof—Contract Act (IX of 1872), s.* 15.

Where a suit for rent upon a *kabuliyat* is resisted by the defendant on the ground that the *kabuliyat*, having been obtained from him by coercion, is not binding on him, it is for him to prove his allegation and, unless he does so, he is bound by the terms of the *kabuliyat*. In such a case it is not for the plaintiff to prove the inception of the tenancy, the area of the land demised and the rent payable by the defendant. [p. 874, col. 1.]

Appeals against the decrees of the Subordinate Judge, Burdwan, dated the 8th February 1909, affirming those of the Munsif, Asansole, dated the 27th January 1903.

Babus *Umakali Mukherjee* and *Khetter Mohan Sen*, for the Appellant.

Babu *Surendra Nath Ghoshal*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal on behalf of the plaintiff in a suit for rent. The case for the plaintiff is that the defendant on the 13th August 1889 executed a *kabuliyat* in his favour, in which he admitted that he held 7 *bighas* 15 *cottahs* of

land measured with a *rashi* of 18 inches a cubit at the annual rental of Rs. 12 3 0. He further agreed that if any excess land was found in his possession, he would pay rent thereof in addition to the aforesaid rental without any objection and neither he nor his heirs would raise any objection thereto. The plaintiff now seeks to recover rent at the rate mentioned in the *kabuliyat* and also additional rent for excess land, which he alleges is in the occupation of the tenant. The tenant resists the claim on two grounds, namely, first, that the *kabuliyat* was obtained from him by coercion and was not binding on him ; and secondly, that there was no excess land in his possession for which he was liable to pay additional rent.

The Courts below have dismissed the suit on the authority of the decision in the case of *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (1). The Subordinate Judge has held that inspite of this contract between the parties it was necessary for the plaintiff to prove the inception of the tenancy and to establish to the satisfaction of the Court the quantity of land and the rent payable by the defendant at that time. He has further held that as the plaintiff has failed to discharge the onus which lay upon him his suit must fail in so far as the claim relates to excess land. In our opinion this view cannot possibly be supported. The Subordinate Judge has misunderstood the decision of this Court on which he has placed reliance. In that case there was no written contract between the parties, the terms of the tenancy were not known with certainty, and the origin of the tenancy had not been established. There was an entry in the rent receipts to the effect that the rent was paid in respect of an area mentioned. Under these circumstances, the Court held that the plaintiff had failed to prove that there was really any excess land in the possession of the defendant for which he was liable to pay rent. In the case before us, unless the allegation of the defendant as to the circumstances under which the *kabuliyat* was obtained from him are established, he is bound by its terms and the *kabuliyat* shows conclusively that he held 7 *bighas* and 15 *cottahs* of land measured according to a *rashi* of 18 inches to the cubit at an annual rental of Rs. 12 3-0. If, upon measurement according to the same standard, it is now established that he holds more than 7 *bighas* and 15 *cottahs* of land, he is obviously bound to pay additional rent for the excess area.

The result, therefore, is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that he may raise an issue as to the circumstances under which the *kabuliyat* was obtained by the plaintiff from the defendant. As the question does not appear to have been properly appreciated at the original trial, the parties will be at liberty to adduce additional evidence, such evidence to be taken by the Subordinate Judge himself or under his direction by the Court of first instance. If the Subordinate Judge finds that the *kabuliyat* is binding upon the defendant, additional evidence will have to be taken to determine the area now in the occupation of the defendant. The costs of this appeal will abide the result.

It is conceded that this judgment will govern the other case (Second Appeal No. 1068 of 1909) which will also be remanded, and the costs will abide the result.

Appeals allowed; Cases remanded.

(1) 5 O. L. J. 538.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1512 OF 1917.

August 14, 1918.

Present:—Mr Justice Sadasiva Aiyar and Mr. Justice Napier.

ABDUR SAMAD SAHIB—PLAINTIFF—APPELLANT

versus

CHINNATHAMBI SAHIB *alias* GULAM MOHIDEEN SAHIB AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Succession—Great-grandfather's great-grandfather's descendant in agnatic line and daughter's son, priority as between—Residuary heirship—Grandfather, meaning of.

Under Muhammadan Law the great-grandfather's great-grandfather's descendant in the agnatic line is entitled to succeed to the estate of the propositus

as a residuary heir in preference to his daughter's son. [p. 875, col. 2.]

Agnates, however remote, are entitled to inherit as residuaries in the absence of nearer agnates and residuary heirship is not confined either to the father's descendants or to grandfather's grandfather's descendants, but extends to the agnate descendants of a "true" grandfather, however high in scale. [p. 875, col. 1.]

The word 'grandfather' indicates, in Muhammadan Law, an ancestor in the paternal line, however remote. [p. 875, col. 1.]

The examples given in the Muhammadan texts are only illustrative, not exhaustive. [p. 875, col. 1.]

Second appeal against the decree of the District Court, Tanjore, in Original Suit No. 235 of 1916, preferred against the decree of the Court of the Subordinate Judge of Negapatam in Original Suit No. 5 of 1915.

Messrs. *T. R. Ramachandra Aiyar* and *N. M. Malim Sahib*, for the Appellants.

Messrs. *T. V. Venkatarama Aiyar*, *R. Kuppusawami Aiyar* and *V. Pattabhirama Aiyar*, for the Respondents.

JUDGMENT.—The plaintiff is the appellant. The genealogical tree found at page 16 of the printed papers is admitted to be correct and I shall reproduce it here for easy reference.

SYED SULTAN ABDUL KADIR SAHIB.

- Mahomed Kaliba Sahib, Sheik Sultan Sahib,
  - Syed Sultan Bava Mohideen Sahib,
    - Syed Mahomed Bakir Sahib,
      - Kaliba Mowla Mahomed Ghouse Sahib,
        - Kaliba Syed Peer Mahomed Sahib,
          - Syed Kaliba Mastan Sahib.
          - Kaliba Mowla Mahomed Ghouse Sahib.
    - Muthuvalli Syed Peer Mahomed.
    - Sheikh Mahomed Sahib.
- Kaliba Syed Husain Kabir Sahib,
  - Kaliba Syed Mahomed Sahib,
    - Syed Mahomed Husain Kaliba Sahib *alias* Haji Sheik Husain,
      - Syed Muhidin Sahib,
        - Syed Kadir Muhidin Sahib,
          - Kaliba Sahib (defendant No. 1.)
          - Syed Hamid Bibi,
            - Abdul Samad Sahib (Plaintiff).
      - Asan Kudus Kaliba Sahib *alias* Santhi Kaliba Sahib,
        - Mahomed Kalia Sahib,
          - Vappuchi Sahib (Foster-son),
            - Syed Mahomed Kaliba Sahib (P. W. No. 5.)

On one question of fact which was in dispute in this case, namely, whether plaintiff was appointed by his maternal grandfather Syed Peer Mahomad Sahib to the office of Kalibath, I take it that the lower Appellate Court finds against the plaintiff in the negative, and that finding being a finding of fact is binding on us in second appeal. I shall, now assume (without deciding) the validity of the plaintiff's contention that his maternal grandfather, Syed Peer Mahomed Sahib who held Kaliba office till 1913 for more than 30 years, was the full and sole owner of that office at his death and that it was a hereditary office to which Peer Mahomed Sahib's heir was entitled to succeed. On that assumption, the question of Muhammadan Law which arises for decision is, whether the plaintiff (the daughter's son of the last holder of the office) is entitled to inherit it as the nearest kindred or whether the 1st defendant, who is descended from the great-grandfather's great-grandfather of the deceased in the agnate line, as residuary, is the next heir. The plaintiff's contention is that the great grandfather's great-grandfather's descendant is not a residuary heir at all under the Muhammadan Law, it being admitted by him that the residuaries inherit under the Muhammadan Law, in priority to distant kindred. The contention of the

appellant is that agnates who are descended from an ancestor more remote than the grandfather's grandfather are not residuaries in their own right according to the Muhammadan Law. So far as the descendants of the grandfather's grandfather are concerned, he is obliged to make the admission that they are residuaries because even the original texts relied on by him (from the Durrul Mukhtar, Sirajiya and Fatawa Alamgiri) do mention the descendants of the grandfather's grandfather as residuaries. As regards the descendants of remoter ancestors, we have got two direct decisions one (so long ago as in 1805) in *Shah Ilahi Buksh* v. *Shah Oasim Ali* (1) and the other in *Mahomed Haneef* v. *Mahomed Masoom* (2). These decisions interpret the texts of the Muhammadan Law as laying down that agnates, however remote, are entitled to inherit as residuaries in the absence of nearer agnates, that residuary heirship is not confined either to the grandfather's (father's father's) descendants (as argued in some cases) or to grandfather's grandfather's descendants, but extends to the agnate descendants of a "true" grandfather, however high in scale. (In those two cases the right of a person descended from a remoter ancestor than the grandfather's grandfather was upheld. The learned Judges evidently treat the examples given in the texts (which extend only up to the grandfather's paternal uncle's descendants) as merely illustrative and not exhaustive. All the notable text writers including Bailee, Ameer Ali, Sarcar and Wilson (see the table at page 291 of Wilson's Digest, 4th Edition) adopt the same interpretation of the texts. In two decisions of this Court also [*Mohidin Ahmid Khan* v. *Sayyid Muhammad* (3) and Indian Jurist, Old Series] the same interpretation is followed. The word 'grandfather' seems to be used to indicate an ancestor in the paternal line, however remote, in the Muhammadan Law books just, as the word "*pita maha*" in Sanskrit is used to denote even the remotest ancestor of man, Brahma himself. I do not think I am competent to pass criticisms on all the above Muhammadan Law authorities, and the criticisms we have listened to from Mr. T. R. Ramachandra Aiyar on them have not satisfied me that they fell into any error in formulating their considered opinions as above. Following them, I hold that the first defendant, though descended from the great-grandfather's grandfather of the propositus, is (as an agnate descended from the nearest ancestor of Peer Mahomed who has left descendants in the male line) to be preferred as Peer Mahomed Sahib's heir to the plaintiff who is only a daughter's son (a cognate) and who comes, therefore, among the inferior class of distant kinsmen. I shall repeat that it is unnecessary to decide whether the Kalibath office was really a hereditary office in the hands of Peer Mahomed, as the plaintiff's suit fails even if it was so. The second appeal is, therefore, dismissed with costs, two sets.

The memorandum of objections is dismissed. There will be no costs.

M. C. P.

Appeal dismissed;
Memo. of objections dismissed.

(1) (1805) Sel. Rep. (Beng.) 131; 6 Ind. Dec.(o. s.) 68.
(2) 21 W. R. 371.
(3) 1 M. H. C. R. 92.

CALCUTTA HIGH COURT.
APPEAL FROM ORIGINAL DECREE No. 85 OF 1917.
July 3, 1919.
Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Panton.
Nawab Khaja HABIBULLAH AND OTHERS—DEFENDANTS—APPELLANTS
versus
ARMAN DEWAN—PLAINTIFF—RESPONDENT.

Contract—Deposit, whether part payment or earnest money—Forfeiture of deposit—Intention of parties.

Where upon an agreement of sale the vendee deposits a sum of money with the vendor, the deposit, unless paid on any special terms, is not merely part payment but is an earnest, so that, on the one hand, if the contract be performed, it is brought into account as part payment; on the other hand, if the purchaser makes default, it may be retained by the vendor, and is thus a security for the performance of the purchaser's part of the contract. The test in each case is, did the parties mutually agree, expressly or by implication, that the

HABIBULLAH v. ARMAN DEWAN.

sum paid was to be treated, not merely as part payment, but as a guarantee for due performance of the contract. [p. 877, col. 1.]

Appeal against the decree of the Subordinate Judge, Barisal, dated the 26th February 1916.

Babus *Surendra Noth Guha* and *Pramatha Nath Banerjee*, for the Appellants.

Mr. *A. K. Fazlul Huq* and Babu *Atindra Nath Mookerjee*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants in a suit for possession of land upon specific performance of an agreement to lease, and, in the alternative, for refund of earnest money. The defendants are proprietors of a newly formed *chur* which they desired to lease out on the best terms available. The property was accordingly put up to auction and the plaintiff offered the highest bids for rent and premium, namely, Rs. 10 and Rs. 131 per *kani* respectively. This was accepted by the agent of the defendants on the 20th December 1911, and the following is the material portion of the agreement which was executed by the plaintiff in favour of the defendants on that date:

"Out of whatever amount would be fixed as *selami* according to the quantity of the land, we do deposit to-day Rs. 200 as earnest money, and within seven days from this date, we shall deposit with the agent at Barisal the balance of one-fourth of the total amount of *selami*; if we fail to do so, the said sum of Rs. 200 paid as earnest money shall be forfeited to the Sarkar of the Nawab Bahadur without any objection on our part. We shall pay the balance of the *selami* money to the agent at the time of the execution of the document. We shall pay rent at the said rate of Rs. 10 per *kani* for whatever land the agent shall, after personal inspection, ascertain as fit for cultivation, and the said agent shall at that inspection settle what rent would be payable for the rest of the land till the same becomes fit for cultivation. Be it also expressed that for whatever land would be reformed in future, we shall pay *selami* for the same at the said rate of Rs. 131 per *kani* and shall pay rent at the said full rate of Rs. 10 per *kani*."

It will be observed that two important elements of the proposed lease were left undetermined: (*a*) the area of the land to be demised, and (*b*) the rate of rent for land not yet fit for cultivation.

On the 28th December 1911 the son of the plaintiff appeared before the agent and prayed that the terms previously fixed might be varied by the assessment of a progressive rent, the maximum to be less than Rs. 6 per *kani*, and also by reduction of the rate of *selami*. The agent refused to alter the terms, recorded an order to that effect on the petition and added:

"Your father must fulfil the contract. Pay Rs. 1,000 you say you have brought as part of the *selami* and bring the balance at once." Rs. 1,000 was paid down, but the plaintiff did not otherwise carry out this order and, on the 28th March 1912, the Pleader for the defendants served a notice upon him demanding completion of the contract. The notice added that if the contract was not carried out in a week, the plaintiff would not get a refund of the sum deposited which, according to the written condition, had been forfeited. The notice further contained a threat that the defendants would, if the plaintiff made further default, lease out the land and realise from him any loss that they might thereby suffer. The plaintiff replied to this notice on the 5th April 1912, urged that the default was on the part of the defendants and claimed a refund of the sum of Rs. 1,200 deposited together with compensation for the loss he had sustained. Nothing further happened till the 21st December 1914, when the plaintiff instituted the present suit for specific performance of the contract, or, in the alternative, for refund of the deposit with interest. The defendants repudiated the suggestion that they were in default and pleaded that the plaintiff was not entitled either to specific performance or to refund of the deposit. The Subordinate Judge has refused to decree specific performance on two grounds: (1) the contract was incomplete, as all the material terms had not been determined, and (2) the plaintiff was in default. As regards the alternative claim for refund of the deposit, the Subordinate Judge has held that the first sum of Rs. 200 has been forfeited but that the second sum of Rs. 1,000 can be recovered. He has made a decree

accordingly in favour of the plaintiff. On the present appeal by the defendants, it has been argued that the Subordinate Judge should have held that the second sum of Rs. 1,000 also had been forfeited. Stress has further been laid on the damage alleged to have been suffered by the defendants as the result of the breach of contract by the plaintiff. This circumstance, however, is not material, as the defendants did not set up a counter claim for damages, nor did they institute a separate suit for recovery of damages for breach of contract. The only question in controversy, consequently, is whether, in the events which have happened, the second sum of Rs. 1,000 has been forfeited like the first sum of Rs. 200.

The general principle applicable to cases of this character is well settled. The deposit, unless paid on any special terms, is not merely part payment but is an earnest: so that, on the one hand, if the contract be performed, it is brought into account as part payment: on the other hand, if the purchaser make default, it may be retained by the vendor. The deposit is, from this point of view, a security for the performance of the purchaser's part of the contract; or, as Lord Macnaghten observed in *Soper* v. *Arnold* (1), "the deposit serves two purposes —if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business." The test in each case, thus, is, did the parties mutually agree, expressly or by implication, that the sum paid was to be treated, not merely as part payment, but as a guarantee for due performance of the contract.

But as Lord Denman, C. J., put it in *Palmer* v. *Temple* (2), "In the absence of any specific provision, the question whether the deposit is forfeited, depends on the intent of the parties to be collected from the whole instrument." The nature and incidents of such a deposit are accurately discussed in the case of *Howe* v. *Smith* (3), which was approved by the Judicial Committee in *Sprague* v. *Booth* (4), where the rule was affirmed that if the payment is a deposit, it is forfeited in the event of default by the purchaser. A similar view is supported by the decisions in *Depree* v. *Bedborough* (5), *Collins* v. *Stimson* (6), *Levy* v. *Stogdon* (7), and *Hall* v. *Burnell* (8). The decision in *Depree* v. *Bedborough* (5) indicates that where the purchaser makes default, no express stipulation is necessary to entitle the vendor to the deposit, and the decision in *Hall* v. *Burnell* (8) shows that the principle is applicable in the absence of any express stipulation to the contrary in the contract. This is confirmed by the statement of Fry, L. J., in *Howe* v. *Smith* (3): "The terms most naturally to be implied appear to me, in the case of money paid on the signing of a contract, to be that in the event of the contract being performed, it shall be brought into account, but if the contract is not performed by the payer, it shall remain the property of the payer. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract." To the same effect is the observation of Cotton, L. J., that the deposit is a guarantee that the contract shall be performed, and the remark of Bowen, L. J., that the deposit, if nothing more is said about it, is, according to the ordinary interpretation of businessmen, a security for the completion of the purchase. This is in conformity to the earlier decision in *Barrell, Ex parte; Parnell In re* (9).

It does not follow, however, that every payment made by the purchaser to the vendor is in the nature of a deposit and is liable to be forfeited, if the purchaser violates his contract: *Cornwall* v. *Henson* (10), where Webster, M. R., doubted whether the

(1) (1889) 14 App. Cas. 429 at p. 435; 59 L. J. Ch. 214; 61 L. T. 704; 38 W. R. 449

(2) (1839) 9 A. & E. 504; 1 P. & D. 379; 8 L. J. Q. B. 179; 48 R. R. 568; 112 E. R. 1304.

(3) (1884) 27 Ch. D. 89 at p. 101; 53 L. J. Ch. 1055; 50 L. T. 573; 32 W. R. 802; 48 J. P. 773.

(4) (1909) A. C. 576; 78 L. J. P. C. 164; 101 L. T. 211.

(5) (1863) 4 Giff. 479; 13 N. R. 187; 33 L. J. Ch. 134; 9 Jur. N. S. 1317; 9 L. T. 532; 12 W. R. 191; 66 E. R. 795; 141 R. R. 289.

(6) (1883) 11 Q. B. D. 142; 52 L. J. Q. B. 440; 48 L. T. 828; 31 W. R. 910; 47 J. P. 439.

(7) (1898) 1 Ch. 478; 67 L. J. Ch. 313; 78 L. T. 185 affirmed (1899) 1 Ch. 5; 68 L. J. Ch. 19; 79 L. T. 364.

(8) (1911) 2 Ch. 551; 105 L. T. 409; 55 S. J. 737.

(9) (1875) 10 Ch App. 512; 44 L. J. Bk. 133; 33 L. T. 115; 23 W. R. 846.

(10) (1900) 2 Ch. 298; 69 L. J. Ch. 581; 82 L. T. 735 49 W. R. 42; 16 T. L. R. 422.

doctrine of *Howe* v. *Smith* (3) would apply to a case where the purchase-money was payable in instalments and all but the last instalment had been paid; in such a case, the question might well arise whether the rights of the parties must not be adjusted upon the footing of a *restitutio ad integrum*. See also *Gee* v. *Pearse*(11). These rules have been repeatedly applied in this country as based on principles of justice, equity and good conscience: *Raghu Nath Sahai* v. *Chandra Protap Singh* (12), *Bishan Chand* v. *Radha Kishan Das* (13), *Balvanta* v. *Bira* (14), *Roshan Lal* v. *Delhi Cloth and General Mills Co. Ltd.* (15) and *Natesa Iyer* v. *Appavu Padayachi* (16). We may add that though all the decisions in the books may not be easy to reconcile, there is no substantial difference as to the principle, though there may be room for divergence of opinion as to the true nature of the payment in a particular case and the mutual intention of the parties with regard thereto. This is well illustrated by *Natesa Aiyar* v. *Appavu Padayachi* (17), and what is incumbent upon the Court in each case is to ascertain the real intention of the parties from all the terms of the contract: *Dagenham Thames Dock Co., In re, Hulse Ex parte* (18).

Let us test the case before us, in the light of these principles. The terms of the contract were reduced to writing on the 20th December 1911 and Rs. 200 was paid by the intending lessee to the agent of the lessors as earnest money. He agreed to pay the balance of one-fourth within seven days and the condition was annexed that if the balance was not so paid, the sum of Rs. 200 paid as earnest money would be forfeited. The balance was not paid as agreed and the result followed automatically that the deposit of Rs. 200 was forfeited. But it is argued on behalf of the defendants that the same fate should be imposed upon the sum of Rs. 1,000 paid after the Rs. 200 had been forfeited. The obvious answer is that the parties, if they had so chosen, might have made a provision to that effect; the forfeiture clause was made applicable in terms only to the sum which had been paid at the date of the contract and there is nothing to indicate that the parties intended to give it a wider operation. The agent of the defendants may have thought when he received Rs. 1,000 that if further payment was not made, the sum should be forfeited, but clearly there was no mutual intention, expressed or implied that the second payment was to be deemed a guarantee deposit. The contract gives the lessors an express right of forfeiture on non-performance of the contract or non-observance of its conditions, and there is no reason why this express right should be enlarged in its operation by an appeal to the general rule that where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit. The position is different where there is no express clause of forfeiture, but simply a payment by way of deposit which implies a liability to forfeiture. We are of opinion that the defendants are not entitled to retain the sum of Rs. 1,000.

The result is that the appeal is dismissed with costs. We assess the hearing fee at three gold *mohurs*.

Appeal dismissed

(11) (1848) 2 De G. & Sm. 325; 79 R. R. 223; 64 E. R. 146.
(12) 15 Ind. Cas. 268; 17 C. W. N. 100.
(13) 19 A. 489; A. W. N. (1897) 123.
(14) 23 B. 56.
(15) 7 Ind. Cas. 794; 33 A. 166; 7 A. L. J. 1019.
(16) 3 Ind. Cas. 941; 33 M. 375; 6 M. L. T. 334; 20 M. L. J. 230.
(17) 19 Ind. Cas. 462; 38 M. 178; 24 M. L. J. 488; 13 M. L. T. 391; (1913) M. W. N. 341.
(18) (1873) 8 Ch. App. 1022; 43 L. J. Ch. 261; 21 W. R. 898.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 386 OF 1918.

November 6, 1918.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

CHILDREN THANKAMMAL VAYAMKAR AMMA AND OTHERS—DEFENDATNS NOS. 2 TO 4—PETITIONERS

versus

MULLATHA MEENAKSHI AMMA'S DAUGHTER KUNHAMMA AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1, 5 AND 6—RESPONDENTS.

Malabar Law—Tavazhi, *manager of, debt contracted*

by, for current tavazhi *expenses—Junior members, liability of—Decree, whether can be passed against junior members—Acknowledgment and payment by manager not as manager—Limitation, whether saved as against junior members—Promissory note, execution of, for contemporaneous advance—Creditor, rights of—Limitation Act (IX of 1908), ss. 19, 20—Evidence Act (I of 1872), s. 91.*

The junior members of a *tavazhi* are liable for a debt on a pro-note executed by the *karnavan* for current *tavazhi* expenses. The creditor can sue both the *karnavan* and the other members of the *tavazhi* and obtain a decree against all. [p. 881, col. 1.]

Govindan Nair v. *Nanu Menon*, 26 Ind. Cas. 750; 27 M. L. J. 595; (1914) M. W. N. 782, distinguished.

Ayyasamy Pillai v. *Gurusami Naicken*, 33 Ind. Cas. 691; 3 L. W. 463, *Nataraja Naicken* v. *Ayyasami Pillai*, 38 Ind. Cas 339: 32 M. L. J. 354; 5 L. W. 410; (1917) M. W. N. 230; 21 M. L. T. 405 and *Nachiappa Chetty* v. *Dakshinamurthy Servai*, 28 Ind. Cas. 345; (1915) M. W. N. 217; 17 M. L. T. 232, followed.

An acknowledgment or payment by the manager, though not expressly stated to have been made or signed as manager, saves limitation also as against the junior members. [p. 881, col. 1.]

The authority to sign an acknowledgment under section 19 of the Limitation Act need not be expressly given by the parties sought to be made liable. The agency to sign can follow from the act of the Court or from rules of statutory or partnership law or the personal law of the parties. [p. 881, col. 2.]

Per *Sadasiva Aiyar, J.*—When a promissory note is executed for money borrowed at the time of the execution of the note itself, the creditor cannot join two separate causes of action in the same suit on two independent heads of claim, namely, one based on the borrowing of the money the instant before the execution of the promissory note, and the other on the promissory note itself. Having regard to section 91 of the Evidence Act, two distinct causes of action do not vest in such cases in the creditor. [p. 880, col. 1.]

Karmali Abdulla v. *Bora Karimji*, 26 Ind. Cas. 915; 39 B. 261; 17 M. L. T. 35; 13 A. L. J. 121; 21 C. L. J. 122; 19 C. W. N. 337; 17 Bom. L. R. 103; 2 L. W. 133; 28 M. L. J. 515; (1915) M. W. N. 606; 42 I. A. 48 (P. C.), explained.

Shanmuganatha Chettiar v. *Srinivasa Aiyar*, 35 Ind. Cas. 219; 40 M. 727; (1916) 2 M. W. N. 14; 31 M. L. J. 138; 4 L.W. 27; 20 M. L. T. 172, not approved.

Per *Spencer, J.*—On the pleadings in the case, the suit was based on the liability for the debt as evidenced by the promissory note. [p. 881, col. 2.]

A manager of a joint family or *tarwad* can acknowledge liability on behalf of the members whom he represents so as to extend the period of limitation against them as well as against himself. [p. 882, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment and decree of the Court of the Subordinate Judge, South Malabar, dated 10th January 1918, in Small Cause Suit No. 1043 of 1917.

FACTS appear from the judgment.

Mr. *K Kutti Krishna Menon*, for the Petitioner.—The suit was on the promissory note executed by the manager. He did not statedly incur liability as manager. The lower Court erred in giving a decree against all the members of the Tavazhi. See *Govindan Nair* v. *Nanu Menon* (1).

There is no finding that the Tavazhi was under any necessity to contract debts.

The creditor has elected to sue on the promissory note and not on the antecedent debt for which the pro-note was executed. On the pro-note the executant only is liable.

The acknowledgment by the manager, *i. e.*, the endorsement of payment on the pro-note in her writing, will only save limitation as against her. She has not signed the endorsement as manager. The suit is barred as against the other defendants.

Mr. *P. S. Narayanaswami Aiyar*, for the Respondent.—The manager has the power to contract or create a debt for the Tavazhi. The pro note was executed for current Tavazhi expenses. The decree against all the members is a proper decree. See *Nachiappa Chetty* v. *Dakshinamurthi Servai* (2), *Ayyasamy Pillai* v. *Gurusami Naicken* (3), *Nataraja Naicken* v. *Ayyasami Pillai* (4).

The creditor cannot sue on two separate causes of action. The suit must be regarded as based not only on the pro note but also on the liability of family members, under Hindu Law, for debts incurred for the family by the manager.

The Sub-Judge has found that the debt was contracted for purposes of the Tavazhi. That means for necessary purposes.

The acknowledgment by the manager need not state that it was made as manager. *Chinnya Nayudu* v. *Gurunatham Chetti* (5). The effect is to extend the period of limitation even as against the other members.

JUDGMENT.

SADASIVA AIYAR, J.—Defendants Nos. 2, 3 and 4 are the petitioners in revision. They are junior members of a Tavazhi, of which the

(1) 26 Ind. Cas. 750; 27 M. L. J. 595; (1914) M. W. N. 782.

(2) 28 Ind. Cas. 345; (1915) M. W. N. 217; 17 M. L. T. 232.

(3) 33 Ind. Cas. 691; 3 L. W. 463.

(4) 38 Ind. Cas. 339; 32 M. L. J. 354; 5 L. W. 410; (1917) M. W. N. 230; 21 M. L. T. 405.

(5) 5 M. 169 (F. B.); 2 Ind. Dec. (N. s.) 118.

1st defendant was the manager. As such manager, she borrowed Rs. 100 in cash for Tavazhi expenses and executed a promissory note in her own handwriting to the plaintiff on the 18th February 1914 A suit was brought against her and the other members of the Tavazhi, the plaint alleging that the money was borrowed under the promissory note for the necessities of the Tavazhi. The Subordinate Judge on the Small Cause side gave a decree against the 1st defendant and also against the other defendants to the extent of their interest in the Tavazhi properties. Defendants Nos. 2 to 4 urge in their grounds of the revision petition, (1) that under the ruling in *Govindan Nair* v. *Nanu Menon* (1) the lower Court erred in giving a decree against the Tavazhi as the suit was solely based on the promissory note, (2) that the lower Court has not found that the Tavazhi had a necessity to borrow. (There are other grounds which raise questions of fact, which it is not usual in revision petitions to consider).

As regards the first point, there was a preliminary argument addressed on the question whether, when a promissory note is executed for money borrowed at the time of the execution of the promissory note itself, the creditor can bring two separate suits or put forward two separate causes of action in the same suit on two independent heads of claim, namely, one based on the borrowing of the money the instant before the execution of the promissory note and the other on the promissory note itself. In *Muthu Sastrigal* v. *Viswanatha Pandara Sannadhi*(6) see also the decision in *Ammalu Ammal* v. *Namagiri Ammal* (7)] I expressed the opinion that, having regard to section 91 of the Indian Evidence Act, two distinct causes of action did not vest in such cases in the creditor. In *Shanmuganatha Chettiar* v. *Srinivasa Aiyar* (8) Abdur Rahim, J., basing himself on the decision of the Privy Council in *Karmali Abdulla* v. *Bora Karimji* (9), held that the creditor has the right to put forward the two claims independently of one another. With the greatest respect I venture to think that their Lordships of the Privy Council were not considering this question in *Karmali Abdulla* v. *Bora Karimji* (9) but a different question, namely, whether other partners were liable on bills drawn by one of the partners for debts incurred by him in the carrying on the partnership business of purchasing brown sugar at Mauritius for shipment to and sale at Hongkong. Their Lordships say expressly at pages 274 and 275* that "the Indian Contract Act" "rules parties in this case," and the question was "whether the transaction is or is not a partnership transaction" and that "it is erroneous to treat the question as purely a question of liability on the bills," just as it is erroneous in the present case to treat the suit as one solely on the promissory note and not also on the Hindu Law liability of the Tavazhi for a promissory note debt incurred by its manager in respect of a family transaction within her powers. I might add that in the decision in *Nachiappa Chetty* v. *Dakshinamurthy Servai* (2), a case decided after the decision of their Lordships of the Privy Council in *Karmali Abdulla* v *Bora Karimji* (9), the learned Chief Justice has the following observation :—"This way of putting it does not take account of the decisions that where the debt and the promissory note came into existence at one and the same time, the maker must be sued on the promissory note and not on the original cause of action." This observation indicates that in the opinion of my Lord, the Chief Justice, there is only one cause of action, after the promissory note was executed (for a contemporaneous borrowing), on which a suit could be brought. I might also refer to the decisions of Coutts Trotter, J., in *Ayyasamy Pillai* v. *Gurusami Naicken* (3) and of Ayling and Seshagiri Aiyar, JJ., in *Nataraja Naicken* v *Ayyasami Pillai* (4), which indicate that the claim based on the rules of Hindu Law and made against persons other than the maker of the promissory note arises along with and as a result of the execution of the promissory note by the managing member. So also in the Full Bench decision in *Krishna Ayyar* v. *Krishnasami Ayyar* (10),

(6) 21 Ind. Cas. 834; 38 M. 660; 26 M. L. J. 19; 14 M. L. T. 520; (1914) M. W. N. 58.

(7) 43 Ind. Cas. 760; 33 M. L. J. 631 at p. 644; 22 M. L. T. 391; 6 L. W 722; (1918) M. W. N. 110.

(8) 35 Ind. Cas 219; 40 M. 727; (1916) 2 M. W. N. 14; 31 M. L. J. 138; 4 L. W. 27; 20 M. L. T. 172.

(9) 26 Ind. Cas 915; 39 B. 261; 17 M. L. T. 35; 13 A. L. J. 121; 21 C. L. J. 122; 19 C. W. N. 337; 17 Bom. L. R. 103; 2 L. W. 133; 28 M. L. J. 515; (1915) M. W. N. 606; 42 I. A. 48 (P. C.).

(10) 24 M. 597.

*Pages of 39 B.—*Ed.*

Subrahmania Aiyar, J., clearly bases his decision on the ground that the debt created by the promissory note itself *ipso facto* creates the obligation on the other members of the family under the Hindu Law, and not that their obligation is created by any antecedent independent debt which existed before the promissory note was executed.

Then the next question is whether the decision in *Govindan Nair* v. *Nanu Menon* (1) precludes the Court from giving a decree against the other members of the Tavazhi even if the debt has been incurred by the Karnavan for purposes binding on the Tavazhi. This decision in *Govindn Nair* v. *Nanu Menon* (1) has been clearly explained by the learned Chief Justice, who was a party to it, in his judgment in *Nochiappa Chetty* v. *Dakshinamurthy Servai* (2). He there points out that the decision in *Govindan Nair* v. *Nanu Menon* (1) was based on the fact that the plaintiff in that case neither alleged in his plaint nor proved by his evidence facts indicating that, by the Marumakkathayam Law, the other members of the Tavazhi were bound by the debt of the manager. On the other hand, the decision in *Nachiappa Chetty* v. *Dakshinamurthy Servai* (2) and the decisions in *Ayyasamy Pillai* v. *Gurusami Naicken* (3) and *Nataraja Naicken* v. *Ayyasami Pillai* (4) impose liability on the other members of the Tarwad or the joint family on the promissory note executed by the Karnavan or the manager (as the case may be) for proper debts.

The next point argued by Mr. Kutti Krishna Menon for the petitioners (though I do not find it raised in the grounds of the revision petition) was that the suit was barred by limitation as against the other members of the Tavazhi, because the payment towards the principal and interest made by the 1st defendant and endorsed on the promissory note in her writing and over her signature does not purport to be made by her as manager of the Tavazhi. I think that the matter is concluded by the Full Bench decision in *Chinnaya Nayudu* v. *Gurunatham Chetti* (5), where it was held that the managing member has got a right to create debts and to make payment towards debts. Just as it is unnecessary that the document creating the original liability should purport to be signed by the executant as manager [see on this point the decision in *Padma Krishna Chettiar* v. *Nagamani Ammal* (11)], it is likewise unnecessary that the manager, when making payments or signing endorsements, should expressly state that he or she pays or signs as manager. If the decision in *Parakutty Amma* v. *Kunhi Krishnan Nair* (12) quoted by Mr. Kutti Krishnan Menon holds otherwise, I regret (with great respect) that I am unable to follow it. That the authority to sign an acknowledgment under section 19 of the Limitation Act need not be expressly given by the parties sought to be made liable and that the agency to sign can follow from the act of the Court or from rules of statutory or partnership law or the personal law of the defendant has been established by the case-law discussed fully in *Lakshumanan Chetty* v. *Padayappa Chetty* (13) in the judgment of Abdur Rahim, J.

Then on the question that there is no finding by the Subordinate Judge that there was necessity to borrow, I think that his finding that the debt was contracted for purposes of the Tavazhi is only another way of saying that it was for the necessary expenses of the Tavazhi that the debt was incurred.

I would, therefore, dismiss the revision petition with costs.

SPENCER, J.—On the pleadings in the Small Cause suit, I am of opinion that the suit was based on the liability for the debt as evidenced by the promissory note of 18th February 1914 signed by 1st defendant, the manager of the defendant's Tavazhi.

Paragraph 5 of the plaint and paragraph 2 of the written statement raised the question whether the debt was contracted for the necessity of the members of the Tavazhi and the Subordinate Judge has decided the issue arising out of this question in the plaintiff's favour.

The petitioners' Vakil relies on the decisions in *Govindan Nair* v *Nanu Menon* (1) in support of his contention that the defendants' Tavazhi is not liable. That suit was based solely upon the promissory note and not upon the original cause of action. It is expressly so stated in the judgment. I would distinguish that case from the present upon that

(11) 30 Ind. Cas. 574; 39 M. 915; 18 M. L. T. 216.
(12) S. A. No. 395 of 1917.
(13) 48 Ind. Cas. 179; 35 M. L. J. 571; 8 L. W. 594; (1918) M. W. N. 877; 25 M. L. T. 371.

ground. In *Nachiappa Chetty* v. *Dakshinamurthi Servai* (2) the learned Chief Justice in following the decision in *Krishna Ayyar* v. *Krishnasami Ayyar* (10) found no difficulty in so distinguishing the decision in *Govindan Nair* v. *Nanu Menon* (1) to which he was a party.

The decision of Coutts Trotter, J., in *Ayyasamy Pillai* v *Guruswami Naicken* (3) and the decision of a Bench in *Nataraja Naicken* v. *Ayyaswami Pillai* (4), in which his decision was confirmed, are exactly to the point on the question raised in this civil revision petition. The cases of partnership which have been quoted in the arguments have not, to my mind, much bearing upon this point as liabilities of partners are governed not by Hindu Law but by sections 249 and 251 of the Indian Contract Act.

On the question whether the 1st defendant's payment of Rs. 23 on the 17th February 1917 which was certified over her signature had the effect of extending the limitation as against the other defendants, I think that the decision in *Chinnaya Nayudu* v. *Gurunatham Chetti* (5) and that in *Sarodi Charan Chuckerbutty* v. *Durga Ram De Sinha* (14) are conclusive as showing that a manager can acknowledge liability of the members of the family which he or she represent so as to extend the period of limitation against them as well as against himself or herself.

I agree with my learned brother in holding that the civil revision petition shall be dismissed with costs.

Petition dismissed.

M. C. P.

(14) 5 Ind Cas. 424: 37 C. 461; 11 C. L. J. 434; 14 C. W. N. 741.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 69 OF 1912.

May 24, 1912.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

LIGRAJ PATJOSI—PLAINTIFF—APPELLANT

versus

MAHADEB RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. XXI, r.* 2—*Execution of decree—Consent decree—Application by judgment-debtor intimating to Court that the terms of the decree have been performed, nature of—Decree-holder, remedy of.*

A consent decree provided that the defendant-judgment-debtor should deliver to the plaintiff a parcel of land and should raise a wall within a time specified in the decree. The decree further provided that the defendant, as soon as he had carried out the terms of the decree, should notify that fact to the Court. Within the specified time the defendant made an application intimating to the Court that he had complied with the terms of the decree. The application was received but no action was taken upon it:

Held, (1) that the application of the defendant did not fall under Order XXI, rule 2 of the Civil Procedure Code; [p. 883, col. 2.]

(2) that if the defendant had not faithfully carried out the terms of the decree, the proper course for the plaintiff was to apply for execution of the decree and the Court would then consider whether the terms of the decree had been carried out. [p. 883, col. 2.]

Appeal against the decision of the District Judge, Cuttack, dated the 4th December 1911, reversing that of the Munsif, Puri, dated the 8th July 1911.

Babu *Narendra Kumar Bose*, for the Appellant.

Babu *Surendra Nath Ghosal*, for the Respondent.

JUDGMENT.—This appeal is directed against an order made apparently under Order XXI, rule 2, of the Civil Procedure Code of 1908. On the 14th September 1910, a consent decree was made between the parties to this appeal. Under that decree the respondent, who was the defendant in the suit, undertook to deliver to the plaintiff-appellant, within seven days, a parcel of land and to raise a wall within the 14th January 1911. The decree further provided that if the defendant failed to carry out the terms of the decree, the plaintiff would be at liberty to execute the decree. The decree further stated that the defendant, as soon as he had carried out the terms of the decree, would notify the fact to the Court. On the 12th January 1911 the defendant intimated to the Court that he had complied with the terms of the decree. This application was received but no action was taken upon it. On the 17th February 1911 the Pleader for the plaintiff discovered that this application had been made and he forthwith preferred objections. On the next day, the Court directed notices to issue upon the

plaintiff as well as the defendant and fixed the case for disposal on the 4th March 1911. On that date, the defendant did not appear and his application was dismissed. On the 4th April 1911 the defendant renewed his application with an express prayer that satisfaction might be entered in the decree under rule 2 of Order XXI of the Code. This was opposed by the plaintiff and the result was that the Court on the 8th July 1911 dismissed the application as barred by Order IX, rule 9. The defendant thereupon appealed, and the District Judge on the 4th December held that the second application was not barred. In this view, he remanded the case in order that the truth of the allegation of the defendant might be investigated. The present appeal is directed against that order. On behalf of the appellant it has been contended, *first*, that the second application is not maintainable, and *secondly*, that, if maintainable, it is barred by limitation under Article 174 of the First Schedule of the Limitation Act. In our opinion, there is no substance in either of these contentions and that the proceedings have been throughout misconceived. The application of the 12th January 1911 was not an application under rule 2, sub-rule (1) of Order XXI, which provides that where any money payable under a decree of any kind is paid out of Court or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly. Even if it could be said in this case that there was an adjustment of the decree, it was not alleged by the defendant judgment-debtor that there was an adjustment either in whole or in part to the satisfaction of the decree holder, and his application of the 12th January 1911 was not an application under sub rule (2) of rule 2 for issue of notice to the decree-holder to show cause why the adjustment should not be recorded as certified. The defendant was bound by the decree to notify to the Court that he had carried out its terms, and this he did. He did not invite the Court to take any action, and, as we have seen, no action was taken till the Pleader of the plaintiff discovered that the application had been made. In our opinion, the application is clearly not one under sub rule 2 of rule 2 of Order XXI and no action ought to have been taken thereon. The proper course for the plaintiff is to apply for execution of the decree, if his case is that the terms of the decree have not been faithfully carried out by the defendant. If such application is made, it will be open to the defendant to show that he has, as a matter of fact, carried out the terms of the decree. The Court will then be in a position to consider whether the terms of the decree have been carried out. We are informed that an application for execution was presented but was struck off by reason of the pendency of the appeal in this Court. If that is so, it will be open to the plaintiff to apply for revival of that application and proceedings may be taken on the basis of the application so revived or of a fresh application for execution.

The result is that this appeal is allowed and the orders of both the Courts below are discharged. Under the circumstances, each party will pay his own costs throughout the litigation.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1719 OF 1918.

February 10, 1919.

Present:—Mr. Justice Chevis.

GOBIND RAM—DEFENDANT—APPELLANT

versus

Musammat PALI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—Appellate Court, whether can set aside decree which has not been appealed against—Civil Procedure Code (Act V of 1908), O. XLI, r. 33.

A Court cannot in the course of the decision of an appeal from one decree set aside a decree which dismisses a separate suit and has not been appealed against [p. 884, col. 2]

P. sued *G.* to recover possession of certain land previously sold by her to the defendant, alleging fraud and undue influence. With regard to the same sale three other suits were also brought, one by a

GOBIND RAM *v.* PALI.

collateral of the last male holder for a declaration to protect her reversionary rights and two by rival pre-emptors. The first Court gave *P.* a decree and dismissed the other three suits *G.* appealed, while the plaintiffs in the other suits did not prefer any appeal. In the course of the appeal *P.* and *G.* put in a compromise, according to which *G.* was to obtain half the land on payment of a certain sum of money. Thereupon the District Judge added the plaintiffs in the other three suits and ordered that those suits be re-opened and re-tried. *G.* preferred a second appeal:

Held, that the order of the District Judge was incorrect and that the suits could not be re-opened.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 1st February 1918, varying that of the Subordinate Judge, 2nd Class, Hoshiarpur, dated the 9th October 1917, decreeing the suit in favour of *Musammat* Pali, plaintiff, with costs and dismissing the remaining plaintiffs' suit without costs.

Lala *Fakir Chand*, for the Appellant.

Lala *Jagan Nath* and Mr. *Behari Lal*, for the Respondents.

JUDGMENT.—*Musammat* Pali, widow of Mutsaddi, sold the land in suit to Gobind Ram on the 14th of May 1915 for Rs. 1,990. Four suits were subsequently brought

(1) by *Musammat* Pali, who sued to recover possession, alleging fraud and undue influence;

(2) by *Musammat* Surasti, daughter of a collateral of Mutsaddi, who sued for a declaration to protect her reversionary rights, alleging want of consideration and necessity;

(3) by Asa Ram, who sued to pre-empt; and

(4) by Durga and Dheru, who also sued to pre-empt.

The first Court gave *Musammat* Pali a decree and dismissed the other three suits. The plaintiffs who were unsuccessful in the first Court did not appeal and so the decrees dismissing their suits became final. Against the decree obtained by *Musammat* Pali Gobind Ram preferred an appeal to the District Judge. Then Gobind Ram and *Musammat* Pali put in a compromise, according to which Gobind Ram was to pay *Musammat* Pali Rs. 1,990 and take half the land. On this the learned District Judge remarked that as the other plaintiffs had had their suits dismissed merely because *Musammat* Pali had been given a decree, their cases should be re opened now that *Musammat* Pali had compromised with Gobind Ram. He accordingly added them as parties to the appeal brought by Gobind Ram and then, passing a decree as between *Musammat* Pali and Gobind Ram in the terms of the compromise, ordered that the three suits brought by *Musammat* Surasti, Asa Ram and Durga and Dheru should be re opened and retried by the lower Court, these plaintiffs being allowed to amend their plaints so as to meet the new circumstances introduced by the compromise. Gobind Ram appeals.

I think the course adopted by the learned District Judge is quite incorrect. Had Gobind Ram's appeal succeeded on the merits, I do not see that this would have been any good ground for re-opening the other three suits. *Musammat* Surasti, Asa Ram and Durga must have been aware that it was open to Gobind Ram to appeal against the decree obtained by *Musammat* Pali and that that decree might be reversed or modified by the Appellate Court. Therefore, if they wished to be on the safe side, they should have appealed merely as a matter of precaution. I am unaware of any provision of law which enables a Court in the course of the decision of an appeal from one decree to set aside the decree which dismisses a separate suit and which has not been appealed against. If *Musammat* Surasti, Asa Ram and Durga have any remedy now open to them, I think it must be by way of fresh separate suits, though I cannot, of course, attempt to offer any opinion as to whether any fresh suits will lie. The learned District Judge says in his order:—

"The compromise read with the original sale deed will be regarded as a new contract between *Musammat* Pali and Gobind Ram." As to this I can only say that it would be premature at this stage to decide any issue likely to arise in any future suits which may or may not be brought.

I accept this appeal and while upholding the decree of the lower Appellate Court passed in terms of the compromise between *Musammat* Pali and Gobind Ram, I reverse so much of the learned District Judge's order as re opens the three suits in which *Musammat* Surasti, Asa Ram and Durga and Dheru were plaintiffs. The order of the first Court dismissing these three suits will stand. The circumstances are peculiar and I pass no order as to costs in this Court. *Musammat* Surasti, Asa Ram and Durga and Dheru will bear their own costs in the District Judge's Court, and as ordered by the first Court, they will also bear their own costs in that Court.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1534 OF 1916.

January 22, 1919.

Present:—Mr. Justice Greaves and Mr. Justice Panton.

SARADINDU MUKHERJEE—DEFENDANT—APPELLANT

versus

CHARU CHANDRA DUTT AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Religious trust—Bequest in favour of idol to be established, validity of—Bona fide *purchaser for value of trust property, position of.*

Bequests to an idol to be established in future are not invalid in Hindu Law. [p. 886, col. 1.]

In dealing with property impressed with a trust for religious purposes no question of *bona fide* purchaser for value arises. [p. 886, col. 1.]

Appeal against the decree of the Additional District Judge, 24 Pergannas, dated the 5th August 1915, modifying that of the Subordinate Judge, 2nd Court of that district, dated the 9th April 1914.

Dr. *Dwarka Nath Mitter* and Babu *Khitish Chandra Chakraverty*, for the Appellants.

Babus *Ram Chandra Majumdar* and *Dwijendra Nath Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant against the decision of the Additional District Judge of the 24-Pergannas, dated the 5th August 1915, modifying the decision of the Subordinate Judge of Alipur, dated the 9th April 1914.

It is necessary to state before dealing with the contentions raised by the appellant a few material facts. On the 29th January 1907 one Suresh Chandra Ganguly made his Will and thereby, *inter alia*, dedicated the bulk of his properties to an idol which he might thereafter establish or which might be established after his death at Benares. In his Will he made provision for the five sons of his two daughters named Keshab, Gopal, Bankim, Khetra and Mritunjoy. Suresh died on the 7th February 1907, and on the 19th November 1907 Probate of his Will was granted to Satis Chandra Sen, the executor named in the Will. Satis died on the 30th January 1908 and Keshab, one of the five grandsons, commenced a suit in 1908 for the construction of his grandfather's Will, for the administration of the estate so far as necessary and for partition. In that suit it was held in accordance with the law as it then stood, that the gift under the testator's Will to an idol to be established thereafter was not a valid gift in Hindu Law, and accordingly on the 5th September 1908 a preliminary decree for partition was passed. On the 15th July 1908 prior to that decree two of the grandsons, Keshab and Bankim, mortgaged to one Sukhilal for Rs. 3,500 their shares in their grandfather's estate, which in accordance with the construction of the Will which had been declared consisted *inter alia* of the property which the testator had dedicated for the purpose of the idol to be established at Benares. On the 29th September 1908 Keshab and Bankim mortgaged their shares to one Nagendra Nath Mitter for Rs. 6,000, the mortgage of Sukhilal being paid off out of the mortgage money. In August 1909, the decision of the Full Bench* was promulgated which declared that bequests to an idol to be established in future were not invalid in Hindu Law. On the 27th September 1909 Nagendra Nath Mitter assigned his mortgage to one Harendra Nath Mukherjee, who was the father of the appellant. On the 25th February 1910 the suit for partition was withdrawn in view of the decision of the Full Bench of August 1909. On the 15th May 1908 Government published a notification for the acquisition of $15\frac{1}{2}$ *cottas* of land which formed part of the testator's estate. The award was published on the 7th August 1908 awarding 1/5th of the compensation money to Gopal, testator's grandson, 2/5ths to the other grandsons, Khetra and Mritunjoy, and the remaining 2/5ths to Keshab and Bankim.

Harendra obtained a decree upon his mortgage and on the 18th March 1910, he attached 2/5ths share in the compensation money belonging to Keshab and Bankim in accordance with the award which amounted to Rs. 2,163, and shortly after Harendra withdrew this sum. On the 19th May 1910 administration *de bonis non* of the testator's estate was granted to the present plaintiff. There was an appeal but the grant was confirmed on appeal.

*See *Bhupati Nath Smrititirtho* v. *Ram Lal Mitra*, 3 Ind. Cas. 612; 37 C. 128; 14 C. W. N. 18; 10 C. L. J. 355 (F. B.)—*Ed.*

KALLAN v. MOHAMMAD MIR.

On the 7th August 1912, Harendra commenced a suit to enforce payment of the balance due to him under the mortgage, and it was held in that suit that the mortgage-debt was realizable from the amount bequeathed to the mortgagees, Bankim and Keshab, under their grandfather's Will. On the 17th March 1913 the present suit was instituted by the plaintiff to recover the sum of Rs. 2,163 from the defendants, being the money withdrawn by their father under the attachment of the 18th March 1910.

Three points are urged before us on appeal. *First*, it is said that the original mortgagee and his assignees had no notice of the *debutter* character of the estate when the original mortgage was entered into. *Secondly*, it is said that as the law stood at the date of the mortgage the mortgage was a good mortgage and was of secular and not of *debutter* property, and *thirdly*, it is urged that the plaintiff had no cause of action against the present defendants as Harendra's heirs, as Harendra obtained the sum of Rs. 2,163 not from the testator's estate but from Bankim and Keshab, and it is said that the plaintiff's cause of action, if any, is against the *cestui que trust* under the Will of Suresh. *Lastly*, it was urged that this is not a case of trust money which is ear-marked and which can be recovered.

So far as the first contention is concerned, it seems to us that there is nothing in this. No question of *bona fide* purchaser for value or any similar question arises. By the Will of Suresh such portion of his estate as was dedicated to the idol to be established at Benares was impressed with a trust for that purpose.

Then so far as the second point is concerned, the learned Vakil for the appellant does not really contest that the effect of the Full Bench decision was not to make a new law but was to declare the law as it stood and has always stood, and so far as the third contention is concerned and also the last contention to which I have referred, it appears to us that on the 18th March 1910 when the sum of money was withdrawn by Harendra, this was money to the knowledge of all the world, by virtue of the decision of the Full Bench, impressed with a trust for religious purposes.

Under these circumstances we think that the decision of the Additional District Judge was correct and this appeal fails and must be dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 566 OF 1919.

November 12, 1919.

Present:—Mr. Justice Bevan Petman.

KALLAN—DEFENDANT—APPELLANT

versus

Mir MOHAMMAD MIR AND OTHERS—PLAINTIFFS AND *Syed* MUZAFFAR ALI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, Expl. VI—Suit on behalf of community in respect of a public right—Parties interested, subsequent suit by—Matter directly and substantially in issue—Res judicata.

Plaintiff sued on behalf of himself and the Muhammadan community for a declaration to the effect that the land sold by defendant No. 1 to defendant No. 2 was *waqf* and that the sale-deed was null and void. It appeared that in 1888 plaintiff on behalf of himself and the Muhammadan community had brought a similar suit against defendant No. 1 and one *I*:

Held, (1) that Explanation VI to section 11 of the Civil Procedure Code was applicable to the case and it could not be contended that the parties to the two suits were not the same; [p. 887, col. 2]

(2) that the question whether the area in dispute was *waqf* or not was directly and substantially in issue in the earlier suits, and having been adjudicated upon could not be re-opened. [p. 888, col. 2.]

Narain Das v. *Faiz Shah*, 157 P. R. 1889, distinguished.

Second appeal from the decree of the District Judge, Delhi, dated the 22nd December 1918, affirming that of the Subordinate Judge, 2nd Class, Delhi, dated the 1st June 1918, decreeing the plaintiffs' claim.

Messrs. *W. B. O'Connor*, *Cooper* and *Badr-ud Din Kureshi*, for the Appellant.

Lala *Moti Sagar*, R. S., and Dr. *Mohammad Iqbal*, for the Respondents.

JUDGMENT.—This judgment will cover Appeals Nos. 563, 627, and 623 of 1919. Appeal Nos. 566 and 627 arise out of a

suit, No. 74 of 1917, and are separate appeals by two defendants. Suit No. 74 of 1917 was by S. Mohammad Mir and others on behalf of the Mohammadan community against Muzaffar Ali Khan and Kallan, the present appellants, for a declaration that two sales by Muzaffar Ali Khan to Kallan were void on the ground that the land sold was part of a graveyard and was *waqf*.

The suit originally related to three sales and was valued at Rs. 1,200 but, apparently, to enable the plaintiffs to avail themselves of the plea of *res judicata* one sale was abandoned and the plaint was amended and limited to two sales, whereby the value of the suit was reduced to Rs. 750.

Appeal No. 623 arises out of Suit No. 129 of 1917 which was instituted by S. Mohammad Mir on behalf of himself and the Mohammadan community against Muzaffar Ali Khan alone. This suit was for an injunction restraining the defendant from doing any acts against the interests of the Mohammadans in the graveyard either by alienating the land, building thereon or otherwise.

In Suit No 74 the case for the plaintiffs was that the land sold by Muzaffar Ali Khan was part of a larger area of 43,620 square yards which was *waqf* and which consisted of a *dargah*, or shrine, and land attached to it which was a graveyard. The defence was that the whole of this area was not *waqf* property, that some 2,000 square yards of land was *waqf* property and that the remainder was the private property of Muzaffar Ali Khan, of which he had already sold part, and that the portion sold to Kallan was his private property.

On the 30th May 1917 in the course of the proceedings Muzaffar Ali Khan made an important statement, in which he admitted that the area in dispute was 43,620 square yards. He also alleged that originally he had been owner of the whole land but that part of it had become a graveyard and urged that no one could be buried in the land without his permission and without payment or purchase.

He also admitted that the whole of the land which was in dispute was shown in the revenue papers in 1863 as Government land.

The first Court decided both suits in favour of the plaintiffs, on the ground that the matter was *res judicata* by virtue of a suit, No. 46 of 1888. The defendants appealed in both the cases, which appeals were dismissed by the lower Appellate Court, that Court agreeing with the decision of the first Court. The defendants, therefore, now appeal to this Court.

The only point for decision is whether the two suits are barred by *res judicata* as found by the lower Courts. For this purpose it is necessary to compare Suit No. 46 of 1888 with the present suits. In the 1888 suit the parties were S. Mohammad Mir on behalf of himself and the Mohammadan community against Ibrahim Ali and Muzaffar Ali Khan, whilst in Suit No. 74 of 1917 the parties are S. Mohammad Mir and three others on behalf of the Mohammadan community plaintiffs and Muzaffar Ali Khan and Kallan defendants. In Suit No. 129 of 1917 S. Mohammad Mir on behalf of himself and the Mohammadan community is the plaintiff and Muzaffar Ali Khan the defendant. Mr. Muharram Ali Chishti on behalf of Muzaffar Ali Khan urges that inasmuch as the parties are not the same, section 11, Civil Procedure Code, is not applicable but this contention is untenable. Kallan is a purchaser from Muzaffar Ali Khan and explanation 6 to section 11, Civil Procedure Code, also makes the point clear. I, therefore, overrule this contention.

The facts in the 1888 suit were that the defendant Ibrahim Ali had purchased a part of the graveyard from Muzaffar Ali Khan and had buried his wife there and had also enclosed with a wall certain existing graves and that the construction of that wall had injured other graves, including that of the father of the plaintiff. The case for the plaintiff was that the *dargah*, with the land attached to it, on which there were a large number of graves and which, including the shrines, measured 11 *bighas*, 1 *biswas*, was *waqf* property and that Muzaffar Ali Khan had no right to sell any portion of it and that Ibrahim Ali had no right to do the acts complained of. The defendant Muzaffar Ali

Khan pleaded that he was the *mutwalli* of the *dargah*, that the land connected with the *dargah* and used as a cemetery was not *waqf*, that the land had been gifted by the Emperor Jahangir to his ancestors and that from the time of the gift it had remained the property, and in possession, of his family, that he had the right to alienate the property for the purposes and safety of the tombs only and not for any dwelling purposes and that in accordance with the usage prevalent in other cemeteries in Delhi land measuring $2\frac{1}{4}$ yards *by* $1\frac{1}{2}$ yards was sold by him at the rate of Rs. 40 to persons desiring to bury their dead.

The first issue in the suit was "whether the land of the cemetery of the *dargah* where lies the disputed place is *waqf* or private property." The Court decided the first issue in favour of the plaintiff and held that the *dargah* including cemetry, etc., *i.e.*, the whole area of 11 *bighas* 11 *biswas* was *waqf* property. The first issue in Suit No. 74 of 1917 is:—"Is the land in dispute (*i. e.*, the whole 43,620 yards) a *qabristan* and was expressly made *waqf* for the purpose." Issue No. 2 is:—"Is the land wholly or partially *waqf* by reason of its being used as *qabristan* for the public, and if partially, how much." The Suits Nos. 74 and 129 were practically consolidated and these were the issues in both of those suits. It is urged by both Mr. O'Connor for Kallan and Mr. Moharram Ali Chishti for Mazaffar Ali Khan that the areas in dispute in the 1888 suit and in the present suit are not shown to be identical and whereas the actual area of 1888 was a plot of 21 feet *by* 22 feet, in Suit No. 74 of 1917 the two plots make a total of 300 square yards. Now the suit in 1888 related to *khasra* No. 399 measuring 11 *bighas* 11 *biswas* and a *gosha* of 14 *biswas*, making a total of 12 *bighas* 3 *biswas*; and the settlement papers, which were then produced, show that it is one large plot including a *dargah* or shrine and a *masjid*.

In his application in the present suits the plaintiff asks for a map to be prepared of *khasra* No. 399 by the *qanungo*. Both parties had maps prepared of the total area in dispute, and Muzaffar Ali Khan admitted in Court that the plan of the plaintiff agreed with his plan in general form and outlines. Muzaffar Ali Khan also admitted, as I have already pointed out, that the area in dispute had been entered in the revenue papers in 1866 as Government property. This is *khasra* No. 399. There is, in my opinion, no doubt whatever that the issue in the 1888 case and in the present cases with regard to the total area claimed by the plaintiff as *waqf* is the same and that the specific plots now sold were included in the first issue in the 1888 case. We have now to see whether the decision of the issues with regard to the total area being *waqf* or not was directly and substantially in issue in all these suits or whether the matter arose only incidentally In my opinion the matter whether this total area was *waqf* or not is directly and substantially in issue in the present cases and was directly and substantially in issue in the 1888 case. It was necessary to decide this point before the rights of the parties with regard to the smaller areas actually in suit could be ascertained and settled. Mr. Muharram Ali Chishti has referred me to a number of rulings, some of which have been dealt with in *Babu Lal* v. *Hari Bukhsh* (1) and some are not in point. It is unnecessary to deal with each and all of them. *Narain Das* v. *Faiz Shah* (2) relied on by him is clearly against him. It is doubtful whether the appellants can take the objection that the property in the former and the present suits is different. This was not specifically urged in the lower Courts in the sense that the total areas dealt with were not the same. The other requirements of section 11, Civil Procedure Code, have been complied with. The Court which tried the 1888 suit was competent to try the subsequent suit and the decision on issue No. 1 in the 1888 suit was upheld on appeal.

In his reply Mr. Muharram Ali Chishti has endeavoured to raise a new point for the first time to the effect that the injunction in so far as it restrains building cannot be *res judicata*, but this matter cannot be gone into at this stage.

For the above reasons I dismiss all three appeals with costs.

Appeal dismissed.

(1) 41 Ind. Cas. 479; 13 P. R. 1916; 122 P. W. R. 1917.

(2) 157 P. R. 1889 (F. B.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECTION 115 APPLICATION No. 117 OF 1919.

September 12, 1919.

Present:—Mr. Lyle, A. J. C.

JAGAR NATH SINGH—PLAINTIFF—APPLICANT

versus

MUSAI SINGH—DEFENDANT—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 73, applicability of, to breaches of contract concerning immovable property —Damages, measure of.

Though the illustrations to section 73 of the Contract Act refer mainly to breaches of contract with regard to movables, there is nothing in the wording of the section itself which would indicate that it is not applicable to contracts dealing with immovable property. A party who suffers from any such breach is entitled to recover from the party responsible for the breach compensation for any loss or damage caused to him thereby which naturally arises in the usual course of things from such breach.

Application against the order of the Sub-Judge, Partabgarh, dated the 23rd July 1919, reversing that of the Munsif, Kunda, dated the 7th April 1919.

Mr. *Basudeo Lal*, for the Applicant.

Mr. *B. B. Chandra*, for the Opposite Party.

JUDGMENT.—The defendant-opposite party executed three mortgage-deeds in favour of the plaintiff-applicant on the 6th of July 1918 and received a sum of Rs. 198 from the plaintiff-applicant. The mortgages were usufructuary, but the defendant failed to have the mortgage-deeds registered or to put the plaintiff-applicant in possession. On these allegations the plaintiff brought a suit for the return of the money advanced to the defendant with interest thereon.

The Court of first instance decreed the plaintiff's claim but the lower Appellate Court dismissed it. Both the Courts held that the defendant had received the sum of Rs. 198 from the plaintiff, but the lower Appellate Court held that under the terms of the mortgage-deeds the defendant was not personally liable to pay the money advanced. Against the decision of the learned Subordinate Judge this application has been made in revision.

It is quite clear that the learned Subordinate Judge has gone wrong in discussing the question whether the terms of the mortgage-deeds are such as to render the defendant personally liable for payment of the money advanced. The plaintiff's case was that the mortgages failed altogether, as the defendant had not got the deeds registered as he ought to have done and had not put the plaintiff in possession. The plaintiff claimed in effect that the defendant had broken his contract and that, therefore, he (the plaintiff) was entitled to a refund of the money which he had paid to the defendant. The learned Pleader for the applicant has relied on section 65 of the Indian Contract Act, but it seems to me that that section is in no way applicable to the present case as the plaintiff could by a suit have compelled the defendant to have the mortgage deeds registered and to give him possession of the property in accordance with the terms of the agreement. The case is, in my opinion, governed by section 73 of the Indian Contract Act. The defendant has broken his contract to give the plaintiff a valid mortgage and to place him in possession of the mortgaged property, and the plaintiff, who has suffered by such breach, is, therefore, entitled to receive from the defendant who has broken the contract, compensation for any loss or damage caused to him thereby which naturally arose in the usual course of things from such breach. He is at least entitled to recover from the defendant the money which he has paid to him in pursuance of the terms of the agreement. Though the illustrations to section 73 of the Indian Contract Act refer mainly to breach of contract with regard to movables, there is nothing in the wording of the section itself which would indicate that it is not applicable to contracts dealing with immovable property: *Nagardas Saubhagyadas* v. *Ahmedkhan* (1) and *Ranchhod Bhawan* v. *Manmohandas Ramji* (2).

The application is, therefore, allowed, the decree of the lower Appellate Court is set aside and the decree of the Court of first instance is restored. The applicant will get his costs in all Courts from the opposite party.

Application allowed.

(1) 21 B. 175 at p. 183.
(2) 9 Bom. L. R. 1087; 32 B. 165.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No 78 OF 1918.

May 29, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Cuming.

RAMSASI ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BOLAI LAL SEAL AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES, BEJOY LAL SEAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Injunction in respect of land, suit for—Pleadings—Boundaries of land in dispute to be clearly defined—Issues, definite—Court, duty of.

In cases where an injunction is sought to restrain the defendant from erecting buildings on land alleged to belong to the plaintiff, it is essential that the boundaries of the land should be given in order to assist the Court to find out what is actually in dispute and against what portion of the land the injunction is sought to be effected. A map ought to be attached to the plaint, and vague descriptions of the boundary ought not to be accepted [p. 891, col. 2]

In such cases it is desirable that issues should be so framed that the Court may understand the actual points arising for its determination, and it ought not to be left open to the parties to raise equivocal, ambiguous and evasive issues [p. 891, col 2]

Appeal against the decree of the District Judge, Hooghly, dated the 4th of September 1917, affirming that of the Subordinate Judge, Howrah, dated the 19th of March 1914.

Babus *Ram Chandra Mozumdar* and *Monmotha Nath Pal*, for the Appellants.

Babus *Sib Chandra Palit*, *Khitish Chandra Chakerbutty* and *Fanchanon Ghose*, for the Respondents.

Babu *Biraj Mohan Mozumdar*, for the Deputy Registrar.

JUDGMENT.—This suit is for a declaration that the defendant No. 1 had no transferable Kaimi right to the disputed land or any right to construct buildings thereon and that the defendant No. 4 had not acquired any right to construct buildings thereon by the purchase of the leasehold rights said to have been created by defendants Nos. 2 and 3. The plaintiffs also prayed for permanent and *ad interim* injunctions.

The plaintiffs are the proprietors of certain lands bearing Touzi Nos. 3994 and 3994A. Their case is that within that Mahal there is a Thika Garkaimi Jama of Rs. 92-11-5 recorded in the plaintiffs' *sheristu* in the name of late Hara Chandra Lahiri, that out of the said lands a certain quantity was acquired by the Government and that the disputed land is said to be 7 *bighas* described in Schedule Gas appertaining to this Jama. It is upon these allegations that the plaintiffs sought relief in this suit.

Several issues were raised, and it is noticeable that although it was suggested at one stage that these 7 *bighas* of land might have formed part of certain other lands belonging to the plaintiffs, yet there was no distinct issue raised with regard to that matter before the trial Court. The learned Subordinate Judge referred to issue No. 6 and said that it appeared to him to have been drawn up in an alternative form, "which had been characterized in several decisions of this Court to be erroneous and misleading," and he said that the proper issue was whether the land in dispute was included within the plaintiffs' alleged Jama in the name of Hara Chandra Lahiri, as to which the plaintiffs sought a declaration of the character referred to already, namely, that it was a Thika Garkaimi or temporary Jama. That was really the issue which was accepted and decided. The learned Subordinate Judge came to the conclusion that it was for the plaintiffs to show that any portion of the disputed land was within this Jama and that they had failed to show that it was. He also went into the question of the character of the Jama, although having regard to his findings he felt that it was unnecessary to do so. He held that this Jama which stood in the name of Hara Chandra Lahiri originally stood in the name of Krishna Sundari Dasi. As to when it came into existence he was unable to ascertain. That it certainly did exist before 1848 was the conclusion he had arrived at; and he said that probably it came into existence somewhere in 1820 or 1833. He says that the river receded about a century ago and lands were formed. Then there was the usual scramble by the neighbouring landlords and the Government also stepped in. Litigation followed and settlements were made by the Government. The settlement took place in 1845 and the Touzis above mentioned were formed by which the plaintiffs became the Malik. In the Settlement Rubakari in connection with these Touzis reference is made to this Jama, which was

found to be in the possession of Krishna Sundari Dasi. A Kabuliyat was taken from her in August 1846. That Kabuliyat does not moreover seem to have been the final document as sanction from the Board was expected at that time and, therefore, the terms of that Kabuliyat were not considered by the learned Subordinate Judge as of any importance. It appears that a little time thereafter Hara Chandra Lahiri acquired this Jama by virtue of a Kobala executed by this lady. He was recognised as the rightful purchaser of the Jama by the superior proprietors. He thereafter mortgaged it to certain people. It was then sold at the instance of the mortgagees and a lady of the name of Rasamoye Dasi purchased it. She was the Benamdar of a well-known Calcutta Zemindar named Moti Lal Seal. From the time it came into her possession it has descended to the successors, the Seals, generation after generation, and it was now in the hands of the 4th generation. The learned Subordinate Judge has found that during this time there was unmistakable recognition of the heritable, alienable and transmissible character of this Jama. He also found that the rent was a fixed rent, and regard being had also to much litigation arising out of land acquisition proceedings and rent suits, he came to the conclusion that the Jama was a Kaimi Jama.

In appeal the learned Judge has practically arrived at the same conclusions. He holds that the plaintiffs have not succeeded in proving that the land described in Schedule Ga or any portion of it is included within the Jama which was in the name of Hara Chandra Lahiri, and in addition to the facts found by the Subordinate Judge he also relies upon the fact that substantial structures were raised on this land which was surrounded by walls and that houses were erected without any opposition from the landlords. Upon these findings the conclusion that the lower Courts have arrived at must be upheld.

It has been argued before us, however, that another point arose in connection with this case which has not been considered, namely, that the 7 *bighas* in dispute or at any rate some portion of it may not belong to the Jama in the name of Hara Chandra Lahiri, but may appertain to the *mal* lands of the plaintiffs in the Touzi above mentioned. That case was never made before this. In these cases it is absolutely essential that the boundaries should be clearly given in order to help the Court to find out what is actually in dispute and against what portion the injunction is sought to be effected. A map ought to be attached to the plaint. Vague descriptions of the boundary, such as 'land in the possession of the plaintiff or land in the possession of the defendant," ought not be accepted. It is also very desirable the issues should so be framed that the Court may understand the actual points arising for its determination, and it ought not to be left open to the parties to raise equivocal, ambiguous and evasive issues which one frequently finds raised in trials of this character. It is the duty of the Court to settle the issues and render them clear. We are unable to change the character of the suit now and start an enquiry as to whether the plaintiffs would have been entitled if they had claimed any right to the disputed land as belonging to their own *mal* lands. We were asked to give them leave to withdraw the present suit with liberty to institute a fresh suit. We do not think we can accede to this request at this stage. If they have any claim that the land is land really belonging to them as *mal* land but does not appertain to this Jama, it may be that they will be able to pursue their remedies. With regard to that we do not desire to express our opinion having regard to the findings, which are clearly expressed and correctly decided.

This appeal is dismissed with costs.

Appeal dismissed.

MATA DIN *v.* KEWAL.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 9 OF 1919.

July 16, 1919.

Present :—Pandit Kanhaiya Lal, J. C.

MATA DIN—PLAINTIFF—APPELLANT

versus

KEWAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Sale—Mortgage, whether sale—Stringency of terms, effect of—Appeal, second—Finding that transaction is not sale, whether can be disturbed.

The onerous character of a mortgage does not necessarily lead to an inference that a sale was clothed in the form of a mortgage to defeat pre-emption.

The stringency of the terms of the mortgage coupled with other evidence adduced may justify a conclusion that the mortgage was used as a cloak, but if the Court competent to express an opinion on the evidence, in the light of the probability suggested by the stringency of the terms, expresses an opinion adverse to the pre-emptor, its finding cannot be disturbed in second appeal.

Appeal against the decree of the District Judge, Lucknow, dated the 23rd October 1918, setting aside that of the Subordinate Judge, Barabanki, dated the 31st March 1918.

The Hon'ble Mr. *Gokaran Nath Misra*, for the Appellant.

Mr. *A. B. Sen*, for Respondents Nos. 1 and 2.

Mr. *S. N. Sinha*, for Respondents Nos. 3 to 5.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The question for consideration is whether a transaction clothed in the form of a usufructuary mortgage for Rs. 2,500 and a deed of further charge for Rs. 1,900 re-payable after 15 years were really a transaction of sale or a transaction of mortgage.

The Court of first instance found that a sale was intended, relying both on the evidence adduced and the stringency of some of the terms contained in those deeds. The lower Appellate Court, however, took a different view. Its finding was that the evidence produced by the plaintiff to show that a sale was really intended could not be trusted and that the stringency of the terms was not enough to justify an inference that the transaction was really one of sale.

As pointed out in *Badri Singh* v. *Ohandika*

BIBI SAIRAH *v.* GOLAB KUAR.

Singh (1) and *Majida Bibi* v. *Fazl Karim* (2), the onerous character of a mortgage does not necessarily lead to an inference that a sale was clothed in the form of a mortgage to defeat pre emption. The stringency of the terms coupled with the other evidence adduced in the case may justify a conclusion that the mortgage was used as a cloak, but if the Court which is competent to express an opinion on the evidence in the light of the probability suggested by the stringency of the terms expresses an opinion which is adverse to the pre-emptor, its finding cannot be disturbed in second appeal.

The learned Counsel who appears for the plaintiff-appellant urges that the lower Appellate Court excluded the stringency of the terms completely from its consideration. But what the lower Appellate Court said was that the mere fact that the deeds contained stringent terms to which the mortgagor had agreed was not enough to prove that the transaction was not a mortgage but a sale. It referred to the evidence of Mazhar Ali, one of the marginal witnesses to the mortgage deed, who stated that the term of redemption was originally fixed at 25 years but was subsequently reduced to 15 years at the request of the mortgagor. The inference which the lower Appellate Court drew from that fact was that the transaction was really intended to be one of mortgage. There is no reason for interfering with the finding arrived at by the lower Appellate Court.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 14 Ind. Cas. 8; 15 O. C. 1.
(2) 19 Ind. Cas. 679; 16 O. C. 9.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 401 OF 1918.

July 29, 1919.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

BIBI SAIRAH—PLAINTIFF—APPELLANT

versus

Musammat GOLAB KUAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 14—Civil Procedure Code (Act V of 1908), s. 24, O. XXI, r. 63—Suit

BIBI SAIRAH v. GULAB KUAR.

instituted in wrong Court—Transfer of suit—Time spent in prosecution in wrong Court, whether can be allowed—Jurisdiction, want of, effect of—Suit to set aside order dismissing objection—Burden of proof—Proof, quantum *of*.

Where a suit is undervalued and as a consequence of the undervaluation is instituted in a Court which would not have had jurisdiction to entertain it had it been correctly valued, the time spent in prosecuting the suit in such Court cannot, under section 14 of the Limitation Act, be allowed in computing the period of limitation applicable to the suit. [p 896, col. 1.]

An order for the transfer of a suit from one Court to another under section 24 of the Civil Procedure Code cannot be made unless the suit has been brought in a Court having jurisdiction. [p. 895, col. 2.]

A suit under Order XXI, rule 63, of the Civil Procedure Code, in which a transferee from the judgment-debtor seeks to establish his title to the property transferred, is in effect a suit to set aside an order passed under rule 58 of the Order and, therefore, the onus lies upon the person relying upon the deed of transfer not merely to prove that it was properly executed and that consideration passed but that the document is really what it purports to be and is not merely a colourable transaction. [p. 897, col. 1.]

The burden is not discharged by merely pointing to the innocent appearance of the instrument under which the plaintiff claims; he must show that the instrument is as good as it looks The defendant is not bound to show that the transaction is colourable. [p. 897, col. 2.]

Appeal from a decision of the Officiating District Judge, Muzafferpur, dated the 24th September 1917.

Messrs. *Fukhruddin* and *P. Banerjee*, for the Appellant.

Mr. *Rai Guru Saran Prasad*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal by the plaintiff Bibi Sairah against a decision of the Officiating District Judge of Muzafferpur, dated the 24th September 1917, in which, overruling the decision of the Subordinate Judge, he dismissed the plaintiff's suit for a declaration.

The plaintiff brought the present suit under the provisions of Order XXI, rule 63, of the Civil Procedure Code, claiming a declaration from the Court that she was the owner in possession of certain property specified in the plaint, and that it never belonged to the defendant 2nd party, and that the defendants 1st party had no right at all to attach and sell the property in execution of a decree which they had obtained against the defendant 2nd party.

Two questions, and two questions only, have been raised in this appeal, one relating to limitation and the other relating to the validity of the transfer of the property in suit made by the plaintiff's husband, who is the defendant 2nd party, at a time when the defendants 1st party had obtained a decree against her husband. In order to understand how the questions for consideration arose, it is necessary to state shortly what the facts are.

In February 1908 the defendants 1st party, whom it will be convenient to refer to as the decree holders, obtained a decree against the defendant 2nd party, who is the husband, as I have already stated, of the plaintiff, for a sum of, in round figures, Rs. 38,000. In the year 1909 execution proceedings under that decree were instituted by the decree-holders. These were opposed by the judgment debtor, the defendant 2nd party, who petitioned to set aside the decree and the execution was stayed pending the hearing of his petition, but, on the 28th September 1910, his objection was disallowed. It appears from the record that the decree was partly executed against the judgment debtor, the defendant 2nd party, and, sometime in the year 1912, further execution proceedings were taken out by the decree-holders and certain properties, which are the subject of the present appeal, were attached and advertised for sale. Previously to that, on the 24th November 1910, the judgment-debtor transferred to the plaintiff under a *baimokasa* deed the property in suit which, at that time, belonged to him and the consideration for the transfer was stated to be the release by the transferee of her husband's obligation to her to pay deferred dower to the extent of the value of the property, which was valued at Rs. 5,000. On the 19th April 1913 the plaintiff filed objections to the execution proceeding, under Order XXI, rule 58, of the Civil Procedure Code, claiming that the property which had been attached had been transferred to her and was in her possession and was not subject to attachment by the defendants 1st party in their suit against her husband. This objection was rejected by the Subordinate Judge, on the ground that the transfer was fabricated in order to defraud the creditors of the judgment-debtor. Thereupon, on the 10th June 1913,

rather less than two months later, the plaintiff instituted the present suit in the Munsif's Court at Muzaffarpur.

In that suit she valued the property, for purposes of jurisdiction, at a sum of Rs. 1,500, and not at a sum of Rs. 5,000, which was the value put upon it in the *baimokasa* deed under which she claimed to have acquired the property. The Munsif at Muzaffarpur, at that date, had jurisdiction to try suits up to the value of Rs. 2,000 and, therefore, if the valuation of the suit was properly given in the plaint there can be no doubt that the suit was properly instituted in the Munsif's Court. But, shortly after the institution of the suit, it appears that the Munsif was transferred and there was no other Munsif at Muzaffarpur who had jurisdiction to try a suit of a value of over Rs. 1,000. Accordingly, the case was transferred from the Munsif's Court to that of the Subordinate Judge, by order of the District Judge, on the ground that the Munsif's successor had no jurisdiction to try suits of a value over Rs. 1,000. That order of the District Judge was made in compliance with the provisions of section 24 of the Civil Procedure Code.

After the case had been transferred to the Court of the Subordinate Judge, a question arose between the plaintiff and the defendants 1st party as to the real value of the property. It appears from the order passed on that occasion, dated the 2nd July 1914, by the Subordinate Judge that the dispute between the parties was really relative to a question of Court-fees, the plaintiff contending that the value of the property was Rs. 1,500 and the defendants contending, apparently, that it was of the value stated in the *baimokasa* deed, *viz.*, Rs, 5,000. The view that the Subordinate Judge took, so far as the Court fees stamp was concerned, was that, in any case, whether it was Rs. 1,500 or Rs. 5,000, the stamp was sufficient and he made this order:—

"In this case the plaint was stamped with a Court-fee stamp of Rs. 10 only in value. The case reported as *Phul Kumari* v. *Ghanshyam Misra* (1) supports this view. I, therefore, hold that the plaint has been properly valued."

It appears to me, reading this order and referring to the case of *Phul Kumari* v. *Ghanshyam Misra* (1), that the only question which the Subordinate Judge was concerning himself with was, whether the proper Court fee had been paid, and when he states, "I, therefore, hold that the plaint has been properly valued", I cannot help feeling that what he intended to say was that so far as the Court fee was concerned, it did not matter whether the valuation was Rs. 1,500 or Rs. 5,000. However that might be, it appears that upon the same day the plaintiff herself applied to amend the plaint by altering the value from Rs. 1,500, as originally stated, to Rs. 5,000 and the plaint was amended accordingly. That was on the 2nd July 1914. After the plaint had been amended, the Subordinate Judge, on the 8th July 1914, returned it to the plaintiff for refiling it in the proper Court, he being of opinion that a suit valued at Rs. 5,000 could not have been filed in the Court of the Munsif and, therefore, it ought to be refiled in the Court of the Subordinate Judge so as to grant jurisdiction. The reason given by the Subordinate Judge was that the Court in which the plaint was originally filed had no jurisdiction to try the case.

The defendant 2nd party, the husband of the plaintiff, as might be expected, put in no written statement to the suit, but the decree-holders contended, by their written statement, first of all, that the suit was barred by limitation and, secondly, that the transfer to the plaintiff by her husband of the property in suit was not a *bona fide* and valid transaction but merely colourable, and that, in any event, the *baimokasa* deed was executed by the husband in order to defeat and delay his creditors within the provisions of section 53 of the Transfer of Property Act.

When the case came for trial before the Subordinate Judge, the issues framed were as follows:—

(1) Whether the deed of *baimokasa* is a *bona fide* and valid transaction? Whether it was executed in order to defeat and defraud creditors as stated by the defendants?

(2) Is the suit barred by limitation?

It will be observed that the first issue is really divided into two separate questions. The first part goes to the validity of the

(1) 35 C. 202; 12 C. W. N. 169; 7 C. L. J. 36; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22.

transaction. The second goes to the question whether or not it is voidable at the option of the creditors who have been defeated or delayed thereby, and the case appears to have been fought and tried and determined on those lines. The Subordinate Judge decided both the first and the second issues in favour of the plaintiff and granted her a decree.

The District Judge, on appeal, differed with him on both points. He came to the conclusion that the suit was barred by limitation, that the document of transfer relied upon by the plaintiff was not a *bona fide* document, and that the plaintiff was never really in possession of the property. He also came to the conclusion on the evidence that, in any event, the transfer was meant to keep the defendants and the other creditors at a safe distance and to defeat and delay them. From this decision the plaintiff has appealed to this Court.

She contends that the learned District Judge was wrong on both points which he decided against her. It will be convenient to deal with the question of limitation first. The period in which a suit under Order XXI, rule 63, of the Civil Procedure Code, may be instituted is one year from the time when the objection in execution is decided against the plaintiff, and if the suit was properly instituted in the first instance, that is to say, on the 10th June 1913, when the plaint was filed in the Court of the Munsif at Muzafferpur, then it was clearly within time. If, however, the suit was instituted before a Court which had no jurisdiction to try it, then the time of institution must be taken as the 8th July 1914, which is clearly more than a year after the date when the objection in execution under Order XXI, rule 58 of the Civil Procedure Code, was decided against the plaintiff. The question, therefore, is whether the learned District Judge was right in coming to the conclusion, as he did, that the suit was instituted in a Court which had no jurisdiction to try it. It is not disputed now that the value of the subject-matter of the suit was Rs. 5,000, and it is not disputed that the plaintiff cannot, by undervaluing the suit, proceed in a Court which has not jurisdiction to try such suit if valued at the proper amount, and if, in fact, it should turn out, as it has now been admitted, that the value was Rs. 5,000 and not Rs. 1,500, the plaintiff cannot, by valuing it at Rs. 1,500, be heard to say that the suit was properly instituted in the first instance. It is contended, however, that by reason of the transfer made by the District Judge when the Munsif before whom the suit was originally instituted was transferred, any defect there might be in the initial want of jurisdiction in the Court before which the suit was instituted was cured, and that, the case having once got before the Subordinate Judge, it was of no moment whether the value was Rs. 1,500 or Rs. 5,000 because the Subordinate Judge had jurisdiction to try a suit of either value. It has been decided by their Lordships of the Privy Council in the case of *Ledgard* v *Bull* (2) that an order for the transfer of a suit from one Court to another under section 25 of the Civil Procedure Code cannot be made unless the suit has been brought in a Court having jurisdiction. That was under section 25 of the old Code, which is now equivalent to section 24 of the present Code. In that case, it is true, the Court in which the suit was instituted had no jurisdiction whatever over the subject-matter, and we have been asked to distinguish that case from the present on the ground that, in the present instance, there is jurisdiction in the Munsif's Court over the subject-matter of the suit upto, at all events, the value of Rs. 1,500. I cannot accept this argument, because I can see no difference in principle between a case where a Court has no jurisdiction over the subject-matter and a case where a Court has no jurisdiction over subject-matter valued at over a certain amount. The subject-matter of the suit in this case is property worth Rs. 5,000. The Court of the Munsif had no jurisdiction whatever to try the case and it seems to me, once a limit is placed upon the pecuniary valuation of the property which may be the subject of a suit in a certain Court, that you cannot say that the Court has any jurisdiction in regard to

(2) 13 I. A. 134; 9 A. 191; 4 Sar. P. C. J. 741.

property of a value over and above that limit. If that is so, it would appear to follow from the decision of their Lordships in the case of *Ledgard* v. *Bull* (2) that the District Judge had no jurisdiction to transfer the case under section 24 of the Civil Procedure Code so as to confer jurisdiction upon the Munsif's successor or substitute, in this case substitute, because his successor had not jurisdiction to try a case of over Rs. 1,000.

The next point which was mentioned but not really pressed was that the plaintiff should be allowed under section 14 of the Limitation Act to deduct the time which was occupied in prosecuting the suit instituted in the Munsif's Court from the period of limitation. The short answer to this is, that the District Judge has found, as a fact, that the plaintiff was not acting in good faith in valuing the property at Rs. 1,500 and in instituting her suit and prosecuting it in the Munsif's Court, and, in support of his finding, he relied upon section 2, clause 7, of the Limitation Act, which provides that nothing shall be deemed to be done in good faith which is not done with due care and caution. As he was satisfied that due care and caution had not been exercised on the part of the plaintiff in this case but, rather, that she deliberately valued her suit at Rs. 1,500 in order to bring it before the Munsif as the Subordinate Judge had already dismissed her objection under Order XXI, rule 58, he thought that there were no merits to enable him to come to the conclusion that she had been acting in good faith. He found as a fact that it was not a *bona fide* mistake and that section 14 of the Limitation Act had no application to the circumstances of the case. In these circumstances, I have come to the conclusion that the learned District Judge was right in holding that the suit was barred by limitation, and that is sufficient to dispose of this case.

The other question, however, was argued before us at some length, and I think it is desirable to state, shortly, the conclusions at which I have arrived on that question. It was contended, in the first instance, that the learned District Judge, in arriving at his conclusions of fact, had not taken into consideration certain features of the evidence which had been dealt with by the Subordinate Judge. The principal feature, and practically the only feature, which it is claimed the District Judge did not deal with specifically in his judgment was the fact, which was referred to in the judgment of the Subordinate Judge, that the defendant 2nd party, the judgment-debtor in this case, had paid off a decree held by another party for Rs 15,000, and had also paid off a sum of Rs. 20,000 due under the decree of the defendants 1st party, the decree holders, and it was in evidence that he was still in possession of property which yielded an income of Rs. 6,000 and, therefore, it could not be argued that he had no means to re-pay the defendants 1st party. It is quite true that the District Judge does not appear to refer specifically to this portion of the evidence relied upon by the Judge of the trial Court, but it cannot be supposed that the reasons which actuated the Subordinate Judge were not present to the mind of the District Judge at the time he gave his judgment, nor is it, in my opinion, necessary that he should deal in detail with the whole of the reasons which induced the Subordinate Judge to arrive at the conclusions of fact at which he did. The learned District Judge goes through the main features of the case very carefully, weighs them, and, for reasons which cannot now be impugned, he comes to the conclusion that the document in question relied upon by the plaintiff was not a *bona fide* document and, further, that there was no evidence to satisfy him that the plaintiff ever was in possession of the property at all; in other words, that her husband remained in possession of the property and that the so-called deed of *baimokasa* had not been intended to be acted upon at all. He further came to the conclusion that the object of this transaction was to defeat and delay the creditors.

The second argument adduced on behalf of the appellant on this part of the case was, that the learned Judge had wrongly placed the onus upon the appellant of proving, not only the actual fact of transfer and consideration paid, but the further fact that the deed in question was really what it purported to be, that is to say, a *bona fide* transaction meant to pass the property. It was contended that, once the transaction had been proved and the fact that the

transfer was for good consideration, the onus lay upon the persons impugning that deed to prove that it was not a *bona fide* transaction, and for this contention the case of *Suba Bibi* v. *Balgobind Das* (3) was relied upon. The facts of that case were certainly somewhat similar to the present and the onus there of proving that the document relied upon was not a *bona fide* valid transaction was placed upon the defendant in the suit. But, although in ordinary cases I think it may be accepted that when once a transfer is proved and the passing of consideration shown, the onus then lies upon the person impugning the document to prove that it is not a valid and *bona fide* transaction, still, in the present case, the suit is one brought under Order XXI, rule 63, of the Civil Procedure Code, which is in effect, as pointed out in the case of *Jamahar Kumari Bibi* v. *Askaran Boid* (4), a suit to set aside an order passed under Order XXI, rule 58, and, therefore, the onus lies upon the person relying upon the deed of transfer, not merely to prove that it was properly executed and that consideration passed, but that the document is really what it purports to be and is not merely a colourable transaction. This question was not specifically dealt with by the learned Judges who decided the case of *Suba Bibi* v. *Balgobind Das* (3) and the incidents attaching to a suit under Order XXI, rule 63, in so far as they affect the burden of proof, do not appear to have been considered in that judgment. But, in the case, I have just referred to, of *Jamahar Kumari Bibi* v. *Askaran Boid* (4), this very question was raised and discussed and determined. A Full Bench of the Calcutta High Court, consisting of Sir Lawrence Jenkins, C. J., Woodroffe and Mookerjee, JJ., three distinguished Judges of that Court, having considered this question as to the onus of proof in a suit, such as the present suit, brought under Order XXI, rule 63, came to the conclusion that in a suit to set aside an order made adversely to the plaintiff on a claim to property preferred by her in execution proceedings, on the ground that the property belongs to her in her own right and not as a *benamidar* for the judgment-debtor, the onus is on her to show affirmatively that not only the ostensible but the real title also is in her. The burden cast on her is not discharged by merely pointing to the innocent appearance of the instruments under which she claims; she must show that they are as good as they look. The defendant is not to make out that they are colourable. That is a decision of three Judges of the Calcutta High Court in which this very question was discussed and determined, and I see no reason for differing from the conclusions therein arrived at. Accepting the ruling laid down there, as I do, it seems to me that the learned District Judge was perfectly right in holding, as he did, that the onus lay upon the plaintiff to prove not merely the execution of the document and the passing of consideration but also the further fact that the document was, to use the language of Sir Lawrence Jenkins, "as good as it looked."

The next point which was raised by the appellant was that in a suit of this nature it was not competent to the defendant to set up, as a weapon of defence, section 53 of the Transfer of Property Act, and that, until they had taken proper proceedings in a Court of competent jurisdiction to set aside the transfer, they could not, in a suit of this nature, contend that the transfer was voidable and so defeat the plaintiff's claim, and for that proposition certain decisions of the Madras High Court were relied upon. It is not necessary to refer to them all, but the principal decision which was relied upon was that of *Palaniandi Chetti* v. *Appavu Chettiar* (5). The first part of the head-note which was relied upon by the appellant is this, "In a declaratory suit under Order XXI, rule 63, Civil Procedure Code, by a vendee from the judgment-debtor, the decree-holder cannot plead in defence that the sale was in fraud of creditors and could not prevail over his decree. If the sale was prior to the attachment, the decree-holder must first set aside the sale by a separate suit." But it must be pointed out that the judgment proceeds upon the assumption

(3) 8 A. 176; A. W. N. (1886) 51.
(4) 30 Ind. Cas. 885; 22 C. L. J. 27.
(5) 34 Ind. Cas. 778; 30 M. L. J. 565; 19 M. L. T. 390.

that the transaction in question was a real one and that it effected and was meant to effect a real transfer of the property from the transferor to the transferee, that is to say, that it was not merely a colourable transaction. In the present case, it has been found upon the issues raised that the transfer was not a *bona fide* transfer at all, that the plaintiff in the suit never had possession of the property and that it was not, therefore, a valid transaction and, therefore, the decision arrived at in the case just mentioned does not appear to me to have any application to the facts of the present case.

The result of the findings is, that the *baimokusa* deed in this case is not merely voidable at the option of the creditors, but it is in fact void and only colourable and was never meant to be acted upon, and the mere fact that the transaction was one which was carried out with intent to defeat or delay or defraud creditors does not in itself bring it within the operation of section 53 of the Transfer of Property Act, which contemplates a transfer binding between the parties but voidable only at the option of the persons specified in the section.

For these reasons I have come to the conclusion that this appeal must fail upon both points raised by the appellant and must be dismissed with costs.

FOSTER, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 144 OF 1917.

March 21, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Panton.

JANARDAN SHAHA PODDAR—DEFENDANT No. 1—APPELLANT

versus

RADHA BULLAV SHAHA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Abichalnama *containing recitals of mutual liability, whether acknowledgment—Acknowledgment accompanied by refusal to pay, effect of.*

Where an *abichalnama* between the parties stated that it had become necessary to make an adjustment of accounts and determine the dues and liabilities of each party after examining the account of their business and went on to say that if after examining the accounts and taking all other evidence the arbitrators, either unanimously or by a majority, should decide that any sums were due to or from either of the parties, the parties would be bound to accept the same as their respective dues and liabilities:

Held, that the *abichalnama* contained an acknowledgment that accounts remained unadjusted which the arbitrators were to adjust and could be relied upon as a document constituting an acknowledgment within the meaning of section 19 of the Limitation Act. [p. 900, col. 2; p. 901, col. 1.]

Under section 19 of the Limitation Act it is not necessary that the acknowledgment should be addressed to any particular person and it is a sufficient acknowledgment even if it is accompanied by a refusal to pay. [p. 900, col. 2.]

Appeal against the order of the District Judge, Dacca, dated the 15th February 1917, modifying that of the Subordinate Judge 2nd Court of that district, dated the 29th March 1913, and remanding the case to his Court to be heard as against defendants Nos 1, 3, 4 and 5

Babu *D. L. Kastgir*, for the Appellant.

Dr. *Sarat Chandra Basak* and Babu *Gopal Chandra Das*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for accounts.

The plaintiff and the defendant No. 1 carried on a partnership business from the year 1311. It was closed at the end of 1313, corresponding to April 1907.

The suit was brought on the 8th March 1912, that is more than three years after the dissolution of the partnership. *Prima facie*, the suit was barred by limitation. But the plaintiff relies upon a document called an *abichalnama* as containing an acknowledgment which saves the claim from being barred.

The learned District Judge was of opinion that there was an acknowledgment of liability contained in the document and accordingly held that the suit was not barred. The defendant No. 1 has appealed to this Court.

Now, this *abichalnama* states that the parties (the plaintiff and the defendant) carried on an *ijmali* business from 1311 up to 1313 B. S. and that it had been closed since then. Then it goes on to say: "At present it has become necessary to make an adjustment of accounts and determine the dues and liabilities of each party after

examining the accounts of the said business. As it is thought that it would be very unnecessarily expensive to have the adjustment of accounts effected through Court, we have agreed to have our disputes decided through arbitration and in that view I, Radha Bullav Shaha, and I, Janardan Shaha, appoint you, Shib Chandra Das Podder and Iswar Chandra Poddar and Nitai Chand Poddar, as arbitrators to settle our disputes and determine our respective dues and liabilities after taking evidence and going through the papers.....
.....If you, after examining our said *ijmali karbar* and taking all other evidence, decide either unanimously or by a majority that any sums are due to or from either of us, we will accept the same to be our respective dues or liabilities. Neither of us shall take any objection to the decision arrived at by you unanimously or by a majority and if we do any, the same will be rejected by Court according to law. You shall be competent to pay, out of the four hundred rupees deposited with you by each of us, the amount that will be found by you to be due from either of us upon the adjustment of accounts. If upon making up accounts the arbitrators determine that the sum due from either of us exceeds rupees four hundred deposited by him, then the person to be found so liable should deposit the additional sum with the arbitrators either at the time of making up accounts or within a time to be fixed by the arbitrators. If the arbitrators cannot arrive at any decision about our dues and liabilities from the papers of the *karbar*, they will either unanimously or by a majority determine what is fairly due from either of us and pay the same to the other from the amount deposited by the debtor.

"The arbitrators will decide the matters referred to them and adjust the accounts within three months from the date of registration of this *abichalnama*.....
....."

We think that this document contained an acknowledgment that accounts remained unadjusted which the arbitrators were to adjust. It further appears that each party distinctly agreed that he would have to pay such amount as might be found due from him on adjustment of accounts. There can be no doubt about this, as each party actually deposited a sum of Rs. 400 with the arbitrators, which was to be applied in payment of the debt which the arbitrators might find to be due from one party to the other.

In the case of *Maniram Seth* v. *Seth Rupchand* (1) the Judicial Committee observed as follows: "For the last 5 years the respondent had open and current accounts with the deceased.....There is, therefore, a clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence would be that at that date either of them had a right as against the other to an account. It follows equally that whoever on the account should be shown to be the debtor to the other, was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative, if the balance should be ascertained to be against him .....We have, therefore, the bare question of whether an acknowledgment of liability, if the balance on investigation should turn out to be against the person making the acknowledgment, is sufficient.....Their Lordships can see no reason for drawing any distinction in this respect between the English and the Indian Law. The question is whether a given state of circumstances falls within the natural meaning of a word which is not a word of art, but an ordinary word of the English language, and this question is clear of any extraneous complications imposed by the Statute law of either England or India."

Their Lordships referred to a decision of Lord Justice Mellish in the case of *River Steamer Co., In re, Mitchell's Claim* (2), where that learned Judge laid it down that "an acknowledgment to take the case out of the Statute of Limitation, must be either one from which an absolute promise to pay can be inferred, or secondly, an unconditional promise to pay the specific debt, or thirdly, there must be a conditional promise to pay the debt and evidence

(1) 33 C. 1047; 4 C. L. J. 94 (P. C.); 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165.

(2) (1871) 6 Ch. App. 822; 25 L. T. 319; 19 W. R. 1130.

that the condition has been performed," and observed:—

"An unconditional acknowledgment has always been held to imply a promise to pay because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do. There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled and no qualification of the natural inference that whoever is the creditor shall be paid when the condition is performed by the ascertainment of a balance in favour of the claimant..... .....The Indian Limitation Act, section 19, however, says nothing about a promise to pay and requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition, which is fulfilled, stand upon precisely the same footing."

In the cases of *Prance* v. *Sympson* (3), and *Banner* v. *Berridge* (4), which were referred to in the judgment of their Lordships, similar acknowledgments were held to satisfy the English law on the subject. In the first case it was held that it is not necessary to have an acknowledgment that a debt is actually due, but it is sufficient that there should be an acknowledgment that the account is pending, and a promise to pay the balance if it should be found to be against the accounting party. In the second case it was held that an unqualified admission that there is a pending account between the parties which has to be examined, is an admission from which a promise may be inferred that when the account is settled the balance shall be paid and that such an admission saved limitation.

In the case of *Sitayya* v. *Rangareddi* (5), the decision in which was based upon the two English cases cited above, an acknowledgment of the plaintiff's right to have accounts taken and of the defendant's liability to pay any balance (if such there should be) against him was held to satisfy the requirements of section 19 of the Limitation Act.

It was pointed out in the case of *Maniram Seth* v. *Seth Rupchand* (1) that "the requirements of English law are, if any thing, more, and not less, stringent than those of Indian law."

On behalf of the respondents we have been referred to Halsbury's Laws of England, Volume 19, page 66, where it is stated that a reference to arbitration does not amount to an acknowledgment of the debt. That is so; but on the very same page, it is stated that where there is an acknowledgment that accounts are still pending and have not yet been adjusted, it constitutes an acknowledgment of liability.

The learned Pleader for the opposite party also relied upon the cases of *Jogeshwar Roy* v. *Rai Narain Mitra* (6), *Bollapragada Rama murthy* v. *Thammanna Gopayya* (7) and *Andiappa Chetty* v. *Devarajulu Naidoo* (8). All these cases are distinguishable, as in none of them was there a clear and unqualified acknowledgment (such as there is in the present case) that there were unadjusted accounts and that one party would pay to the other any amount which might be found due from him on adjustment of accounts.

Each case must turn upon the particular terms of the document upon which reliance is placed as constituting the acknowledgment.

In the present case, there was a clear statement that the accounts had to be settled and further that each party would pay to the other any amount which might be found due from him on such adjustment of accounts and for this purpose each party deposited the sum of Rs. 400 with the arbitrators for payment to the other side.

It is to be observed that under section 19 of the Indian Limitation Act, it is not necessary that the acknowledgment should be addressed to any particular person and it is a sufficient acknowledgment even if it be accompanied by a refusal to pay. Here the document satisfied all the conditions of section 19 and we are of opinion that it

(3) (1854) 1 Kay 678; 18 Jur. 929; 69 E. R. 289; 101 R. R. 811.

(4) (1881) 18 Ch. D. 254; 50 L. J. Ch. 630; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.

(5) 10 M. 259.

(6) 31 C. 195; 8 C. W. N. 168.

(7) 35 Ind. Cas. 575; 4 L. W. 48; 20 M. L. T. 129; 31 M. L. J. 231; 40 M. 701.

(8) 12 Ind. Cas 378; 36 M. 68; 21 M. L. J. 1024; 10 M. L. T. 251; (1911) 2 M. W. N. 225.

constitutes an acknowledgment within the meaning of section 19 of the Limitation Act.

That being so, the appeal must be dismissed with costs, one gold *mohur*.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM MADRAS HIGH COURT.

June 20, 1919.

Present :—Viscount Cave, Lord Philimore, Sir John Edge, and Mr. Ameer Ali.

N. VARADA PILLAI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JEEVARATHNAMMAL—DEFENDANT—RESPONDENT.

Adverse possession—Gift by joint owners—Petition to Collector for mutation of names, whether evidence of gift—Possession of donee, nature of—Evidence Act (I of 1872), s. 91—Hindu Law—Will, construction of—Widow, estate taken by.

P., who died in 1867, executed a Will, clause 3 of which was in the following terms: "I have given my half share in Kariamangalam *mitta* to my wife, Nayar Alangarammal, *alias* Thayarammal, on account of her maintenance and other absolute use. She is at liberty to enjoy the same with powers of alienation by sale, etc" and by clause 4 he gave his property, in general terms, to the two infant sons of his eldest brother. The plaintiffs, the sons of the two foregoing, brought the present suit to establish their title to a moiety of the *mitta* or estate, and claimed, in the alternative, as persons entitled to succeed on the death of the testator's widow *A*, which occurred in 1912, to her property not disposed of during her lifetime or by her Will, that the moiety in question was undisposed of at her death and vested in them as her heirs.

The whole *mitta* originally belonged to the testator and his brother, and on the latter's death in 1879 his share became vested in his widow *R. A.* and *R*, the owners of the *mitta*, joined in a petition to the Collector in 1895 reciting that they had given away the *mitta* to *D.*, the daughter of *R*, and prayed that the *mitta* be transferred accordingly, and this was done. The defendant, the daughter of *D.*, contended that in consequence of this, the moiety passed to *D.* and through her to the defendant and that the estate having been in the possession of *D*, and herself after *D*'s death for upwards of 12 years, the plaintiffs' suit was barred by the rule of adverse possession:

Held, (1) that clause 3 of the Will gave an absolute interest in the moiety to the testator's wife, and that the 4th clause operated upon the remaining property only, and that on the death of *P.* his moiety of the *mitta* vested in his widow *A.* absolutely; [p. 902, col. 1.]

(2) that during the lifetime of *R* the possession of *D.* was adverse as against both *A.* and *R*, that when on the death of *R.* in 1901 *D.* became entitled to a moiety of the property, the character of her possession of the other moiety as against *A.* was not changed, and as there had been an ouster of *A.* before the death of *R* which continued after her death, the possession of *D.* was adverse to *A* throughout, and that consequently the suit must fail; [p. 904, col. 1.]

(3) that having regard to section 91 of the Evidence Act, although the petition of 1895 to the Collector and the change of names in the register were not admissible to prove a gift, they could be referred to as explaining the nature and character of the possession thenceforth held by *D.*, as leading to the inference that the receipt of the rents by *D.* was a receipt in the character of donee and owner of the land and, therefore, in her own right and not as a trustee or manager for her mother and aunt. [p. 903, col. 2.]

Appeal against the judgment and decree of the High Court of Madras, (Coutts Trotter and Srinivasa Aiyangar, JJ.), reported as 22 Ind. Cas. 111, in Civil Appeal No. 327 of 1913, against the decree of the District Court, Chingleput, in Original Suit No. 51 of 1912.

Messrs. *De Gruyther*, *K. C.*, and *K. Brown*, for the Appellants.

Messrs. *Christie*, *K. C.*, and *Ingram*, for the Respondent.

JUDGMENT.

VISCOUNT CAVE.—This is an appeal by the plaintiffs from a decree of the High Court of Madras, dated the 19th November 1915, reversing a decree of the District Court of Chingleput, dated the 11th August 1913, and dismissing the suit.

The suit was brought to establish the title of the plaintiffs to a moiety of a *mitta* or estate situated about thirty miles from Madras and known as the *mitta* of Kariamangalam. The *mitta* at one time belonged to Narayanasami Pillai, an ancestor of the parties, and on his death it passed to his three sons as members of a joint family. In the year 1845 a partition took place, under the terms of which the eldest son relinquished all interest in the *mitta*, which thereupon became vested in the two younger sons, Gopala Krishna Pillai and Parthasarathi Pillai, in equal shares. No question arises as to the share of Gopala Krishna; but it is material to state that, on his death in the year 1879, his share became vested in his widow, Rajammal, and

that he left issue one child only, a daughter named Duraisani.

Parthasarathi died in the year 1867, having made a Will upon which a question of construction arises. Clause 3 of the Will was in the following terms :—

"I have given my half share in Kariamangalam *mitta* to my wife, Nayar Alangarammal, *alias*, Thayarammal, on account of her maintenance and other absolute use. She is at liberty to enjoy the same with powers of alienation by sale, etc."

By clause 4 of the Will the testator gave his property (in general terms) to the two infant sons of his eldest brother, who are now represented by their sons, the plaintiffs. The plaintiffs contend that the effect of the Will was to vest the moiety in question in the testator's wife, Alangarammal, for her life only, and that on her death (which occurred in the year 1912) it passed under clause 4 to the plaintiffs ; but it was held both in the District Court and in the High Court that clause 3 gave an absolute interest in the moiety to the testator's wife, and that the fourth clause operated upon the remaining property only. Their Lordships agree with this construction of the Will; and they accordingly hold that, on the death of Parthasarathi, his moiety of the *mitta* vested in his widow, Alangarammal, absolutely.

But the plaintiffs have an alternative claim. It appears that they were the persons entitled to succeed on the death of Alangarammal to her property not disposed of during her lifetime or by her Will, and they contend that the moiety in question was in fact undisposed of at the death of Alangarammal, and accordingly vested in them as her heirs. The defendant, on the other hand, contends that, in consequence of certain events which happened during the lifetime of Alangarammal, the moiety in question passed to Duraisani, and through her to her daughter, the defendant, and accordingly that the plaintiffs have no right thereto. These events must now be stated.

On the 10th October 1895, Rajammal and Alangarammal, who were then the registered owners of the two moieties of the *mitta*, presented a petition to the Collector, whereby, after reciting that they had, on the 8th October 1895, given away the two villages constituting the *mitta* as *stridhanam* to Duraisani, *alias* Alamelu, they prayed that orders might be passed for transferring the villages into her name. The petition concluded: "The said Alamelu-ammal shall hold and enjoy them with power to alienate them by way of gift, mortgage, sale, etc." Duraisani on the same date also presented a petition to the Collector reciting the gift of the villages to her on the 8th October 1895, and requesting that they should be transferred into her name. The Collector accordingly on the 8th May 1896 registered the *mitta* in the name of Duraisani.

It was not contended before the Board that the above transactions effected a valid gift of the property to Duraisani ; for such a gift must, under section 123 of the Transfer of Property Act, be made by registered deed. Nor, having regard to section 91 of the Evidence Act, can the recitals in the petitions be used as evidence of a gift having been made. But the defendant's case is that Duraisani, although she may have acquired no legal title under the transactions referred to, in fact took possession of the property when it was transferred into her name and retained such possession until her death in December 1911, after which date it passed to the defendant as her successor, and accordingly that the plaintiffs' claim is barred by upwards of twelve years' adverse possession. The High Court upheld this contention ; and their Lordships, after considering the evidence, have arrived at the same conclusion.

There was a considerable body of evidence showing that Duraisani was in possession or receipt of the rents and profits of the *mitta* during the period above referred to. At or about the date of the attempted gift, Duraisani, who until then had lived with her husband in Madras, came to live with her mother and her aunt, Alangarammal, in the neighbourhood of the *mitta* and thenceforward spent the greater part of the year with them. From the same date all *pattas* were granted and *muchilikas* taken in the name of Duraisani alone ; and the property was managed by agents appointed by her, who accounted to her for the rents. It was contended on behalf of the plaintiff

that assuming Duraisani to have been in actual possession of the land, she held such possession, not in her own right, but as trustee or manager only for her mother and aunt, and accordingly that her possession was not such adverse possession as to give a title under the Limitation Act; and in support of this contention the plaintiffs relied upon the evidence of a former *manigar* of the estate, who stated that during the life of Rajammal (who died in 1901) he "used to pay collections to her." But the witness in question prefaced his evidence above referred to by the statement that Duraisani "had confidence in Rajammal," and he stated emphatically that Duraisani was *zamindarini* from 1896. Having regard to these statements and to the remainder of the evidence in the case, the proper inference appears to be that, if any rents were in fact paid to Rajammal after 1896, they were so paid by the direction of her daughter Duraisani (who lived with her) and in order that they might be applied to the joint household expenses.

The plaintiffs also relied upon the Will of Rajammal dated the 2nd April 1901. By this Will the testatrix referred expressly to the petition of the 10th October 1895 and the subsequent transfer of the two villages into the name of Duraisani, and added: "and the above two villages are being enjoyed by the said Duraisani Ammal." The Will then proceeded as follows:—

"My daughter, the said Alameluammal *alias* Duraisani Ammal, shall take the above two villages and shall either amicably or through Court recover and take all the following arrears, jewels, etc., due to me, *viz*, the Zamin Sircar arrears due to me in the said villages up to part Fasli 1305 upon account from the tenants of the said villages, etc."

It was held by the District Judge that these words amounted to a devise of the two villages to Duraisani, and accordingly that they afforded evidence that in the view of the testatrix no beneficial gift had been previously made to her, but the High Court held that there was in fact no devise of the villages. In the absence of the original text of the Will, which was no doubt seen by the Judges in India, their Lordships are unable to say which construction is correct. But even if the devise included the testatrix's interest in the two villages, it would appear to be reasonably clear that the gift was by way of confirmation only and affords no evidence that Duraisani was a trustee of the property. In any case the recitals contained in the Will are strong evidence of the possession of the property by Duraisani.

The plaintiffs also relied upon a draft Will which was prepared for Alangarammal just before her death in 1912, but which has been held by the Courts in India not to have been adopted by her as her Will. This draft Will contained recitals similar to those contained in the Will of Rajammal, and these recitals were followed by a gift of the villages to the defendant, who had then succeeded to the estate of Duraisani. It may be doubted whether any valid argument can be founded upon a draft Will not signed or adopted by the person for whom it was prepared, but in any case the observations which have been made concerning the Will of Rajammal apply to this draft Will also.

It should be added that, although the petition of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani. In other words, although the petitions and order do not amount to a gift of the land, they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of donee and owner of the land, and, therefore, in her own right and not as trustee or manager for her mother and aunt.

Lastly, the plaintiffs put forward the contention that on the death of Rajammal in 901 Duraisani became entitled either under her Will or by succession to her moiety of the *mitta*, and accordingly that as from that date possession of the villages must be deemed to have been held by her as part owner and not adversely. This contention was founded upon the English rule of law, which was abrogated by the Statute 3 and 4 William IV, C. 27, section 12, that the possession of one of several co-parceners' joint tenants or tenants in common is the possession of the others so as to prevent the statutes of limitation from affecting them. Whether this rule is applicable to sharers in an unpartitioned agricultural village in India not

holding their shares as members of a joint family, it is unnecessary for the purposes of the present case to decide: for upon the facts of the case the rule has no application. The limits of the rule were defined in *Culley* v. *Doe d Taylerson* (1) as follows:—

"Generally speaking, one tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of one tenant-in-common is the possession of the other, and to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But, where the claimant, tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the Jury to take into consideration whether they will presume that there has been an ouster: . . . . and, if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his ejectment for entirety."

In the present case, it is plain that during the life of Rajammal the possession of Duraisani was adverse as against both co-owners; and this being so, there is no reason for holding that when on the death of Rajammal she became legally entitled to a moiety of the property, the character of her possession of the other moiety as against Alangarammal was changed. There having been an ouster of Alangarammal before the death of Rajammal, this ouster continued after her death, and the possession of Duraisani was adverse to Alangarammal throughout. This contention, therefore, also fails.

For the above reasons and upon a review of the whole of the evidence their Lordships have arrived at the conclusion that the decision of the High Court is right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

(1) (1840) 11 A. & E. 1008 at p 1014; 3 P. & D. 529; 9 L. J. Q. B. 258; 113 E. R. 697; 52 R. R. 566.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1367 OF 1917.

June 27, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, Kt.

SITANATH SHAH BANIK—JUDGMENT-DEBTOR—APPELLANT

versus

MADAN MOHAN DAS—DECREE-HOLDER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Mortgage, suit on—Preliminary decree, declaring that if sale-proceeds prove insufficient mortgagor shall be liable for balance, nature of—Final decree, whether necessary.

A preliminary decree in a mortgage suit, which provides for sale of the mortgaged property and directs that if the whole amount of the debt is not realised by the sale, the defendant shall be liable for the rest of the claim if legally realisable, is not a composite decree which would enable the holder thereof to proceed against the other properties of the judgment-debtor without a fresh decree obtained under rule 6 of Order XXXIV of the Civil Procedure Code and, therefore, the decree-holder is entitled to apply for a personal decree for the amount of the balance. [p. 905, col. 1.]

Appeal against the decree of the Additional District Judge, Sylhet, dated the 15th July 1916, affirming that of the Munsif, 2nd Court (with special powers) of that place, dated the 21st February 1916.

Babus *Broja Lal Chuckerbutty* and *Probodh Chandra Rai*, for the Appellant.

Babu *Gopal Chandra Dass*, for the Respondents.

JUDGMENT.

HUDA, J.—The facts are shortly these: The plaintiff decree-holder instituted a suit to enforce a mortgage-bond. A decree was passed for the sale of the mortgaged property and there was a further direction that if the whole amount was not realised by the sale of the mortgaged property for the rest of the claim, if legally realisable, the defendant No. 1 would be liable.

It appears that after this decree was obtained and before the mortgaged properties could be sold, a third party brought a suit for a declaration that the mortgaged property could not be sold in execution of the decree and succeeded in getting such a declaration in the presence of the decree-holder and the judgment-debtor. There-

upon the decree-holder applied to proceed against the other properties of the judgment-debtor, but the Court asked him to make an application under Order XXXIV, rule 6. He made such an application, but he was absent when it was taken up for disposal and it was rejected. The decree-holder afterwards made the present application under Order XXXIV, rule 6, and this application has given rise to this appeal, the judgment debtor being the appellant before us.

The points raised are, *first*, that the preliminary decree to which I have already referred was a composite decree which enabled the decree-holder to proceed against the other properties of the judgment-debtor without a fresh decree obtained under Order XXXIV, rule 6, and that, therefore, he is not entitled to a fresh decree, *secondly*, it is argued that the previous application for a decree under Order XXXIV, rule 6, being rejected, the decree-holder cannot make a second application for such a decree.

As regards the second point, it seems to me that this not being a point which is raised in the grounds of appeal we ought not to allow the learned Vakil for the appellant to raise it, and there is another reason why he should not be allowed to raise the point and that is this; several points, and this was one of them, were raised in the lower Appellate Court but were abandoned at the hearing of the appeal. The only question, therefore, which I need consider is the question whether the decree-holder is entitled to a fresh decree. I think he is so entitled. In the first place, the preliminary decree was not a composite decree allowing the decree holder to proceed against the other properties of the judgment debtor. It says that he may proceed if he were legally entitled to do so, thus leaving it for future decision whether the decree-holder was legally entitled to obtain such a decree. It seems to me that although the language of the decree may be somewhat unfortunate, it was intended only to give leave to the decree-holder to apply for a personal decree for the amount of the balance. It has also been pointed out to us by the learned Vakil for the respondent that in the final decree that was passed there was no provision for any personal decree.

I, therefore, think that the decree passed by the Court below is correct and this appeal should be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1799 OF 1917.

October 1, 1919.

Present:—Sir Abdur Rahim, KT., Officiating Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

BEEJU BEE *alias* ZULAIKA BEE AMMAL (DEAD) AND OTHERS—DEFENDANT No. 2 AND LEGAL REPRESENTATIVES OF THE DECEASED 2ND DEFENDANT—APPELLANTS

versus

Syed MOORTHUJA SAHIB AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 and 3 TO 3—RESPONDENTS.

Muhammadan Law—Dower—Widow, lien of, for unpaid dower, nature of—Transferee of lien, position and rights of

A Muhammadan widow, who is lawfully and without force or fraud in possession of her husband's property, is entitled to retain possession of such property as against his other heirs until her dower is satisfied, even though such possession was not obtained with the consent, express or implied, of, or under an agreement with her husband or his other heirs, and such property would not be divided among the heirs until the dower debt is satisfied. [p. 917, col. 1.]

A vendee from a Muhammadan widow in possession of her husband's property for payment of her dower is entitled to retain possession of the property sold to him as against the heirs till the unpaid dower-debt is satisfied, but the sale itself is invalid and not binding on the heirs. [p. 918, col. 2.]

(Authorities reviewed.)

Per *Abdur Rahim, Offg. C. J.*—A Muhammadan widow can transfer a dower-debt as also her right to remain in possession as a means of realising that debt. It may be that she does not acquire all the rights of a mortgagee properly so called by virtue of this lien for instance, she may not be entitled to sue for the sale of the property to realise the debt, or to claim a preference as against an auction-purchaser in execution of a decree passed on a mortgage executed by her husband, but to the limited extent that this right is recognised as security for payment of the dower-debt, there is no

reason why it cannot be passed to a transferee of the dower-debt or transmitted to her heirs. [p. 91[2], col. 1.]

Per *Seshagiri Aiyar, J.*—The right to retain possession and to pay herself out of the proceeds which a Muhammadan widow acquires to realise her dower-debt is not of the same kind as the lien considered in English cases. It is more in the nature of a charge on the property, because the right to pay herself out of the income is incidental to the possession taken by a widow. [p. 920, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, North Arcot, in Appeal Suit No. 156 of 1916, preferred against the decree of the Court of the Principal District Munsif, Vellore, in Original Suit No 502 of 1914.

FACTS.—A Muhammadan widow to whom dower was due was found to be in possession of her husband's property. At the time of the husband's death, the other heirs were all minors (children). She alienated the property in 1906, five years after her husband's death. The question was, whether she had a lien for unpaid dower and whether an alienee could claim the benefit of such lien.

This second appeal coming on for hearing on the 18th July 1918, the Court (Phillips and Kumaraswami Sastri, JJ.) delivered the following

JUDGMENT.—Before disposing of this appeal, it is necessary to have a finding as to whether Mahar was due to 1st defendant on the date of her husband's death and if so, what was its amount. Findings will be returned in six weeks. Time for filing objections is seven days.

In compliance with the order contained in the above judgment, the Subordinate Judge of North Arcot submitted the following

FINDING.—Finding on the issue framed by the High Court and sent down for finding.

2. The issue is

Whether Mahar was due to 1st defendant on the date of her husband's death and, if so, what was its amount.

3. When the 2nd defendant's Vakil proposed to adduce evidence on the issue newly framed by the High Court and sent down for finding, the Vakil for the plaintiff objected to it on the ground that the remand order does not contemplate the taking of fresh evidence and authorise this Court to do so and unless, as provided by Order XLI, rule 25, there is an express direction in the order of remand to admit additional evidence, this Court has no jurisdiction to receive it.

4. It is admitted on both sides that there is no evidence on the record on this issue, which is one of fact, for this Court to merely hear comments on it and record a finding and, therefore, though there is in the order of remand an omission to direct this Court to take down further or fresh evidence, this Court may do so. That even in the absence of such direction, the lower Appellate Court, *i. e.*, the Court to which the new issue is sent down for finding, may receive or record additional or fresh evidence appears clearly from the notes of Mr. Ameer Ali to Order XLI, rule 25, where he has collected and quoted all the authorities on this point. Hence I decided to record the evidence the 2nd defendant proposed to adduce.

5. He examined three witnesses and filed Exhibit III, the marriage register of the plaintiff's father Amin Sahib with plaintiff's mother Amina Bi, who is the 1st defendant. Though she is described in the suit sale-deed as Banu Bi, her proper name, *i. e.*, the name given to her by her parents, is Amina Bi. Amina is only the feminine form of Amin, which is the name of her husband. It was elicited in the evidence of the 1st witness Mahomed Sheriff that it is customary or usual to give a new name to the wife in the family of her husband, if the husband's name also happens to be the same as her name. Defendants' 3rd witness Mahomed Khan, who is the husband of the vendee the 2nd defendant, swears that he negotiated the sale transaction with the pensioned Subadar Mahomed Yusuff (whose son has married the daughter of the 1st defendant the vendor and who also acted as the vendor's agent in the matter of the sale) and was informed by him (the said Subadar) that her name Amina was changed into Banu by her husband after her marriage. In Exhibit III she is described as Amina Bi and daughter of Syed Cassim. This document, which is the original, is produced by the defendants' 1st witness Mahomed Sheriff, who is the present Government Khajee. He has been Khajee for the last 3 years. He succeeded in this office one Abdul Hafiz, who held that office for 18 or 20 years and died. This Abdul Hafiz is the son and successor as Khajee of his father Abdul Wahab. It seems to be the practice sanctioned by

Government of these Khajees to appoint their own Naibs or deputies, who generally attend the Muhammadan marriages and register them and produce them before the Khajee, who either signs or affixes his seal on them and places them in his records. The predecessor-in-office of Abdul Wahab as Khajee was Mahomed Mohidin and the seal on Exhibit III is his seal. Exhibit III is in the handwriting of Abdul Wahab, who was the Naib or deputy of Mahomed Sharif. His handwriting is proved by defendants' 1st witness who has been in his youth a pupil of Abdul Wahab. This witness swears that he obtained Exhibit III from the custody of the widow of Abbul Hafiz, his immediate predecessor-in-office. Owing to disputes between the two widows of Abdul Hafiz he has not obtained possession of the entire records of his office but as occasion arises for production of any document he takes it from her. This document is dated 28th Shaban 1290 Hijiri corresponding to 7th October 1873. It is, therefore, an ancient document and it comes from proper custody and presumably genuine. The Mahar promised to the wife Amina by the husband Amin as stated in Exhibit III is 39 *tolas* of pure gold equal in value to Rs 570 in those days, as a sovereign was then selling at Rs. 10. Its present value is a little over Rs. 700 (*sic*) as the market price of a *tola* of pure gold is Rs. 32 as it is well known to every one. The statement in Exhibit III is also partially confirmed by the defendants' 2nd witness Ali Khan.

6. Mahar is either prompt or deferred. In exceptional cases it is prompt and it is generally deferred. In this case also it must be deferred, as the 1st defendant herself admits in the sale-deed, Exhibit I, that it was due. The plaintiff does not even now disclose or say that it was prompt and paid or that it has been satisfied by his father before his death or by his heirs after his death.

7. My finding, therefore, is that dower or Mahar was due to the 1st defendant on the date of her husband's death and it was 39 *tolas* of pure gold.

8. I may note here that after the 2nd defendant closed his evidence, the plaintiff moved for time to summon his witnesses, and it was refused as the finding is due on the 28th instant.

This second appeal coming on for final hearing on the 22nd April 1919, after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial and having stood over for consideration till the 1st May 1919, the Court (Phillips and Kumaraswami Sastri, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

This second appeal raises two important questions of Muhammadan Law as to which there is a conflict of decisions.

One Syed Amin Sahib died about 19 years ago leaving a widow, two sons (one of whom died before suit) and four daughters. The plaintiff, who is the surviving son of the deceased, was a minor when his father died and he filed this suit about 14 years after his father's death for partition. Meantime the widow, who was in possession of the properties, sold one item of immoveable property left by her husband to the 2nd defendant by a sale-deed, Exhibit I, dated the 10th April 1906 and the vendee has been in possession ever since. The sale deed recites that the property was in the possession of the vendor and was sold for the dower-debt due to her from her husband according to Muhammadan Law, for discharging other debts and for family expenses.

There is no dispute as to the right of the plaintiff to the share claimed. The 2nd defendant claimed exclusive right to the property conveyed by the widow on the ground that the sale was binding on the plaintiff and the other heirs, but on second appeal this position was given up. It is argued on his behalf that on partition (which in this case has to be by sale under the Partition Act owing to the fractional share plaintiff is entitled to) the 2nd defendant as purchaser will not only be entitled to the share of his vendor or widow but also to the dower due to her. It is contended for the plaintiff that the dower has become barred, that the widow had no lien on the estate for her dower as she did not take possession under any agreement with the heirs, that she was to be in possession as security for or in lieu of her dower, and that in any event her right as widow in possession could not be assigned or pass to the purchaser.

We accept the finding of the Subordinate Judge that the sum of Rs. 700 and odd was due to the 1st defendant at the date of her husband's death and still remains unpaid. There is no evidence, nor was it the 1st defend-

ant's case, that on her husband's death she was put in possession of the property (sold by her) under any agreement between herself and other heirs as to her dower. All that appears is that she was entitled to be paid her dower, that she was in possession from the date of her husband's death till she sold the house and that the sale-deed purports to be, *inter alia*, for the purpose of her paying herself the dower.

It has been held that a widow, who lawfully and with the consent, express or implied, of the other heirs of her husband obtains possession of the whole or any part of his estate in satisfaction of or as security for her dower, is entitled to retain such possession till her dower is paid. It is unnecessary to refer to the earlier authorities after the decision of the Privy Council in *Hamira Bibi* v. *Zubaida Bibi* (1).

When, however, there is no such agreement, there has been a conflict of authorities. In *Amani Begam* v. *Muhammad Karimullah* (2) Burkitt, J., after referring to the decision of the Privy Council in *Bebee Bachun* v. *Hamid Hossein* (3), held that a Mohammadan widow, to whom dower is due and who is in lawful possession of her husband's property, is entitled against the co-heirs of the husband to retain possession of the property until the dower debt has been paid, it being immaterial whether this possession was obtained originally with or without the consent of the co-heirs. A similar view was taken by Mookerjee and Teunon, JJ., in *Sabjan Bewa* v. *Ansar ud-din* (4), where the learned Judges after a careful review of the authorities observed: "It cannot be disputed that under the Muhammadan Law when a widow is in possession of the undistributed property of her deceased husband, such possession having been obtained lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled as against the other heirs of her husband to retain such possession until her dower-debt is paid; but she must account to them for the profit received."—They dissent from the decisions in *Tasliman* v. *Kasiman* (5) and *Amanat un nissa* v. *Bashir unnissa* (6), which lay down that an agreement with the widow or the heirs was necessary. A similar view was taken in *Mohammad Sharafat* v. *Wahida Sultan Begum* (7).

A contrary view was taken in *Amanat-un-nissa* v. *Bashir-un nissa* (6) and *Muhammad Karimullah Khan* v. *Amani Begam* (8), where it was held that a widow has no lien if she was not put in possession under an arrangement that she was to be in possession till her dower was paid. The decision in *Muhammad Karimullah Khan* v. *Amani Begam* (8) was an appeal from the judgment of Burkitt, J., in *Amani Begam* v. *Muhammad Karimullah* (2) already referred to. In *Amanat un-nissa* v. *Bashir un-nissa* (6) the learned Judges (Edge, C. J., and Banerji, J.) observe: "So far as we are aware, neither a Mohammadan widow nor any other creditor can give themselves a lien by taking possession, without the consent or authority of the persons entitled: of property to the possession of which those other persons are entitled. If a Muhammadan widow entitled to dower has not obtained lawfully, that is, by contract with her husband, by his putting her into possession, or by her being allowed, with the consent of the heirs, on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs, of property to the possession of which they, and she in respect of her share in the inheritance, are entitled" The above view, which puts a very limited construction on the words "property of which she has lawfully and without force or fraud obtained possession" in the judgment of the Privy Council in *Bebee Bachun* v. *Hamid Hossein* (3), has been criticised at some length by Sir Roland Wilson in his Digest of Anglo-Muhammadan Law at pages 233 to 235. In *Ali Baksh* v. *Alah Dad Khan* (9) the learned Judges were not in favour of the limited interpretation of the word

(1) 36 Ind. Cas. 87; 38 A. 581; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517; 43 I. A. 234 (P. C.).

(2) 16 A. 225; A. W. N. (1894) 52.

(3) 14 M. I A. 377 at p. 383; 17 W. R. 113; 10 B. L. R. 45; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39; 20 E. R. 828.

(4) 9 Ind. Cas. 1031; 38 C. 475 at p. 480; 13 C. L. J. 427.

(5) 6 Ind Cas. 44; 12 C. L. J. 564.

(6) 17 A. 77; A. W. N. (1895) 7.

(7) 28 Ind. Cas. 191; 19 C. W. N. 502; 21 C. L. J. 319.

(8) 17 A. 93; A. W. N. (1895) 16.

(9) 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J. 567.

'lawfully.' Their Lordships of the Privy Council in *Hamira Bibi* v. *Zubaida Bibi* (1), while dealing with the nature of the widow's right to dower, observe : "Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully with the express or implied consent of her husband or his other heirs obtains possession of the whole or part of his estate to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower and this is the only creditor's lien of the Muhammadan Law which has received recognition in British Indian Courts and at this Board." The case proceeded on the finding that there was an agreement whereby the widow was allowed to be in possession by the other heirs to satisfy her claim, and their Lordships were not dealing with a case where she was in possession without any express consent or arrangement. None of the decisions of the Indian Courts as to the nature and extent of the widow's right in respect of dower was referred, and it is doubtful if their Lordships intended in the above passage to lay down that there was no lien unless the widow's possession was in pursuance of an arrangement with the husband or, on his death, of the other heirs.

The next question is as to the right of an alienee of the property from the widow to claim payment of dower due to her in cases when a widow in possession of her husband's property sells or mortgages it.

In *Muzaffar Ali Khan* v. *Farbati* (10) it was held, following *Hadi Ali* v. *Akbar Ali* (11) and *Ali Muhammad Khan* v. *Azizullah Khan* (12), that a Mohammadan widow in possession of immoveable property of her deceased husband in lieu of her dower has no transferable interest in the property, her interest being nothing more than an interest in property restricted in its enjoyment to the owner personally, the transfer of which is prohibited by section 6, clause (*d*) of the Transfer of Property Act. In *Ali Bakhsh* v. *Alah Dad Khan* (9) the right was, however, held to be heritable, entitling her heirs to remain in possession till the dower was paid. Referring to *Ali Muhammad Khan* v. *Azizullah Khan* (12) the learned judges accepted the ruling as correct when the property is transferred and not merely the right to dower. In *Majidmian* v. *Bibi Saheb Jan* (13) it was held that the widow entitled to dower and in possession with the consent of the heirs had a heritable right. If the right is not purely personal and can pass to her heirs, there seems to be no reason why an alienee of the property should not, on the sale being set aside at the instance of one of the heirs as being beyond her competence, stand in the widow's shoes at least to the extent of her claim for dower.

We have not been referred to any decision of the Madras High Court having any bearing on the questions above referred to. As the points raised are of considerable importance, we refer the following questions to a Full Bench :—

1. Is a Mohammadan widow who lawfully enters into or continues to be in possession of her husband's property after his death, but without any agreement with the other heirs as to her dower, entitled to be paid her dower before the property of which she is in possession is divided between her husband's heirs?

2. Has a vendee from her of such property the same right as the widow in respect of the dower due to her in cases where the widow has alienated the properties and the alienation is impeached by the other heirs?

This second appeal came on for hearing, in pursuance of the Order of Reference to a Full Bench on the 27th, 28th August and the 1st September 1919.

Mr. *T. R Venkatrama Sastri* (with him Mr. *M. T. Vaidyanatha Aiyar*), for the Appellants.—Where a Mohamadan widow to whom dower is due enters lawfully into possession of property which belonged to her husband and continues in such possession without objection from other heirs, an agreement by the latter is to be implied and she has a lien. *Hamira Bibi* v. *Zubaida Bibi* (1) on appeal from *Hamira Bibi* v. *Zabaida Bibi* (14). The texts on the point are all collected in *Balund Khan* v. *Musam-*

(10) 29 A. 640; 4 A. L. J. 521; A. W. N. (1907) 221.
(11) 20 A. 262; A. W. N. (1898) 32.
(12) 6 A. 50; A. W. N. (1883) 204.

(13) 30 Ind. Cas. 870; 40 B. 34; 17 Bom. L. R. 770.
(14) 7 Ind. Cas. 497; 33 A. 182; 7 A. L. J. 1025.

mat Janee (15). See also Hamilton's Hidaya, Volume III, pages 161, 162, 509. See also *Bebee Bachun* v. *Hamid Hossein* (3), *Ameer oon-nissa* v. *Moorad-oon-Nissa* (16) (where even the power to alienate is recognised).

[ABDUR RAHIM, OFFG. C. J.—Is she just like any other creditor ?]

With this exception that she is entitled to take possession and retain it in respect of the property. *Janee Khanum* v. *Amatool Fatima* (17) which is upheld in *Woomatool Fatima Begam* v. *Meerunnissa Khanum* (18). See also *Ahmed Hossein* v. *Khodeja* (19), *Bibee Tajim* v. *Syud Wahed Ali* (20).

The only question is whether the entry is 'lawful.' The word has been held to import nothing more than absence of fraud or force, which is the present case. In any case the heirs ought to prove their case. See also *Umatul Mehdi* v. *Kulsum* (21), *Sabjan Bewa* v. *Ansar ud din* (4), *Mohammad Sharafat* v. *Wahida Sultan Begum* (7), *Ramzan Ali Khan* v. *Asghari Begam* (22). See also *Ali Bakhsh* v. *Alah Dad Khan* (9), *Muhammad Karimullah Khan* v. *Amani Begam* (8) and *Amanat un-nissa* v. *Bashir un-nissa* (6) (*per contra*), *Bibi Tasliman* v. *Kasiman* (5) (*per contra*). The widow is not bound to show that her husband or his other heirs consented to her taking possession. But see *Ameer Ammal* v. *Sankaranarayanan Chetty* (23), *Bazayet Hossein* v. *Dooli Chund* (24), *Yasin Khan* v. *Muhammad Yar Khan* (25).

On the second question referred, I submit that the lien has been construed to be in the nature of a security and as the dower-debt is undisputedly heritable and transferable, the security also is. *Ali Bakhsh* v. *Allahdad Khan* (9). It may be that she is incompetent to make a permanent and binding alienation. *Kummur-ool-nissa Begum* v. *Mahomed Hussun* (26). See also *Nawab Mahomed Ameenooddeen Khan* v. *Mozuffer Hossein Khan* (27). The so called 'lien' is a possessory right and possessory rights are transferable. *Sundar* v. *Parbati* (28), followed in *Narayana Row* v. *Dharmachar* (29), *Azizullah Khan* v. *Ahmad Ali Khan* (30). See also *Majidmian* v. *Bibi Saheb Jan* (13). But *Ali Muhammad Khan* v. *Azizullah Khan* (12) takes a different view. *Azizullah Khan* v. *Ahmud Ali Khan* (30) says that the widow's lien is heritable.

[ABDUR RAHIM, OFFG. C. J.—The Muhammadan Law of transfer is very limited.]

But see *Ali Bakhsh* v. *Alah Dad Khan* (9). The right is not a mere personal right, it being of the nature of a security. See also *Basir Ali* v. *Nazir Ali* (31), *Jamna Das* v. *Ramautar Pande* (32). The observations in *Hadi Ali* v. *Akbar Ali* (11) and *Muzaffar Ali Khan* v. *Parbati* (10) are purely *obiter*.

The strict rule of Muhammadan Law being that there can be no administration of the estate of a deceased Muhammadan until all his debts are paid, the right of the heirs to possession of their shares does not arise until the debts are all paid off. Hence it would follow that their consent to the widow's entering into possession of their share also in lieu of dower due is of no legal value, inasmuch as their shares are not in existence and so is unnecessary.

Mr. *T. Narasimha Aiyangar* (with him Mr. *Mir Zynuddin*), for the Respondent :— The Muhammadan Law is clear that either a contract with the husband or the consent of the heirs is necessary before a widow can get a lien for her dower. The consent may, however, be express or implied. *Hamira Bibi* v. *Zubaida Bibi* (1). On the death of a Muhammadan, the estate vests in all his heirs at once in the proportion of their respective shares, subject to the payment of debts. Though the actual division may not be made, the vesting is not delayed. Hence consent is necessary before a lien can attach. See also *Mohammad Husain*

(15) 2 N. W. P. H. C. R. 319 at pp. 332, 333.
(16) 6 M. I. A. 211 at p. 212; 1 Sar. P. C. J. 533; 19 E. R. 79.
(17) 8 W. R. 51.
(18) 9 W. R. 318 at p. 322.
(19) 10 W. R. 369.
(20) 22 W. R. 118.
(21) 35 C. 120; 12 C. W. N. 16; 8 C. L. J. 245.
(22) 6 Ind. Cas. 405; 32 A. 563; 7 A. L. J. 614.
(23) 25 M. 658.
(24) 4 C. 402; 5 I. A. 211 (P. C.); 3 Sar. P. C. J 853.
(25) 19 A. 504; A. W. N. (1897) 135.
(26) 1 Agra H. C. R. 287.
(27) 5 B. L. R. 570; 14 W. R. 5 (P. C.).
(28) 12 A. 51; 16 I. A. 186 (P. C.); 5 Sar. P. C. J. 448.
(29) 26 M. 514.
(30) 7 A. 353; A. W. N. (1885) 54.
(31) 4 Ind. Cas. 462; 13 C. W. N. 153.
(32) 2 Ind. Cas. 460; 31 A. 352; 6 A. L. J. 427.

v. *Bashiran* (33); Macnaghten, page 356.

In the present case the heirs are the mother and children. The latter were minors at the time of their father's death. Hence their consent, either express or implied, was impossible. Hence no lien can attach.

The alienee cannot claim any right. The husband died in 1901. The alienation was in 1903, *i.e*, more than three years after. So the dower-debt was barred. Therefore, the alienee cannot claim anything on account of the dower. Construed too strictly, the lien, if any there was, has never been held to be anything more than heritable. It is not a 'lien' of the kind familiar to English law. It is not transferable. It does not rank on a par with a mortgage. *Ameer Ammal* v. *Sankaranarayanan Chetty* (23), following *Yasin Khan* v. *Muhammad Yar Khan* (25). See also *Barayet Hossein* v. *Dooli Chund* (24). Further the alienation cannot extend even to the widow's share, according to the strict rule contended for, for the alienation would be premature.

Moreover, in order that a lien should attach there should be possession to the exclusion of the other heirs. The mother and children are living together and there is no exclusive possession.

[ABDUR RAHIM, OFFG. C. J.—The question of consent was not before the Privy Council in *Hamira Bibi* v. *Zubaida Bibi* (1), as it was assumed that there was no consent at all.]

It was. See also *Arumugham Chetty* v. *Muthu Koundan* (34), *Vinjanampati Peta Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu* (35), *Rangasami Gounden* v. *Nachiappa Gounden* (36).

Mr. *M. S. Vaidyanatha* replied.

OPINION

ABDUR RAHIM, OFFG. C. J.—The first question asked by this reference is whether a Muhammadan widow, who is lawfully in possession of her husband's property after his death but not by virtue of any agreement with his other heirs, is entitled to retain such possession until the dower due to her has been paid or satisfied before the property in her possession is divided among the heirs.

In the Allahabad and Calcutta High Courts there have been a long series of decisions, some of them conflicting with the others, on the subject of a Mohammadan widow's lien for dower, but in this Court the question is practically bare of authority. There are also four decisions of the Privy Council in this connection, the latest being in the case of *Hamira Bibi* v. *Zubaida Bibi* (1). Our main task is to ascertain whether in the course of their judgment in the last case, the Judicial Committee wanted to confirm the view of the law expounded by the Chief Justice, Sir John Edge, of the Allahabad High Court in *Amanat-un-nissa* v. *Bashir-un-nissa* (6), restricting the lien of the widow to cases where she had entered upon possession in order to satisfy her dower-debt under an agreement with her husband or her husband's other heirs, or the view of the law expounded in *Amani Begam* v. *Muhammad Karimullah* (2), *Ramzan Ali Khan* v. *Asghari Begum* (22) and *Subjan Bewa* v. *Ansar-ud-din* (4), where it was held that the lien of a widow in possession does not depend upon any such agreement but upon the fact of her being in possession of her husband's property for the satisfaction of her dower, provided she obtained possession of the property in question lawfully and without force or fraud.

There is no difficulty as to the interpretation of what their Lordships of the Privy Council actually say in *Hamira Bibi* v. *Zubaida Bibi* (1). The passage runs thus:—"Naturally the idea of payment of interest on the deferred portion of the dower does not enter into the conception of the parties. But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this

(33) 26 Ind Cas. 109; 12 A. L. J. 1141.

(34) 52 Ind. Cas. 525; 37 M. L. J. 166; 9 L. W. 565; (1919) M. W. N. 409; 26 M. L. T. 96; 42 M. 711.

(35) 43 Ind. Cas. 225; 41 M. 136; 22 M. L. T. 334; 33 M. L. J. 519; 6 L. W. 649; (1918) M. W. N. 55.

(36) 50 Ind Cas. 498; 42 M. 523 at p. 536; 36 M. L. J. 498; 17 A. L J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 43 I. A. 72 (P. C.).

is the only creditor's lien of the Muesalman Law which has received recognition in the British Indian Courts and at this Board." In that case, however, the only question for determination before the Judicial Committee was whether the widow in possession was entitled to any interest or compensation in respect of her unpaid dower, and the arguments on either side were concentrated on that point. So far as it appears, the widow's right to remain in possession until her dower was satisfied was not disputed, at any rate, before the Privy Council, and the fact in that case was that she had been allowed by the other heirs to take or remain in possession of the whole estate to satisfy her claim for dower. The cases reported in *Ameer-con-nissa* v. *Moorad-oon-nissa* (16), *Bebee Bachun* v. *Hamid Hossein* (3), *Sabjan Bewa* v. *Ansar-ud din* (4) and *Ramzan Ali Khan* v. *Asghari Begam* (22) were all cited in connection with the point under consideration of the Judicial Committee as to the widow's right to interest or compensation in respect of her unpaid dower, and it seems to be clear from the report that their Lordships' attention was nowhere directed to any question relating to the circumstances under which the widow's right to remain in possession for satisfaction of the dower debt arose. Nor is there anything to show that they wanted to settle the controversy raised in India with respect to this question by the decision in *Amanat un-nissa* v. *Bashir-un-nissa* (5). As I shall presently point out, there is a clear preponderance of decisions in India opposed to the view enunciated in this Allahabad case, but which finds *prima facie* support from the passage in the judgment of the Privy Council above cited, if we were to take it literally and without reference to the question, which the Board was actually called upon to decide. In the absence of anything in that judgment to indicate that their Lordships intended to determine the question whether a Muhammadan widow who obtained possession of her husband's estate lawfully and without force or fraud in lieu of her dower is not entitled to retain her possession until her claim is satisfied, unless she had obtained such possession with the consent of her husband or of his other heirs, we shall not be justified in fastening upon the literal language of their observation, if we found that the view was opposed to Muhammadan Law as expounded in the British Indian Courts in a chain of decisions ranging over half a century with one or two solit exceptions, at least since the case of *Ameer-oon-nissa* v. *Moorad un-nissa* (16), which was decided by the Privy Council in 1855 in 6 Moore's Indian Appeals 211. In that case it was found that the husband did not impignorate the estate by the deed of dower; it was, nevertheless, held that the widow had a lien on her deceased husband's estate as being hypothecated for her dower and could either retain the property to the amount of her dower or alienate part of the estate in satisfaction of the claim. The parties in that case were Sheas and, so far as the widow's right to alienate part of the estate in satisfaction of her claim to dower is concerned, the Shea Law differs to some extent from the Sunnie Law. But the case is of importance, in so far as it appears that the heirs of the husband could not have consented to the widow obtaining possession, or remaining in possession, as they denied her status altogether. Yet it was held that she was entitled to remain in possession of her husband's property for the satisfaction of her dower. In *Janee Khanum* v. *Amatool Fatima* (17), which was a Sunnie case, it was held that a widow in possession of her husband's property, under a claim of dower, had a lien as against his other heirs; as regards money belonging to the estate of her husband she might appropriate it to her claim for dower and as regards other property she was entitled to a lien as security for the dower-debt. In that case the widow had been deprived of her possession by a decree of Court in a suit by the heirs. It was, nevertheless, held that she still retained her lien. The next is a decision of Sir Barnes Peacock, C. J., and Jackson and Macpherson, JJ., in *Woomatool Fatima Begam* v. *Meerunnissa Khanum* (18), which is relied on by the Privy Council in *Hamira Bibi* v. *Zubaida Bibi* (1) in support of the proposition that the widow in possession is entitled to a reasonable interest on the dower-debt or compensation if she is to render an account of the rents and profits. There it was laid down, after a consideration of the authorities on Muhammadan

Law, including the Serjiyah and Macnaghten's Precedents of Marriage, etc., case XXIV, and Macnaghten's Precedents of Debts and Securities, case X, that the widow of a Mussalman in possession of her husband's estate, under a claim of dower, has a lien upon it, as against those entitled as heirs and is entitled to possession of it as against them until her claim for dower is satisfied. This right is not founded on any agreement with her co-heirs, or their consent, or the consent of her husband obtained in his lifetime. This is made specially clear from Macnaghten's case XXIV cited in the judgment. The learned Judges also cite a number of decisions, including the judgment of the Privy Council in *Ameer oon nissa* v. *Moorad-oon-nissa* (16) above referred to. They were quite conscious of the fact that that was a case between Sheas, for they go on to point out that "according to the Shea doctrine, the creditor has power to sell landed property to an amount sufficient to satisfy the dower without recourse to the public authorities;" but, "according to the Sunnie doctrine, the creditor has simply a lien on any land of the debtor, and cannot take them over so as to acquire an absolute title in satisfaction of the dower, without the consent of the heirs, or a decree of Court." This statement of the law clearly negatives the proposition that the consent of the heirs is necessary to create a widow's lien for dower.

In *Ahmed Hossein* v. *Khodeja* (19) Sir Barnes Peacock, C. J., held again, sitting with Dwarkanath Mitter, J., that the widow was entitled to a lien for whatever dower remained due to her and that the heirs could not recover the property so long as any portion of the dower remained unsatisfied. So far as one can gather, he did not rest the widow's right on the fact of her being in possession. In any case that judgment does not in the least suggest that the widow, in order to acquire a valid lien, must have entered into possession with the consent of her husband's heirs. The same deduction is to be made from an earlier judgment of Sir Barnes Peacock reported on the margin of the above case, *viz.*, *Syud Atahur Ali* v. *Altaf Fatima* (37). The case of *Meer Meher Ally* v. *Musammat Amanee* (38) also recognised the Muhammadan widow's lien for dower over the property of which she was in possession, in the sense that the lien must be satisfied like that of any other creditor before the estate is distributed among the heirs, not that she was entitled to any preference over the other creditors.

In the Allahabad High Court the question was fully considered in *Syud Imdad Hossein* v. *Musammat Hosseinee Buksh* (39) printed as an appendix to *Balund Khan* v. *Musammat Janee* (15) and the learned Judges then followed the ruling of Sir Barnes Peacock in *Ahmed Hossein* v. *Khodeja* (19) and also an earlier decision of the Allahabad High Court.

The Judicial Committee considered this question in a case arising among the Sunnies in *Bebee Bachun* v. *Hamid Hossein* (3). There no agreement by the husband to pledge the property for dower was proved and the widow was put in possession of the husband's estate after his death by the Collector inspite of the opposition of the other heirs. Their Lordships did not find it necessary to state whether this right of the widow's lien for dower was a lien strictly so called, although it was so stated in the judgment of Sir Barnes Peacock above referred to, but they say that whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received. They did not say that it was necessary for the widow's right to arise that she should have obtained possession of the property with the consent of or under an agreement with her deceased husband or his heirs; if that were a necessary condition, her claim would not have been sustained upon the facts, though the co heirs did not for a long time after she obtained possession take any steps to dispossess her. It is also significant that they relied on their previous ruling in *Ameer-oon-nissa* v. *Moorad-un-nissa* (16) in support of the law as they enunciated it,

(37) 10 W. R. 370.
(38) 11 W. R. 212.

(39) 2 N. W. P. H. C. R. 327.

Then reverting to the Allahabad High Court, in *Ali Muhammad Khan* v. *Azizullah Khan* (12), this lien was recognised, although the learned Judges were of opinion that it was a personal right and did not pass to the purchaser of the estate from the widow. In *Azizullah Khan* v. *Ahmad Ali Khan* (30) Mahmood, J., held that a Muhammadan widow lawfully in possession of her husband's estate occupied a position analogous to that of a mortgagee, whose possession could not be disturbed until the dower debt had been satisfied and that on the widow's death if the dower remained unsatisfied, her heirs were entitled to succeed her in the possession of the property. Mr. Justice Mahmood required as a condition of validity of the widow's right that she should be lawfully in possession, following in this connection the rulings of the Privy Council and the Allahabad High Court, and not that she should have obtained possession with the consent of her husband's heirs. This was in 1885. In *Amani Begam* v. *Muhammad Karimullah* (2) the law was enunciated to the same effect in a carefully considered judgment upon a review of the more important rulings.

The first clear note of dissent, so far as I can see, was expressed in *Amanat un-nissa* v. *Bashir-un-nissa* (5) referred to above. Edge, C. J., says: So far as we are aware, neither a Muhammadan widow nor any other creditor can give themselves a lien by taking possession, without the consent or the authority of the persons entitled, of property to the possession of which those other persons are entitled. If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed, with the consent of the heirs, on his death to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs, of property to the possession of which they, and she in respect of her share in the inheritance, are entitled. It would be otherwise if the heirs consented to her taking possession in order to acquire a lien." In no other case could the widow's possession be said to have been lawfully obtained within the meaning of the judgment of the Privy Council in *Bebee Bachun* v. *Hamid Hossein* (3). The learned Judges say that their conclusion is supported by the case of *Musammat Wahid un-nissa* v. *Musammat Shubrattun* (40), the decision in which was approved by their Lordships in the case of *Bazayet Hossein* v. *Dooli Chund* (24), and also by the decisions of the Allahabad High Court in *Musammat Meerun* v. *Musammat Najeebun* (41), *Ali Muhammad Khan* v. *Azizullah Khan* (12) and of the Calcutta High Court in *Bibi Mehrun* v. *Musammat Kubeerun* (42). Of these cases the decision in *Bibi Mehrun* v. *Musammat Kubeerun* (42) to some extent bears out the learned Judges. What was actually decided in that case, however, was that according to Muhammadan Law a simple contract for a money payment in lieu of dower did not necessarily give the wife a lien over her husband's property. But it is observed that "if on the death of her husband the heirs allow her to get possession of any of his property, and to hold it in lieu of payment of what may be due to her under the contract, she will have a lien on that as against the heirs." It does not appear that the case of a widow lawfully in possession without the consent of the heirs was specifically before them. The authority they refer to—the decision in *Meer Meher Ally* v. *Musammat Amanee* (38)—only held that a widow having a lien was not entitled to any special charge on the estate or preference of any sort as against the other creditors, and the learned Judges do not profess to lay down the conditions under which the widow's lien arises under the Muhammadan Law. In *Musammat Wahid un nissa* v. *Musammat Shubrattun* (40) the only point which was decided was that a Muhammadan widow had no lien on any specific property of her deceased husband so as to enable her to follow that property, as in the case of a mortgage, into the hands of a *bona fide* purchaser for value from one of the heirs of the husband. Sir Charles Hobhouse, J., who examined the previous decisions at some length, stated their effect in cases where

(40) 6 B. L. R. 54; 14 W. R. 239.
(41) (1867) N. W. P. H. C. R. 335.
(42) 13 W. R. 49.

the widow was in possession in these words: "They are, I think, all of them cases in which dower being admitted to be due, the widow was or had been in possession of the whole estate, and in which the heirs sought to oust the widow without having previously paid the amount of the dower or debt. Now, it seems to me that in such a case under the Muhammadan Law, had it not been the case of a widow especially, but that of any other creditor, such creditor, equally with the widow, would have been entitled to hold over the estate of which he was in possession until his debt had been paid off." Further on, no doubt he gives us his own opinion, founded on Macnaghten's statement of the Muhammadan Law as to mortgages and pawns, that the seizure of the property must be given by the owner and that the consent of the husband or his heirs after his death was necessary for the validity of a lien for dower where the widow is in possession. Loch, J., treating the question entirely from the Muhammadan point of view observes:—"It may be here remarked that the decisions of this Court appear almost invariably to have treated the widow in possession of her husband's property in the light of a mortgagee or pawnee so far as her dower is concerned, and have held that she could not be deprived of possession till her claim for dower is satisfied." He does not say that such possession must have been obtained with the consent of her husband or his heirs. In *Bazayet Hossein* v. *Dooli Chund* (24) Sir Barnes Peacock delivering the judgment of the Judicial Committee approved of the ruling in *Musammat Wahid un nissa* v. *Musammat Shubrattun* (40) on the question for decision before them in these words:—"Their Lordships entirely concur in the view of the law which was laid down in the case cited from the 6th Bengal Law Reports and the other authorities cited, and are of opinion that a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bona fide* purchaser for value to whom it has been alienated by his heir at-law." One cannot presume that he wanted to endorse any statement that where a widow was lawfully in possession of her husband's estate she would not acquire a valid lien unless she had obtained such possession with the consent of her husband or his heirs, for as I have shown, he was himself a party to more than one ruling in which, as Chief Justice of the Calcutta High Court, he had upheld the lien of a Mohammadan widow in possession without requiring that such possession should have been obtained with the consent of her husband or his heirs. The case of *Musammat Meerun* v. *Musammat Naeebun* (41) does contain a *dictum* which bears out the view expounded in *Amanat un nissa* v. *Bashir-un nissa* (6), but I do not find that either the previous decisions or the authorities on Muhammadan Law are discussed there and case No. XXXVII of Macnaghten's Precedents of Marriage, etc., referred to in the judgment only lays down that a widow cannot take possession of her husband's landed property on her own authority in virtue of her claim for dower without a judicial order.

The view of the law stated in *Amanat-un nissa* v. *Bashir un-nissa* (6) was canvassed in that Court in *Ali Bakhsh* v. *Alah Dad Khan* (9) and distinctly disapproved; so also the Calcutta decision in *Sabian Bewa* v. *Ansir ud-din* (4) dissented from that ruling, holding that it was sufficient if the widow entered into possession lawfully and without force or fraud and that it was not necessary that she should have done so under an agreement with her husband or his heirs [see also *Umatul Mehdi* v. *Kulsum* (21)]. The only Arabic treatise on Muhammadan Law to which my attention is drawn as containing a direct *dictum* on this question is Khazinat ul riwayah, chapter on dower; the passage is to this effect:—"The woman is entitled to take the amount of her dower from the estate of her deceased husband without the consent of his heirs, if the estate consists of *dirhams* and *dinars*" (*i.e.*, current coins); "but if it consists of property which needs be sold, so much will be sold as is necessary and her dower will be paid thereout, whether that property has been bequeathed by her husband or not, and she will take it," (*i. e.*, her dower) "without the consent of the heirs." I am not aware that this book has been printed, but it seems to be in vogue in British India as it is relied on in Majmuoa Fatawa of Muhammad Abdul Hye of Lucknow on

this very point. (See page 86, 1882, Lucknow Edition.) I would not have felt justified in basing my opinion solely on this treatise, but I cite the quotation to show that it is in support of the view taken by the Courts in the majority of the cases referred to and also in accord with the principles of Muhammadan Law on the subject.

All the authorities suggest that the Muhammadan widow's lien for dower on property of which she is in possession arises not by virtue of any agreement with her husband or his heirs but by the provisions of Muhammadan Law relating to the administration of a deceased person's estate. That is why it stands on the same footing as any other creditor's lien. If a widow or any other creditor of a deceased Muhammadan acquired the rights of a pledgee or pawnee by reason of being placed in possession of the deceased person's property by the consent of his heirs, then she or he would have a preferential right relatively to the rights of other creditors of the deceased. If it is not as a pledgee, properly so called, that a widow having a claim for dower has a lien over property in her possession, then there can be no necessity under the Muhammadan Law that she should have obtained possession with the consent of the heirs. What is called a widow's lien in this connection is founded on the rule of Muhammadan Law as to the administration of a deceased person's estate, *viz.*, that a creditor who has obtained possession of the property of the deceased debtor should be allowed to continue in possession until the debt is satisfied. Supposing the estate is insolvent, he is not entitled to ask that his debt should be paid in full before the estate is distributed *pro rata* among the other creditors. The right of the widow or of any other creditor similarly situated is no more than this, that the heirs are not entitled to recover the property in their possession until the debt is satisfied, because under the Muhammadan Law the distribution of the estate is postponed till after payment of all debts owing by the deceased, including the dower due to his wife. This principle is laid down in every authoritative text book of Muhammadan law. In the Serjiyah it is stated: "There belong to the property of a person deceased four successive duties to be performed by the Magistrate: First, funeral ceremony and burial, etc.; next, the discharge of his just debts from the whole of his remaining effects; then, the payment of his legacies out of a third of what remains after his debts are paid; and, lastly, the distribution of the residue amongst his successors, etc." See also Macnaghten's Principles of Muhammadan Law, Chapter 1, section 1, paragraph 5. It is upon that principle that case X in Macnaghten's Precedents of Debts and Securities is based. There the question is put: "A man dies being indebted to his wife for her dower. Has she a lien on the personal property left by her husband in satisfaction of such dower in preference to the other heirs?" [See *Woomatool Fatima Begam* v. *Meerunnissa Khanum* (18).] "Answer: "If the other heirs pay the widow the amount of her dower, she has no claim on the property left by her husband, except for her legal share of the inheritance; and if they do not pay her the amount of her dower, she has, in the first instance, *a prior claim, on account of her dower*, on the property left by her husband, whether real or personal. The residue, after her claim is satisfied, will be divided between her and the other heirs, according to their respective shares of inheritance." And in Macnaghten's Precedents of Marriage, etc., Case XXIV, it is said that "there is distinction between money and other property in cases of dower, *viz.*, that the widow is at liberty to take the former description of property over which she has absolute power; but as to the other property, she is entitled to a lien on it as security for the debt, and it does not become her property absolutely without the consent of the heirs or a judicial decree. Where the debt is large and the property is small, the former necessarily absorbs the latter, in spite of any objection urged by the heirs, who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate." The ruling of the Judicial Committee in *Bebee Bachun* v. *Hamid Hossein* (3), however, requires, following a number of rulings of the Indian Courts on this point, that the widow's possession will only be recognised if she obtained it lawfully and without force or fraud. If one may say so, I can quite understand such a limitation, for it is against the policy of the law that possession obtained unlawfully or by use of force or fraud should

be recognised by the Courts, although the limitation is not laid down in so many words in the texts on Muhammadan Law. But to go further and to say that the possession must be taken with the consent of the heirs would be entirely to ignore the principle on which the right of the widow in possession is based. She is also one of the heirs under the Muhammadan Law in addition to her being a creditor to the extent of the dower which remains unpaid. If she peaceably enters into possession, such possession would undoubtedly be lawful by virtue of her position as an heir, if not also as a creditor. Suppose, on the other hand, she entered into possession under a false claim of gift or purchase, that possession might not justify her in claiming a lien for her unpaid dower any more than if she had obtained possession by force.

My answer, therefore, to the first question will be that a Muhammadan widow, who is lawfully, and without force or fraud, in possession of her husband's property, is entitled to retain possession of such property as against his other heirs until her dower is satisfied, even though such possession was not obtained with the consent (express or implied) of, or under an agreement with, her husband or his other heirs, and that such property would not be divided among the heirs until the dower debt is satisfied. In order that the second question, whether a vendee from a Muhammadan widow of the property of which she is in possession in lieu of dower has the same power as she had in respect of the dower due to her, may be answered, we have to consider whether the right of the widow in possession of her husband's property in lieu of her dower to retain such possession until her dower is satisfied is transferable at all or whether it is a purely personal right. There is no express text of Muhammadan Law, so far as one can see, dealing with the point. Macnaghten in the passage already cited speaks of such a right as a security for payment of the dower debt. The rulings of the Courts are almost equally divided. In *Azizullah Khan* v. *Ahmad Ali Khan* (30) Mahmood, J., describes the position of the widow as analagous to that of a mortgagee, while in *Ali Muhammad Khan* v. *Azizullah Khan* (12) it was treated as a personal right and did not pass to a purchaser of the estate from the widow. In the more recent rulings in that Court Chief Justice Edge in *Hadi Ali* v. *Akbar Ali* (11) calls it a purely personal right which did not survive to her heirs; and it is also described in *Muzoffar Ali Khan* v. *Parbati* (10), where they say that such a right is not transferable and is nothing more than an interest in property restricted in its enjoyment to the owner personally; in *Wahid Ali Khan* v. *Tori Ram* (43) it was held to be heritable right and one capable of being transferred. The same appears to be the view taken in *Tahirunnissa* v. *Nawab Hasan* (44). In *Ghulam Ali* v. *Saqir-ul nissa Bibi* (45) it was ruled that the widow's right, though analagous to that of a mortgagee, was not in all respects that of a usufructuary mortgagee so as to preclude her from suing for her dower. In Bombay the view that prevailed is that it is not a mere personal right; it is a substantive right which is heritable and transferable. [See *Majidmian* v. *Bibi Saheb Jan* (13).] In this Court the only question that arose in this connection at all was whether the widow's lien for dower would give her any right as against a purchaser in execution of a decree for sale passed on a mortgage executed by the husband and it was answered in the negative, the learned Judges holding that the lien did not stand on the same footing as that arising from a mortgage. [See *Ameer Ammal* v. *Sankaranarayanan Chetty* (23)] In *Nawab Mahomed Ameenuddeen Khan* v. *Mozuffer Hossein Khan* (27), which was a case from Calcutta, their Lordships of the Privy Council upheld the decree of the High Court which was to this effect, that the heirs of the widow in possession who had succeeded her on her death could not be ousted from possession unless the dower was paid. It must be noted, however, that no objection was taken before the Privy Council to this part of the decree. On principle, the right of the widow to retain possession till the satisfaction of her dower debt must, in my opinion, be held as

(43) 21 Ind. Cas. 91; 35 A. 551; 11 A. L. J. 856.
(44) 3 Ind. Cas. 938; 36 A. 558; 12 A. L. J. 906.
(45) 23 A. 432; A. W. N. (1901) 124.

against the claims of the heirs to be a right capable of descending to her heirs and of being transferred by her along with the right to dower. The law gives her the right not because she is the widow of her deceased husband but in her capacity as one of his creditors. When the widow dies, all her rights of the nature of or in connection with property descend under the Muhammadan Law to her heirs, and there seems to be no reason to make an exception to the rule with respect to this right of heirs, which it may be mentioned would often be a very valuable right. Take the case where the widow has been in possession for more than three years and dies before the dower-debt is satisfied; the heirs would not be able to recover the unsatisfied portion of the dower if the right to retain possession did not descend to them. Similarly, the widow can transfer a dower-debt and I can conceive of no good reason why she should not be able to transfer her right to remain in possession of the property of which she has obtained possession as a means of realising that debt. It may well be that she does not acquire all the rights of a mortgagee properly so called by virtue of this lien. For instance, she may not be entitled to sue for the sale of the property to realise the debt [see *Ghulam Ali* v. *Sagir-ul nissa Bibi* (45)], or to claim preference as against an auction-purchaser in execution of a decree passed on a mortgage executed by her husband. *Ameer Ammal* v. *Sankaranarayanan Chetty* (23). But to the limited extent that this right is recognised as security for payment of the dower-debt, there is no reason why it could not be passed to a transferee of the dower-debt or transmitted to her heirs. It is well settled law [see *Asher* v. *Whitlock* (46), the judgment of the Privy Council in *Sundar* v. *Parbati* (25) and *Ibrahim Rowthen* v. *Sangaram Chetty* (47)] that a person in peaceable possession of land, as against every one but the true owner, has an interest capable of being inherited, devised or conveyed.

Then the next question is:—Has a vendee from a Muhammadan widow in possession of her husband's property for payment of her dower the same right as the widow in respect of the dower due to her, in cases where the widow has alienated the property and the alienation is impeached by the other heirs. As pointed out above, the widow has no power to sell the property in her possession and, therefore, the sale itself will not bind her husband's heirs. She, however, could transfer her right to possession along with the dower-debt and in my opinion the alienation must be upheld to that extent. The principle of law in this connection, which is based on justice, equity and good conscience, is well established and is recognised in section 43 of the Transfer of Property Act in these terms:—"Where a person erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists." I would, therefore, answer the second question in the affirmative; that is to say, the purchaser, to the extent of the unpaid portion of the widow's dower, is entitled to retain possession of the property sold to him as against the heirs until the dower-debt is satisfied, but that the sale itself is invalid and not binding on her heirs.

OLDFIELD, J.—I agree.

SESHAGIRI AIYAR, J.—It has been argued that the two questions submitted for the consideration of the Full Bench have been too broadly worded and that the facts of the case do not demand answers for both these questions. That is a matter which need not be discussed. We have to answer the questions which apparently in the opinion of the referring Judges arise for consideration. Upon the first question the position is this. There is a large body of opinion in Calcutta and in Allahabad to the effect that a widow of a deceased Muhammadan, who takes peaceful possession of his property, is entitled to retain it until her dower is paid. These early cases only impose two conditions: The possession must be lawful, and it should not have been acquired by fraud or by force. The few non-judicial

(46) (1865) 1 Q. B. 1 at p 6; 35 L. J. Q. B. 17; 11 Jur. (N. s.) 925; 13 L. T. 264; 14 W. R. 26.
(47) 26 M. 504.

authorities to which Mr. Venkatarama Sastriar drew our attention seem to support this view. Sir Roland Wilson in his Muhammadan Law strongly advocates it. Mr. Macnaghten in his precedents takes the same view. In *Ameer-oon-nissa* v. *Moorad-oon nissa* (16), although the question was not directly decided, the desires suggested by the Judicial Committee is not quite consistent with the view that possession should be obtained with the consent of the heirs. At page 219 of the volume the opinion of the Moulvi is quoted, which is to the effect that a Muhammadan lady can without recourse to Courts transfer the property which she has taken in lieu of dower. This decision was considered by the Judicial Committee in *Bebee Bachun* v. *Hamid Hossein* (3). In that case possession was given to the widow by the Collector. Certainly it was not a case in which possession commenced with the consent of the heirs. Here again there is no limitation in the judgment to the effect that unless possession is taken with the consent of the heirs the widow will not be entitled to retain it. The last Privy Council case, *Hamira Bibi* v. *Zubaida Bibi* (1), for the first time as far as the Judicial Committee is concerned stated that possession should be obtained not only lawfully and without fraud or force but should have been "*with the consent of the heirs of the deceased.*" It was suggested that this reservation about consent was altogether unnecessary for the decision of the case before the Board. On the face of it, it looks as if this contention is right. It is necessary to consider, therefore, whether it is a deliberate pronouncement by the Judicial Committee on the question. For that purpose, I shall to some extent examine the case-law in Bengal and Allahabad. In Calcutta the first reported case brought to our notice is *Janee Khanum* v. *Amatool Fatima Begam* (17). That was a case in which it was sought to distinguish between the Shia and the Sunni doctrine as regards the right supervening on taking possession. Consent is not mentioned as a factor to be taken into account. In *Ahmed Hossein* v. *Khodeja* (19), and in the case at page 370 of that volume which is appended as a foot-note, there could not have been any question of consent. *Bibee Tajim* v. *Syud Wahed Ali* (20) also does not speak of consent. *Umatul Mehdi* v. *Kulsum* (21) is another decision to the same effect. In *Sibjan Bewa* v *Ansar ud-Din* (4) Mr. Justice Mookerjee very elaborately examined this theory of the necessity for the consent of the heirs. He criticises adversely the view of Sir John Edge in *Amant-un-nissa* v. *Bashir-un-nsisa* (6) and points out that it would be meaningless to import the idea of a consent where possession has been taken peacefully and without fraud. In *Muhammad Shrafat* v. *Wahida Sultan Begum* (7) that view was upheld. On the other hand *Bibi Tasliman* v. *Kasiman* (5) adopted the view enunciated in *Amanat-un-nissa* v. *Bashir-un-Nissa* (6). These are all the Calcutta cases. As regards Allahabad, in *Musammat Meerun* v. *Musammat Najeebun* (41) it was held that possession taken without fraud would suffice to unable the widow to retain possession and to get her dower paid out of the income. In *Amani Begam* v. *Muhammad Karimullah* (2), which defines what lawful possession is, there is no suggestion that it should have been obtained with the consent of the heirs. Sir John Edge in *Amanat un-nissa* v. *Bashir-un-nissa* (6) stated the law thus:— "If a Muhammadan widow entitled to dower has not obtained possession lawfully, that is, by contract with her husband, by his putting her into possession or by her being allowed with the consent of the heirs, on his death, to take possession in lieu of dower, and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession, adversely to the other heirs, of property to the possession of which they, and she in respect of her share in the inheritance, are entitled. It would be otherwise if the heirs consented to her taking possession in order to acquire a lien." In later cases in Allahabad this view was not followed. In *Ali Bakhsh* v. *Alah Dad Khan* (9) the learned Judges distinctly differed from *Amanat-un nissa* v. *Bashir un nissa* (6). It is with reference to these authorities that we have to deal with the *dictum* of the Judicial Committee. Sir John Edge was one of the members of the Board who heard *Hamira Bibi* v. *Zubaida Bibi* (1). The Rt. Honourable Mr. Ameer Ali was another member. *Sibjan Bewa* v. *Ansar-ud-Din* (4), in which the view of Sir John Edge in

Amanat-un-nissa v. *Bashir-un-nissa* (5) has been criticised, was quoted at the Bar. Under these circumstances having regard to the constitution of the Bench and having regard to the fact that the view opposed to *Amanat-un-nissa* v. *Bashir-un-nissa* (6) was placed before the Judicial Committee, is it open to us to say that the statement of the law in *Hamira Bibi* v. *Zubaida Bibi* (1) is an *obiter dictum* which is not binding on Indian Courts. So far as Madras is concerned, there is no course of decisions on the question. In Calcutta and in Allahabad this *dictum* may affect vested rights and may lead to some unsettlement. There is one thing to be said in favour of the *dictum* of the Privy Council. By taking possession for dower the dower-debt is placed in a higher category than ordinary debts. It really amounts to giving preference to one creditor over others. It may not be unreasonable under these circumstances that the law should insist that the consent of the other heirs should be obtained for such an exceptional treatment of a debt. There is another consideration which Mr. Narasimha Aiyangar pressed before us. Supposing the dower-debt had become barred by limitation, and the widow takes possession more than three years after it had become due. If she enters into possession, she would be stipulating for the payment of a barred debt in preference to the payment of running debts. In these circumstances, it may be unreasonable to lay down that without the consent of the other heirs such a preference should be obtained. On the other side it was argued that the object of the law in permitting the wife to take and retain possession of her husband's property is to put a check on the tendency to divorce the wife without proper reasons. This would be defeated if consent predicated as a condition precedent. Further in most cases the amount of the dower will be disputed by the other heirs and they are not likely to permit the widow to assume possession. None of these considerations have been discussed in *Hamira Bibi* v. *Zubaida Bibi* (1) and I am, therefore, not prepared to differ from the Officiating Chief Justice, whose view in such matters is entitled to great respect, in holding that the Judicial Committee did not intend to decide definitely that possession taken without consent will not give the widow the right to retain it until the dower debt is discharged.

Now I go to the second question. I feel no doubt on this point that our answer should be in the affirmative. Assuming that the widow has taken possession with the consent of the heirs and lawfully, I fail to see why her remedies should not be transferred. There is considerable authority for the proposition that it can be inherited, *Kummur-oon-nissa Begam* v. *Mahomed Hussun* (26), *Panchanan Bose* v. *Gurudas Roy* (48), *Majidmian* v. *Bibi Saheb Jan* (13), *Ali Bakhsh* v. *Allah Dad Khan* (9), *Tahirunnissa* v. *Nawab Hasan* (44) and *Basir Ali* v. *Nazir Ali* (31). Against these there is *Ali Muhammad Khan* v. *Azizullah Khan* (12), *Hadi Ali* v. *Akbar Ali* (11) and *Muzoffar Ali Khan* v. *Parbati* (10). The Muhammadan text-book writers including Macnaghten and Sir Roland Wilson seem to incline to the view that the right can be transferred and inherited. No doubt under the English law, ordinarily speaking, a lien is not transferable. See 19 Halsbury, page 2. But that is because a lien has been regarded as a personal privilege. Even in England there are exceptions in favour of certain classes of lien-holders. But I do not think that the right to retain possession and to pay herself out of the proceeds, which a Muhammadan widow acquires, is of the same kind as the lien considered in English cases. It is more in the nature of a charge on the property, because as I said before, the right to pay herself out of the income is incident to the possession taken by a widow. *Maina Bibi* v. *Wasi Ahmad* (49), on which Mr. Narasimha Aiyangar strongly relied, does not really decide the question. That was a case in which a decree was obtained by the heirs against the widow for possession of the property which she had taken in lieu of dower. The decree provided that on payment to the widow of the amount due, she should deliver possession and that in default of payment within a particular time her right to the property should become absolute. The amount was not paid in time. Thus under the decree she became the absolute owner. Thereafter she made a

(48) 9 B. L. R. 187; 18 W. R. 317.

(49) 51 Ind. Cas. 242; 17 A. L. J. 629; 1 U. P. L. R. (H. C.) 106; 41 A. 538.

gift of the property to her daughters. The question was considered whether this deed of gift, if otherwise unenforceable, conveyed to the daughters a right to the dower. It was held that as the right to the dower and the right to retain possession were not specifically transferred, the donees were not entitled to stand in the shoes of the donor in that behalf. One thing is clear from that judgment, namely, that the dower debt was placed in the same category as a mortgage-debt. It is also clear that by the failure to pay money in time the widow acquired a right to the property by virtue of the decree, and not by virtue of the right she had to retain possession for dower. It is further clear that by the deed of gift there was not and could not have been any transfer of the right to the dower. These considerations do not affect the present case. I have looked into Exhibit I, and I find that the widow transferred the property for her dower-debt. The principle of subrogation is well recognised in India, and the principle of equity which compels a plaintiff to discharge a lawful debt before recovering possession has been recognised in cases of sales by widows, by managers and by co-tenants. I fail to see why that principle is not applicable to the case of a sale by a widow. The sale proceeds were applied to pay the dower-debt. Therefore the vendee stood in the shoes of the vendor to the extent of the rights which she had in the property sold. I am, therefore, of opinion that the right which the widow had to remain in possession for her dower is capable of being transferred.

M.[C. P.

Answred in affirmative.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 14 OF 1919.

July 18, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

EWAZ ALI KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

QUDRAT ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Jurisdiction of Civil and Revenue Courts—Landlord and tenant—Proprietary or under-proprietary rights, determination of—Ejectment—Revenue Courts, jurisdiction of, to determine status and terms of tenancy.

In cases to which the U. P. Land Revenue Act applies, the Courts of Revenue have the exclusive jurisdiction to determine the status of a tenant and the special and other terms on which such tenant holds [p. 922, col. 2.]

The Civil Courts can decide whether or not a person holds the proprietary or under-proprietary rights, but they cannot set aside an ejectment proceeding or determine its validity if the interest affected is not under-proprietary. [p. 922, col. 2.]

Appeal against the decree of the Sub-Judge, Kheri, dated the 24th October 1918, upholding that of the Munsif, Kheri, dated the 12th November 1917.

Mr. *Ali Mohammad*, for Appellants Nos. 1 to 4.

Mr. *Kanhaiya Lal* holding brief of Mr. *Puttoo Lal*, for the Respondents.

JUDGMENT.—The dispute in this case relates to certain plots of land which form part of the Mahal of which the defendants are the superior proprietors. The plaintiff was in cultivatory possession of the said plots. The defendants got him ejected through the Revenue Court. The plaintiff sued for possession of the said plots on the allegation that he had a heritable and transferable right therein and that the defendants had no right to eject him from the same

The Courts below dismissed the claim. Their finding is that the plaintiff had no under-proprietary rights in the said plots.

It appears that Saadat Khan was originally the owner of the Zemindari share to which the disputed plots appertain. His right, title and interest were sold by auction in execution of a decree obtained by Tokhan Sah against him in 1874. In the sale proclamation then issued Saadat Khan was described as owning a 5-annas 4-pies ancestral share in that village and as holding 70 *bighas* of *sir* land in his cultivation and in that of his two sons (Exhibit D4). At the time of the sale a right of occupancy in the *sir* land was expressly reserved. That right was of the kind referred to in section 5 of the Oudh Rent Act (XIX of 1868) then in force. It was not a transferable right and could not, therefore, be under-proprietary. The Courts below were unable to say from the

evidence that the plots in dispute formed part of the said 70 *bighas* of *sir* land. All that the evidence showed was that plot No. 26/2 which forms a part of plot No. 39/1, new *khasra*, and plot No. 29, old *khasra*, which has now been re-placed by No. 44, new *khasra*, were treated as forming part of the said 70 *bighas* of *sir* land in some previous litigation (Exhibits 4 and 6). No Khitauni or Jamabandi of the old Settlement has been filed. The *khasras* filed are not enough to indicate what plots are comprised in the said *sir* area. A definite conclusion is not, therefore, possible in the circumstances. The fact remains that even if these plots formed part of the said 70 *bighas* of the *sir* land in which a right of occupancy was reserved to Saadat Khan at the time of the sale his son, the plaintiff-appellant, can have no higher position than that which was assigned to his father. He holds no under-proprietary right and cannot, therefore, be restored to possession by the Civil Court.

As observed by their Lordships of the Privy Council in *Mohammad Abul Husan Khan* v. *Prag* (1), in cases to which the U. P. Land Revenue Act (III of 1901) applies, the Courts of Revenue have the exclusive jurisdiction to determine what is the status of a tenant and what are the special or other terms upon which such tenant holds. The Civil Courts can decide whether or not he holds the proprietary or under-proprietary rights therein but can go no further. They cannot set aside an ejectment proceeding or determine its validity if the interest affected is not under-proprietary.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 38 Ind. Cas. 814; 20 O. C. 8; 21 M. L. T. 102; 15 A. L. J. 113; 19 Bom. L. R. 202; (1917) M. W. N. 232 and 456; 32 M. L. J. 388; 21 C. W. N. 582; 26 C. L. J. 165; 5 O. L. J. 34 (P. C.).

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 161 OF 1917.

February 6, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

RAKHAL CHANDRA DIGAR AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

SIDHI NATH SINGH AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Mortgage, suit on—Decree providing for sale of other properties in event of mortgaged property proving insufficient, nature of—Mortgagee, right of, to personal decree.

A decree in a mortgage suit which provides that in the event of the mortgaged properties fetching a price insufficient to meet the mortgage debt, there shall be a personal decree against the other properties of the mortgagor, is not a mortgage-decree in the strict sense of the term. [p. 923, col. 2.]

If a mortgagee brings a suit upon his mortgage bond and it is found that the mortgage is invalid, the mortgagee can realise his dues from other properties of the mortgagor, unless there is an express stipulation in the bond that the mortgage-debt is to be realised from the mortgaged properties alone. [p. 923, cols. 1 & 2.]

Appeal against an order of the District Judge, Manbhum, dated the 24th March 1917, affirming that of the Munsif, Raghunathpur, dated the 31st October 1916.

Mr. *B. Basu*, for the Appellants.

Mr. *Sishir Kumar Mitra*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—In this case the mortgagee, in September 1910, obtained a decree in a suit brought by him upon his mortgage bond. The decree was in the terms of the compromise, which was to the effect that the amount agreed upon should be recovered from the mortgaged properties and that if that should prove insufficient, the balance should be recovered from the other properties of the mortgagor. Upon the mortgaged properties being brought to sale, it was found that the mortgage was void under section 46 of the Chota Nagpur Tenancy Act of 1908, which provides that no transfer by a *raiyat* of his right in his holding or any portion thereof by mortgage or lease for any period which exceeds or might in any possible event exceed five years shall be valid to any extent.

The two lower Courts have agreed that the mortgage was invalid by reason of the provisions of this Act. The decree-holder then filed a petition asking for an order that the other properties of the judgment-debtor should be put up to sale in accord-

ance with the compromise above referred to. To this the judgment-debtor objected on two grounds: *firstly*, on the ground that the other properties could not be brought to sale unless there was a second decree directing that sale, and, *secondly*, on the ground that it was not open to the decree-holder to proceed against these properties in execution of his decree but that in order to do so he must bring a suit upon the personal covenant contained in the mortgage-bond. These objections have been overruled by both the lower Courts and the case now comes before us in second appeal.

Of the cases cited before us there are only two directly bearing upon this point, *viz.*, the case of *Firibhu Narain Singh* v. *Baldeo Misra* (1) and the case reported as *Behari Lal* v. *Basheshar Dayal* (2), where it was held that if the mortgaged property cannot be sold in execution of a mortgage decree, no decree under section 90 of the Transfer of Property Act can be granted. Both these cases were decided by learned Judges sitting alone; and the former case appears to have been dissented from in a later decision reported as *Pirbhu Narain Singh* v. *Amir Singh* (3). The law on this subject has been discussed at length in the case of *Javerbhai Jorabhai* v. *Gordhan Narsi* (4). There can be no doubt that at any time, up to the sale of the mortgaged property, the mortgagee can abandon his claim against the mortgaged property and ask for a personal decree and bring to sale the other properties of the mortgagor without first bringing to sale the mortgaged properties. It is quite clear that if the mortgagee brings a suit upon his mortgage-bond and it is found that the mortgage is invalid, it would be most inequitable to allow the mortgagor to defeat the claim of the mortgagee and to deprive him of money which is obviously due to him under a personal covenant to pay, and that the mortgagee should be prevented from realizing his dues, unless there is an express stipulation in the bond that the mortgage debt is to be realized from the mortgaged properties and from the mortgaged properties alone. It is quite clear that there was no such stipulation in the present case. In fact there is a clear provision in the compromise decree that in the event of the mortgaged properties fetching a price insufficient to cover the mortgage debt there must be a personal decree against the other properties of the mortgagor. It has been argued that this was a mortgage decree and can only be executed as such. The fact is that it is not a mortgage decree in the strict sense of the term, inasmuch as it contains a direction that the other properties of the mortgagor should be proceeded against, and that is not the form of a mortgage decree provided by the Transfer of Property Act. The ordinary procedure is to draw up a personal decree against the mortgagor only in the event of the sale proceeds proving insufficient. In my opinion although the correct procedure would have been to provide in express terms that there was to be a personal decree in the event of the mortgage being found to be invalid, yet I consider that such decrees should not be strictly interpreted in India and that justice should be administered between the parties, provided that neither party suffers by such a course. In my opinion the proper course to adopt in this case is to give the compomise decree a liberal construction. I am of opinion that the decree-holder is entitled to proceed against the other properties of the mortgagor judgment-debtor in the event of the mortgage being found to be invalid.

I would dismiss this appeal with costs.

ATKINSON, J.—I concur.

Appeal dismissed.

(1) 4 A. L. J. 157; A. W. N. (1907) 69; 29 A. 260.
(2) 14 Ind. Cas. 591; 9 A. L. J. 529.
(3) A. W. N. (1907) 83; 29 A. 269.
(4) 28 Ind. Cas. 44; 39 B. 353; 17 Bom. L. R. 269.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 29 OF 1919.

September 2, 1919.

Present:—Mr. Stuart, J. C.

Musammat BIBI SAIDUNNISSA—AUCTION-PURCHASER—APPELLANT

versus

FAIYAZ HUSAIN AND OTHERS—OBJECTORS, MUHAMMAD HASAN—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r.

BIBI SAIDUNNISSA *v.* FAIYAZ HASAN.

96, 97, 98, 99, 103—*Execution of decree—Sale—Auction-purchaser, application by, for recovery of possession, dismissal of—Appeal, whether lies—Remedy of auction-purchaser.*

While proceedings for the sale of certain mortgaged property were pending, the mortgagor executed leases of certain land included in the mortgaged property for 40 years. The mortgagee purchased the property in auction sale and applied under Order XXI, rule 97, of the Civil Procedure Code for possession of the same. The lower Court held that the leases were collusive, but declined to interfere with the possession of the lessees and passed an order under Order XXI, rule 96, of the Code that it should be proclaimed that the interest of the mortgagor had been transferred to the auction-purchaser:

Held, (1) that the order of the lower Court amounted to an order dismissing the application of the decree-holder under Order XXI, rule 99, of the Civil Procedure Code:

(2) that the auction-purchaser, who was a party other than the judgment-debtor against whom an order had been made under Order XXI, rule 99, of the Civil Procedure Code, had no right of appeal and that his remedy was to institute a suit against the occupiers for their ejectment.

Appeal against the decree of the Subordinate Judge, Bara Banki, dated the 14th April 1919.

Mr. *Niamatullah*, for the Appellant.

Mr. *Basudeo Lal*, for Respondents Nos. 1 and 3.

JUDGMENT.—Muhammad Husain had executed a simple mortgage. A suit was brought on the basis of this mortgage and a decree was passed against Muhammad Husain declaring a lien on the mortgaged property. While proceedings for the sale of the mortgaged property were pending, Muhammad Husain executed leases of certain land included in the mortgaged property in favour of his own relations. These leases were executed on the 7th February 1918. Muhammad Husain apparently claimed to have cultivated the land leased continuously for over twelve years. On the 21st October 1918 the property in question was sold and purchased by *Musammat* Bibi Saidunnissa, the mortgagee and decree-holder. When she endeavoured to obtain possession over the land transferred by these leases, the lessees opposed her possession. She, therefore, applied under the provisions of Order XXI, rule 97, for possession of the property. The learned Subordinate Judge has decided that the leases in question, which are for a period of 40 years, are collusive and not executed in good faith. He has declined to uphold these leases, but he has decided that, inasmuch as the mortgagor had at the time when he made those leases the right to lease the property for a period as long as seven years in the ordinary manner, he should not interfere with the possession of the present occupiers. He, therefore, passed an order under Order XXI, rule 96, that it should be proclaimed that the interest of the mortgagor had been transferred to the auction-purchaser. In other words, he decided under the provisions of Order XXI, rule 95, that the auction-purchaser should be given the same rights to collect the rent as were reserved to the judgment-debtor under the leases of the 7th February 1918. The auction-purchaser appeals.

I first have to look at the nature of the order of the learned Subordinate Judge. The application before him was an application under Order XXI, rule 97. He could have allowed that application under rule 98 or dismissed it under rule 99. He certainly did not allow the application under Order XXI, rule 98. Can it be said that he dismissed it under Order XXI, rule 99? I consider that he did dismiss it under Order XXI, rule 99, for he refused to dispossess the occupiers who were persons other than the judgment debtor and passed an order prejudicial to them. He went out of his way to pass an order under Order XXI, rule 96, declaring the auction purchaser's rights. But that order is not *per se* prejudicial to the occupiers, although there is a portion of the judgment which is prejudicial to them inasmuch as it would appear to lay down that they can be ejected after seven years. However, in so far as the order goes, it is not prejudicial to them. Now in these circumstances, has the auction purchaser the right to appeal? I am of opinion that she has not such a right. She applied under Order XXI, rule 97, for the dispossession of the occupiers of the land. She has failed to obtain that relief. In other words, her application has been dismissed under Order XXI, rule 99. So the provisions of Order XXI, rule 103, have force. She is a party not being a judgment-debtor against whom an order has been made under rule 99. Her remedy is to institute a suit to establish the right by which she claims the present possession of the property. It is open to her to institute

a suit against the present occupiers for their ejectment, on the ground that they are holding under fraudulent and collusive leases alleging that the circumstance that the mortgagor might have given them valid transfers cannot avail them when as a matter of fact he gave them invalid transfers. But her remedy appears to me to be by a regular suit and not by way of appeal.

I, therefore, dismiss this appeal but in the circumstances of the case without costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 921 OF 1918.

June 13, 1919.

Present:—Justice Sir Asutosh Chaudhuri, Kt.

ANUKUL CHANDRA CHAKRABERTI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

TUFANI SHEIKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Agricultural holding, what is—Cess Return, entry in, value of—Holding partly homestead and partly cultivated.

Where there is a question whether certain land is agricultural land within the meaning of the Bengal Tenancy Act, the evidence of persons who have known the land for years and have taken part in the cultivation of it, coupled with a Cess Return in which the land is described as agricultural, would warrant the conclusion that the land originally was agricultural, and this conclusion is not contradicted by the fact that in a subsequent *chitta* the land is described as *bastu* land, nor is it inconsistent with the fact that a portion of the land is occupied by a homestead. [p. 926, cols. 1 & 2.]

Appeal against the decree of the District Judge, Rajshahye, dated the 25th of January 1918, affirming the decree of the Munsif, Boalia, dated the 25th of September 1916.

Babus *Sarat Chandra Roy Choudhury* and *Krishna Kamal Maitra*, for the Appellants.

Babu *Jatindra Mohan Choudhury*, for the Respondents.

JUDGMENT.—The only question for determination in this appeal is whether the holding, which is within the municipal limits of Rajshahye town, is an agricultural holding governed by the Bengal Tenancy Act, or whether it is governed by the Transfer of Property Act.

The following facts have been found, namely, that the defendants have been in possession for three generations of this holding and that for about 50 years they have got their homestead in a portion of the land. The trial Court found that it was an agricultural holding on the basis of an entry in a Cesse Return filed by the landlord and on the evidence that some of the land used to be cultivated. That Court also held that even if the holding was non-agricultural, the defendants had acquired a permanent right inasmuch as the holding had apparently been inherited from grandfather to grandson and the rent had been the same. Upon both the grounds he dismissed the plaintiffs' suit.

In the Appeal Court the learned Judge held that so far as the second point was concerned, the case in *Moharam Sheikh Chaprasi* v. *Telamuddin Khan* (1) was distinguishable, inasmuch as in the case before him it had not been shown that the tenancy had been treated by the landlord as heritable and also because it had been found in the case in *Moharam Sheikh Chaprasi* v. *Telamuddin Khan* (1) that the land had been let out for residential purposes. Except as above he affirmed the decision of the trial Court. He held that the case had been rightly decided on the basis of the Cess Return in which the holding was shown as an agricultural one. He is quite right in saying that if the holding was non-agricultural, it should have been entered in part 3 of the Cess Return, which refers to tenure-holders according to the definition of that term under the Cess Act.

The learned Vakil who has appeared for the appellants has contended that the learned Judge has not taken into account the Chitta, Exhibit I, dated 1270, in which this holding is described as *bastu*. He argues that although the land may have been cultivated and paddy may have been grown upon it, yet having regard to the fact that the Chitta was earlier in date then the Cess Return of 1900, there was no definite finding that the land had been treated as agricultural land from its inception. He strongly relied upon the finding of the learned Munsif that the origin of the holding had not been shown and he said that in order to be considered a *raiyat* as defind in the Bengal

(1) 13 Ind. Cas. 606; 16 C. W. N. 567; 15 C. L. J. 220.

AKULA ACHIAH v. CHALLAPALLI LAKSHMINARASIMHAM.

Tenancy Act it must be shown that the land was acquired for purposes of cultivation. His argument was that there was no finding to that effect and that, therefore, there ought to be a remand, and if necessary fresh evidence should be taken to ascertain as to what the character of the land was when it was first let out and also to consider the question as to whether it was cultivated as culturable land and for what period, and then to determine the question as to whether any occupancy right can be claimed by the defendants.

Having regard to that contention, I had the whole of the evidence placed before me relating to the question of cultivation. Several persons had been examined on that point, old people who had known the land from their childhood, some of whom had actually taken part in its cultivation and some of whom were near neighbours. That evidence, taken with the fact that in the Cess Return of 1900 the land is described as *krishi chashi raiyate*, that is, to my agricultural cultivated *raiyati* land, I think it may safely be held that the land was originally for agricultural purposes. The Chitta of 1270, which described it as *bastu* land, need not be taken as contradicting that fact. It is quite consistent with the fact that a portion of it was homestead land and a portion was agricultural land. Reference in this connection may be made to the case of *Mohesh Chunder Gungopadhya* v. *Bisho Nath Doss* (2), in which Mr. Justice Markby points out the view taken by Mr. Justice Bayley in a decision in *Kalee Kishen Biswas* v. *Sreemutty Jankee* (3) that there was a distinction between *bastu land* and land let out for the purpose of constructing a *bashabari*. Mr. Justice Bayley said that *bastu* land might be met with in ordinary cultivators' holdings, and Mr. Justice Markby said that he was not aware that that opinion had been dissented from in any case and that it would be a matter of surprise if a *raiyat* with an ordinary holding, having built his house upon a portion of it, were to find that although he had a right of occupancy as to the culturable land he had no right of occupancy as to the rest. I find also an earlier case decided by Mr. Justice Markby, where he points out the distinction between houses in towns and what are called homestead lands of *raiyats* engaged in agriculture. See *Pogose* v. *Ra.oo* (4). I am unable to hold that the Chitta in any way contradicts the argument based upon the description of this land as agricultural contained in the Cess Return.

It has also been pointed out to me that the learned Judge's finding that in the present case there has virtually been an enhancement of rent is not justified by the evidence. The learned Munsif held that the rent had not been varied, but it is unnecessary to go into the question having regard to what I have held, namely, that the holding is an agricultural one governed by the Bengal Tenancy Act.

This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(2) 24 W. R. 402.
(3) 8 W. R. 250.
(4) 22 W. R. 511.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 706 OF 1918.

August 6, 1919.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Moore.

AKULA ACHIAH—DEFENDANT No. 2—PETITIONER

versus

CHALLAPALLI LAKSHMINARASIMHAM—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), s. 17—Decree, ex parte, *application to set aside—Deposit of decretal amount, when to be made.*

When an application is made under section 17 of the Provincial Small Cause Courts Act to set aside an *ex parte* decree, the deposit required by the section need not be made at the time of presenting the application. The provisions of the section not being mandatory, it would be a sufficient compliance therewith if the amount is deposited before the application is heard. [p. 927, col. 2.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif, Bezwada, in Civil Miscellaneous Petition No. 2760 of 1917, in Small Cause Suit No. 885 of 1917, dated the 27th November 1917.

Dr. *S. Swaminadhan*, for the Petitioner.—Whatever may be the precise language of

section 17 of Act IX of 1887, the Courts in the Mofussil have uniformly recognized payments made before the application to set aside the *ex parte* decree was heard as sufficient compliance with the section. The Madras High Court has held in *Ramasami* v. *Kurisu* (1) that the section is only directory and not mandatory. The view is supported by the analogous provisions of sections 4 to 6 of the Pensions Act. The decisions lay down that the Collector's certificate before judgment was sufficient.

Mr. *T. Ramachandra Rao*, for the Respondent, relied on the unambiguous term of section 17 and *Jagan Nath* v. *Ohet Ram* (2) and *Somabhai* v. *Wadilal* (3).

JUDGMENT.—In this case an *ex parte* decree was passed on the 27th July 1917. The defendant, alleging that he did not become aware of the decree till the 26th August 1917 and that the summons was not served on him personally, applied to set aside the *ex parte* decree. This was on the 29th August 1917. It is conceded that along with the petition, the amount of the decree was not deposited. It is said that it was deposited before the application was heard. We express no opinion as to whether this deposit after the time allowed for the application is valid or not. The only question before us is whether the provision in section 17 of Act IX of 1887 is directory or mandatory. Parker and Wilkinson, JJ., held in *Ramasami* v. *Kurisu* (1) that it was not mandatory. Mr. Justice Miller in *Suryanaray na* v. *Ramanna* (4) did not dissent from this view. So this decision of Parker and Wilkinson, JJ., has stood unchallenged in this Court for nearly thirty years, and we feel no doubt that the practice regarding the receipt of the deposit amount in the Mofussil Courts has been in consonance with that ruling. We would, therefore, have followed the ruling without assigning reasons, had it not been for the fact that Mr. Justice Ayling in the admission Court and Mr. Justice Krishnan in the final Court sitting as a single Judge have questioned the correctness of *Ramasami* v. *Kurisu* (1). If we may say so, the language of section 17 of the Mofussil Small Cause Courts Act does not seem to lend itself to the interpretation placed on it in *Ramasami* v. *Kurisu* (1). In *Jogir Ahir* v. *Bishen Dayal Singh* (5), *Jogannnath* v. *Ohet Ram* (2) and *Somabhai* v. *Wadilal* (3) the ruling of this Court has not been accepted as good law. But the interpretation is not without precedent. In regard to cases under the Pensions Act, which by sections 4 to 6 require a certificate of the Collector before the plaint is filed, it has been held that the production of the certificate before judgment would cure the defect. The same view was taken of the requirements of sections 92 and 93 of the Code of Civil Procedure relating to the sanction of the Advocate-General or the Collector. Reference may also be made to suits for which the production of a succession certificate is necessary. These classes of cases supply an analogy for the liberal interpretation placed on the section in *Ramasami* v. *Kurisu* (1). Further, the policy of the Legislature in demanding payment is to enable the successful decree-holder to take out immediate execution. The relief in a small cause suit being expected to be a speedy and a summary one, the Legislature demands that the successful plaintiff should not be put off for a further period by not making the decree amount available to him for immediate execution. Therefore, although if the case had come before us for the first time, we would have taken the view which the plain language of section 17 suggests, having regard to the fact that the decision now questioned has been law in this Presidency for nearly 30 years, that there is nothing opposed to justice in the interpretation placed on the section by two learned Judges of this Court and that there are analogies which may justify the view taken in *Ramasami* v. *Kurisu* (1), we think it unnecessary to refer the matter for the consideration of a Full Bench.

We must reverse the order of the lower Court and remit the application for disposal in the light of the above observations. Costs will abide.

M.C.P.

Petition allowed; Case remanded.

(1) 13 M. 178.
(2) 28 A. 470; 3 A. L. J. 318; A. W. N. (1906) 93.
(3) 9 Bom. L. R. 893.
(4) 6 Ind. Cas. 400; 34 M. 68; 7 M. L. T. 308; (1910) M. W. N. 279.
(5) 18 C. 83.

AJUDHIA *v.* MATA BADAL.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 463 OF 1918.

June 27, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

AJUDHIA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MATA BADAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition, suit for—Disruption of family—Limitation—Burden of proof.

In a suit for partition of joint family property if the disruption of the joint family is proved, it is for the plaintiff to show that it took place within 12 years prior to the suit or that he had been in possession within that period.

Appeal against the decree of the Sub-Judge, Partabgarh, dated the 26th August 1918, upholding that of the Munsif, Partabgarh, dated the 23rd March 1918.

Mr. *Ali Mohammad*, for the Appellants.

Mr. *Ram Prasad*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to the leasehold rights in certain plots of land held by Debi Dat and to certain groves and trees standing on some other plots in the village of Ramwapur. The allegations of the plaintiffs were that the said leasehold rights and trees were the joint property of the family, to which the parties belong, that Debi Dat was the head and manager of the family, that the plaintiffs became separate in mess and residence about eight or nine years prior to the suit and that they are entitled to a partition of a two-thirds share.

The defendants, who are descendants of Debi Dat, denied the title of the plaintiffs and pleaded that Debi Dat was living separate from other branches of the family, now represented by the plaintiffs, from 45 years and that the said property was his self-acquired and separate property.

The Courts below have found in favour of the defendants and dismissed the claim. Their finding is that separation had not taken place within twelve years prior to the suit and that the plaintiffs had not got any share of the profits of the disputed property as alleged by them. The learned Counsel for the plaintiffs contends that the Courts below have omitted to give due weight to the contents of one of the permanent leases obtained by Debi Dat in his name and to the entries made in the *khasra* for 1315 F. In the former there is a reference to the old tenancy having existed; but that reference does not necessarily imply that the old tenancy was held by the entire family, or by any person other than Debi Dat. In the latter Debi Dat and Ajudhia Prasad are recorded as holding certain trees on plot No. 967 and Matabadal, Gurdat and Ajudhia are recorded as holding the trees standing on plots Nos. 1127/1 and 1127/2 *khasra*. The Courts below have carefully considered the above *khasra* and have come to the conclusion that the entries contained internal evidence of their unreliability and were not entitled to any weight. It is not open to the plaintiffs to contend in second appeal that the opinion which the Courts below have formed in regard to the value to be attached to the document was erroneous. The Courts had to consider the entries in that *khasra* along with the entries in the previous *khasras* produced in the case; and if they gave greater weight to the latter, no objection can be taken on that score. It is further argued that a separation in mess and residence did not amount to a disruption of the joint family. But the evidence adduced by the plaintiffs in this case was that there was not only separation in mess and residence, but the profits also used to be divided. A complete separation must, therefore, be deemed to have taken place long before the suit, and as was pointed out in *Mendana* v. *Jagan Nath Bakhsh* (1), the disruption being proved, it was for the plaintiffs to show that it took place within twelve years prior to the suit, or that they had been in possession within that period. The findings on these points being against the plaintiffs, there is no reason for interference with the decisions passed by the Courts below.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 25 Ind. Cas. 689; 17 O. C. 235.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 37 OF 1919.
March 14, 1919.
Present :—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.
MOBARAK ALI AND ANOTHER—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 24—Confession made after several conversations with Police Officers, admissibility of.

To render a confession admissible it must be made voluntarily, and not as the result of any inducement or threat. A confession made after a conversation of several days with the Investigating Officer and other Police Officers cannot be said to be a voluntary confession so as to make it admissible against the person who made it. [p. 930, cols. 1 & 2; p. 931, col. 1.]

Appeal against the conviction and sentence passed upon the accused by the Sessions Judge, Backergunge, dated the 25th November 1918.

Mr. *B. M. Sen*, for the Appellants.

Mr. *A. K. Fazlul Haq*, for the Crown.

JUDGMENT.

SHAMSUL HUDA, J.—Mobarak Ali and his son Subhan Ali were placed on their trial before the Sessions Judge of Barisal on charges framed under section 302, Indian Penal Code, for having caused the death of one Azmat Ali. The Judge, agreeing with both the Assessors, convicted the accused of the offence charged and sentenced them to transportation for life. Against the conviction and sentence this appeal has been preferred by both the accused.

The case for the prosecution mainly rests on the confessions made by the accused and as the learned Judge has himself said, 'apart from these there is practically no case whatever.' We have, therefore, to consider first of all whether these confessions were voluntary or whether they were the result of any inducement or threat. The Assessors found the accused guilty and apparently they believed the confessions to be true, but they gave no indication of their opinion on the question whether the confessions were or were not voluntary.

The circumstances of the case are shortly these: the deceased was a nephew of the accused Mobarak Ali. He had lost his father at an early age and was brought up by his uncle who had got him married. They lived in the same Bari, deceased occupying the west Bhita and the accused the east Bhita. It appears that the deceased, when he came of age, claimed his father's share of the ancestral properties. There was an arbitration and the arbitrators divided the properties between the uncle and the nephew in the proportion of 10 annas and 6 annas. Mobarak agreed to the division and himself demarcated the lands but when the deceased went to plough the land that was allotted to him, Mobarak Ali is said to have opposed him. It is also alleged that the deceased complained of his uncle's conduct to the landlord and that in consequence the landlord fined Mobarak Ali's son Sobhan Rs. 25. It is also said that the day before the occurrence Mobarak Ali's cows had damaged the paddy crop of the deceased which had led to a quarrel between them. This was alleged as a possible motive for the crime in the first information lodged by the wife of the deceased on the 27th of July 1918. On the whole it may be taken as established that the uncle and the nephew were not on good terms. On the 25th of July the wife of the deceased, Rupsan Bibi, had gone on a visit to her father's house. She came back the next morning and found her husband not in the house. From what she saw on her return her suspicions were roused and she informed her father who came almost immediately, and there was a search in which the second accused Suban took part under the direction of his father. The dead body was found in a deserted Bhita a quarter of a mile from the house of the accused and close to it was a Donga boat belonging to the deceased. There was a palm-fruit in the boat. Information was lodged in the Thana by the wife of the deceased. The Police Sub-Inspector came and the dead body was sent for *post mortem* examination. The cause of death could not, however, be ascertained owing to the fact that the body was in an advanced stage of decomposition.

As I have said, the point for consideration is whether the confession is relevant under section 24 of the Evidence Act. The confession was made at 3 P. M. on the 30th of July 1918. It was subsequently retracted and was said to have been induced by ill-treatment of the Police. The Judge was of

opinion that there was intrinsic evidence that the confession was true. I shall deal with this matter later on, but it seems to me that before considering the intrinsic evidence bearing on the truth of the confession I must answer the question whether the confession was admissible. In my opinion the confession was made under circumstances that would exclude its admissibility. It appears that the Sub-Inspector of Police came to the spot at 5 P. M. on the 27th of July and from the very beginning he suspected the first accused. It also appears that even before the Sub-Inspector came and almost immediately after the discovery of the dead body, the Chowkidar and the Dafadar had arrested the accused Mobarak Ali, or at any rate kept him under restraint. There is some conflict of evidence as to when the accused were formally arrested by the Sub-Inspector. The Sub Inspector says that he arrested the accused at 2 P. M. on the 29th of July. It is, however, clear that the accused were under the control of the Police almost immediately on the Daroga's arrival, although they might not have been under actual arrest. The Sub-Inspector admits that on the 28th he questioned the accused from 7 to 10 P. M. He also says that he told Amir Ali, Hujjat Ali, Dafadar and the Chowkidar to talk with the accused. We are not told what was the nature of the talk. As I have said, we are dealing with a retracted confession. It may be that the story of ill-treatment is false. At any rate, it has not been proved, but it is always difficult for an accused to prove ill treatment even when it is true. One would naturally ask why was the Sub Inspector questioning the accused for 3 hours, if not for the purpose of getting a confessional statement. Why did he ask the Dafadar, Chowkidar and two others to talk to the accused ? Talk on what subject if not of the murder? The accused Mobarak Ali and his son had been both from the very beginning pretending, (if they were the murderers) that they knew nothing about the murder. What happened between the evening of the 26th and the afternoon of the 30th July which influenced the accused to throw off the mask and make a clean breast of their sins before the Magistrate? To my mind, it can only be accounted for by the influence of the Police exercised over them during the time the accused were under their control. I cannot think that it was a sudden attack of penitence, nor can it be said that accused were confronted with any very damaging evidence and thought that it was useless any longer to insist on their innocence. Except on the hypothesis that the confession was due to inducement or threat on the part of the Police the conduct of the accused seems to be inexplicable. The learned Judge was very much impressed by the incident of the palm-fruit. Subhan said that as they were carrying the dead body in the boat a palm-fruit fell from a tree in Naimuddin's homestead and his father asked him to pick it up. He asked his father for an explanation and was rebuked for his curiosity. Mobarak Ali states in his confession that he put the palm-fruit in the Donga so that it might create the impression that the deceased had gone to steal palm fruits and was killed by a ghost. I do not think this circumstance carries any great weight. The fruit was found in the boat and its presence had to be accounted for. It is not a thing that came out incidentally in the course of the narration. If the story told in the confession was a got up story, those who are responsible for it must have felt the necessity of getting the explanation both from the father and the son and we have the explanation in the confession of both. I am not, therefore, impressed by the Judge's argument on the intrinsic evidence furnished by the confession itself. If the confession is put aside, as I have said, there is little else to go upon. All we have is the evidence of a quarrel between the uncle and the nephew, but that to my mind is not sufficient to account for the murder of a nephew by an uncle who had himself brought him up from his infancy. In addition to this evidence of motive we have only the evidence of Meherjan that on the 25th of July about midnight, *i. e.*, about the time when according to the confession the murder was committed, she saw two men going from south to north. It was a moonlight night and she could recognise Mobarak Ali and Subhan Ali. In cross-examination she said: "there were some jute plants between her and the accused and they were taller than herself." In re-examination

she explained that she saw the accused after they had passed the jute plants. Between her Bari and the Bari of the accused a *khal* intervenes. From the earliest moment suspicion had attached to the two accused. She saw them going together at an unusual hour of the night in which the murder had taken place and yet she did not mention the incident to her husband until Monday the 29th, *i. e.*, 4 days after. This is suspicious. It also seems to me that the possibility of death by snake bite or any other cause of like nature has not been excluded. The discovery of the Piri with which the murder is said to have been committed carries no weight. Piris are to be found almost in every cultivator's house

For all these reasons I think it would be unsafe to convict the accused upon evidence such as we have before us. I would, therefore, acquit them.

RICHARDSON, J.—I have had the advantage of reading the judgment of my learned brother in this case and concur in the conclusion at which he has arrived.

The case turns on the confessions of the two accused. It may be that this is not a case in which the Sessions Judge would have been justified in ruling as matter of law only that the confessions were inadmissible on the ground that they were not voluntary. But if the case had been tried by a Jury, the Jury should certainly have been instructed that if they came to the conclusion on the evidence that the confessions were in fact not voluntary confessions, they should be discarded. When inquisitorial methods are employed, as they seem to have been in the present case, the question will arise whether the confession which follows has not been obtained by inducement or threat or other improper means. The employment of such methods has often been condemned.

Moreover, the confessions here were retracted and the only corroboration which they receive is from the doubtful evidence of Meherjan Bibi.

I agree that the conviction and the sentences should be set aside.

Conviction and sentence set aside.

PATNA HIGH COURT.

CRIMINAL REVISION No. 103 OF 1918.

April 8, 1918.

Present :—Justice Sir Ali Imam, KT.

HARI LAL CHOUDHRY AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 203, 437—Complaint against several accused—Magistrate refusing to proceed against some—Order, whether amounts to discharge—Further enquiry, order for—Notice to accused, whether necessary.

One *S.* instituted a criminal case against eleven persons. The Magistrate instituted proceedings only against some of them and after their conviction rejected the petition of the complainant to issue process against the remainder. On application by the complainant the District Magistrate under section 437 of the Criminal Procedure Code ordered the remaining accused to be proceeded against. No notice was issued to the accused prior to the passing of the order:

Held, (1) that the order of the Magistrate refusing to issue process amounted to a discharge and that the District Magistrate had, therefore, jurisdiction to proceed under section 437, Criminal Procedure Code; [p. 932, col. 2.]

Ajab Lal Khirher v *Emperor*, 32 C. 783; 9 C. W. N. 810; 2 Cr. L. J. 524, followed.

(2) that no notice was required to be issued to the accused inasmuch as they had never appeared before a Magistrate nor been formally discharged. [p. 932, col. 2]

Before an order is made under section 437, Criminal Procedure Code, it is not necessary that notice should in all cases be served upon the accused. Notice is necessary only in those cases where the accused have already appeared and have been discharged. In cases where the accused have not appeared before the Magistrate and taken their trial, no such notice is necessary. [p. 932, col. 2.]

Ambar Ali v. *Anjab Ali*, 14 Ind. Cas. 768; 39 C. 238; 13 Cr. L. J. 304, *Girdhari Marwari* v. *Emperor*, 12 C. W. N. 822; 8 C. L. J. 73; 8 Cr. L. J. 51, distinguished.

Hari Dass Sanyal v. *Saritulla*, 15 C. 608 (F. B.); 13 Ind. Jur. 55; 7 Ind. Dec. (N. S.) 989, *Girish Chunder Ghose* v. *Emperor*, 29 C. 457; 6 C. W. N. 638, followed.

FACTS appear from the judgment.

Mr. *Gour Chandra Pal*, for the Petitioners.—It is a general principle of Criminal Law that no order to the prejudice of an accused person should be made behind his back. This is observed in practice every day by the High Court, and there is all the more reason that the Subordinate Courts should follow this sound principle: *Ambar Ali* v. *Anjab Ali* (1), *Girdhari Marwari* v. *Emperor* (2).

(1) 14 Ind. Cas. 768; 39 C. 238; 13 Cr. L. J. 204.
(2) 12 C. W. N. 822; 8 C. L. J. 73; 8 Cr. L. J. 51.

HARI LAL CHOUDHRY v. EMPEROR.

The order of the Magistrate does not amount to a discharge and, therefore, the District Magistrate had no jurisdiction to direct a further enquiry. It is not a case of "any complaint which has been dismissed," nor is it the "case of any accused person who has been discharged," inasmuch as the accused never appeared, were never charged and, therefore, could not be said to have been discharged.

The Assistant Government Advocate, for the Crown.—The District Magistrate had jurisdiction to order further enquiry; the order of the Magistrate refusing to issue process amounts to a discharge. This is now well settled. *Ajab Lal Khirher* v *Emperor* (3).

[IMAM, J.– You need not pursue this point further. I want to hear you on the question of want of notice.]

Issue of notice is discretionary ; the law nowhere provides for it. In fact the section is silent on the point. The true test is: "Have the accused been prejudiced for want of service of notice?" The rulings draw a distinction between cases where the accused have appeared at any stage of the case and have been discharged, and cases where they have never appeared. The Full Bench case of *Hari Dass Sanyal* v. *Saritulla* (4) draws this distinction. *Girish Chunder Ghose* v. *Emperor* (5).

JUDGMENT.—The facts of this case are shortly these. One Sheonandan Singh instituted a criminal case against eleven persons, including the petitioners. Out of these eleven some were tried and convicted. After their conviction the private prosecutor happened to die and one Jugrup Singh, his uncle, applied to the Sub-Divisional Officer of Hajipur for summoning the petitioners to take their trial The Sub Divisional Officer rejected this petition, on the ground that the case had been adequately dealt with by the first trial. Thereupon Jugrup Singh moved the District Magistrate of Mozafferpur, who ordered the petitioners to be proceeded against.

The learned Vakil appearing on behalf of the petitioners has taken two points on which he asks me to hold that the order of the District Magistrate of Muzafferpur is *ultra vires*

(3) 32 C. 783: 9 C. W. N 810; 2 Cr. L. J. 524.

(4) 15 C. 608 (F. B.); 13 Ind. Jur. 55; 7 Ind. Dec. (N. S.) 989.

(5) 29 C. 457; 6 C. W. N. 638.

The first contention is that there should have been notice served upon his clients before an order under section 437 of the Code of Criminal Procedure could have been passed. Reliance for this contention is placed upon *Ambar Ali* v. *Anjab Ali* (1) and *Girdhari Marwari* v. *Emperor* (2). On the authority of these rulings it is contended that the order without notice is bad. The learned Assistant Government Advocate appearing on the other side has drawn my attention to *Girish Chunder Ghose* v. *Emperor* (5) and *Hari Dass Sanyall* v. *Saritula* (4). His contention is that notice in all cases under section 437 of the Code of Criminal Procedure is not necessary. He argues that such notice is necessary only in those cases where the accused have already appeared and have been discharged. In cases where the accused have not appeared before the Magistrate and taken their trial, he contends, no such notice is necessary. I agree in the contention raised by the Assistant Government Advocate. The authorities he has cited clearly draw a distinction between the cases covered by *Ambar Ali* v. *Anjab Ali* (1) and *Girdhari Marwari* v. *Emperor* (2), above referred to, and the case before me. On the facts of this case it is quite evident the petitioners, as a matter of fact, never had appeared before any Magistrate and, therefore, the authorities relied upon by the Assistant Government Advocate apply to the present case.

The second point on the question of jurisdiction raised on behalf of the petitioners is that the District Magistrate of Muzafferpore had no jurisdiction at all to direct a further enquiry into this case. There is no substance in this contention. The point is concluded by the authority of *Ajab Lal Khirher* v. *Emperor* (3). The order of the Sub-Divisional Officer in this case refusing to try the petitioners amounts to a discharge and the jurisdiction of the District Magistrate under section 437, Criminal Procedure Code, remains.

In the circumstances the application is rejected.

Application rejected.

BOMBAY HIGH COURT.

CRIMINAL APPEALS NOS. 119 TO 135 OF 1919.

June 26, 1919.

Present:—Mr. Justice Shah and Mr. Justice Hayward.

EMPEROR—PROSECUTOR—APPELLANT

versus

J. B. H. JOHNSON—ACCUSED—RESPONDENT.

Factories Act (XII of 1911), s. 41 (a)—Penal Code (Act XLV of 1860), s. 71—Employing several persons to work in contravention of provisions of Act—Offences, whether separate.

The language of section 41 (*a*) of the Factories Act indicates that what is prohibited is the employment of any person or allowing any person to work contrary to the provisions of the Act, that is to say, it is an offence to employ any person, or allow him to work, contrary to the provisions of the Act. Therefore, where several persons are so employed, the offence is complete and separate in respect of each person employed or allowed to work contrary to any of the provisions of the Act [p. 933, col. 2; p. 934, col. 1; p 935, col. 1.]

To such a case the provisions of section 71 of the Penal Code have no application, because the offence of each workman is distinct and separate and there is not one offence collectively merely by the fact of a number of these offences having been committed at the same time. [p. 934, col. 2; p. 935, col. 2.]

Criminal appeal by the Government of Bombay from the orders of acquittal, passed by the Sessions Judge, Ahmedabad, reversing convictions and sentences passed by the Sub Divisional Magistrate, Ahmedabad.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

Sir *Chimanlal Setalvad* for the Accused.

JUDGMENT.

SHAH, J.—The facts which have given rise to these appeals are few and undisputed.

On the 4th of September last at about 11-30 P. M. eighteen persons were found working in the Calico Mills, which is a textile factory subject to the provisions of the Indian Factories Act, XII of 1911. Eighteen complaints were lodged in respect of the employment of these eighteen persons against the manager of the said factory. The accused pleaded guilty, and he was convicted in all these eighteen cases and sentenced to pay a fine of Rs. 100 in each case. On appeals to the Sessions Court the learned Sessions Judge upheld the conviction in the first of these cases and set aside the convictions and sentences in the remaining seventeen cases. He was of opinion that the offence was one of employment of labour collectively and that it was not a separate offence to employ each person contrary to the provisions of the Act.

It is in these seventeen cases, in which the accused has been acquitted by the Sessions Court, that the present appeals are preferred by the Government of Bombay. The question of law that arises is whether under section 41 (*a*) of the Act the offence consists of the employment of labour apart from the number of men employed or whether the offence is complete and separate in respect of each person employed or allowed to work contrary to any of the provisions of the Act.

It has been argued on behalf of the Crown that under section 29 of the Act no person can be employed in any textile factory after 7 o'clock in the evening, that under section 41 (*a*) if in any factory any person is employed or allowed to work contrary to the provisions of the Act, the manager is liable to fine which may extend to Rs. 200, and that the offence is distinct in respect of every person employed or allowed to work contrary to the provisions of the Act. It is further contended that neither the terms of section 45 of the Act nor the corresponding provisions of the English Statute (1 Edw. VII, c. 22, section 135) support the conclusion at which the lower Appellate Court has arrived.

On behalf of the accused it has been urged that the general scheme of the Act, including the provisions relating to the textile factories, indicates that the prohibition is not in respect of any individual but in respect of the labour collectively, and that, therefore, an offence under section 41, clause (*a*), is not the offence of employing each individual but the offence of employing one or more workmen at a time. It is also urged that section 45 of the Act lends support to that view. It is further argued that in any case the provisions of section 71 of the Indian Penal Code are applicable to this case and that there should be only one punishment in respect of all these offences, even if the act of employing each of these persons is treated as a separate act.

After a consideration of these arguments I am clearly of opinion that the contention urged on behalf of the Crown must be allowed. The words of section 41 (*a*) are clear and indicate, in my opinion, that what

is prohibited is the employment of any person or allowing any person to work contrary to any of the provisions of the Act. That would mean that it is an offence under section 41 (*a*) to employ any person or to allow him to work contrary to the provisions of the Act. In the present case, there is no doubt that all these eighteen persons were employed contrary to the provisions of section 29, sub-section 1. It is not suggested that any of the exceptions contained in sub-section (2) of section 29 or in section 30 of the Act are applicable to the facts of the present case. The accused has pleaded guilty to the charges, and there is no doubt that the employment of each one of these seventeen persons was contrary to the provisions of section 29, sub-section 1. The employment of each person must be treated as a distinct act, and the fact that eighteen persons were employed at one time cannot make the employment of these persons one act of employment. The argument based on the scheme of the Act seems to me to be open to the objection that it ignores the clear phraseology of sections 29 and 41, clause (*a*), and that it involves the assumption that the object of the Act is to regulate the working of the mills and the employment of labour collectively and not necessarily to secure protection for the workmen employed in the factory individually. There is no justification for such an assumption. On the other hand, it is a fair view to take that these provisions are intended, among other things, to protect the persons employed in the factory and that the result can be effectively secured if they are read as applying individually and not collectively. As regards section 45 of the Act, I think that it has no application to the present case, and that it throws no light on the point under consideration. It applies in terms to a repetition of the same kind of offence from day to day and not to offences of the same description on the same day. The words of clause (*b*) of section 45 must be read with reference to the purpose of the section, and cannot be allowed to control the plain meaning of section 41, clause (*a*). It is significant that in clause (*b*) in the corresponding section 143 of the English Statute the same phraseology is used, even though under section 137 of that Act the penalty is provided for each person employed.

The provisions of section 71 of the Indian Penal Code, in my opinion, have no application to this case. If the offence consists of employing the labour collectively after the prescribed hour, no resort to section 71 is necessary. If it is an offence to employ each workman, section 71 cannot apply. The first paragraph of the section applies to a case where a repetition of the same offence constitutes in the result the same offence. This is indicated by illustration (*a*). In the present case the offence, if it consists of employing each workman, is distinct and separate and there is no one offence collectively merely by the fact of a number of these offences having been committed at the same time.

The ground upon which the learned Sessions Judge has based his conclusion is that under the repealed Indian Factories Act of 1881, there was an express provision that the offence would be in respect of each individual employed. That, no doubt, was expressly provided as an exception to a proviso which existed in the Act of 1891 and also in the amended section in the Act of 1891. But in the new Act the proviso including the exception is omitted. I do not think that the omission suggests the inference which the lower Appellate Court has drawn. It was apparently to modify the plain meaning of the words of the principal part of the section that the proviso was inserted and even then an exception was made as regards the offence of employing each person. In my opinion the omission to re-enact the proviso rendered the exception unnecessary. Thus the omission has the effect of leaving the words used in the section to indicate their plain and natural meaning. that it would be an offence to employ any person contrary to the provisions of the Act. I cannot agree with the learned Sessions Judge in his suggestion that all the offences indicated in other clauses of section 41 are single offences. I am unable to read all the other clauses of the section in that sense. For instance, it is difficult to accept, as has been suggested in the course of the argument before us, that under clause (*e*) of section 41, which makes it an offence to construct any door in contravention of section 15, it would be only one offence whether one door is constructed in contraven-

tion of section 15 or several doors are so constructed. I do not, however, desire to pursue this line of argument, nor to express any definite opinion as to the interpretation of any other clause of section 41, as that is not strictly necessary for the purpose of this case. I am content to take the words used in clause (*a*) with which we are concerned in this case and to interpret them in their natural and plain sense.

I have no doubt, therefore, that the convictions in these seventeen cases recorded by the Trial Magistrate were right and that the acquittals are wrong.

The result is that the orders of the lower Appellate Court in these seventeen appeals are set aside and the convictions recorded by the Trial Magistrate restored.

As regards the sentences, while it is right that the total fine in respect of these several offences should be substantial, it should not be excessive. The record does not disclose all the circumstances connected with the employment of eighteen persons on this particular occasion. On the whole we think that the sentence of Rs. 50 in each of these seventeen cases would be sufficient to meet the ends of justice. We accordingly order that the accused be sentenced to pay a fine of Rs. 50 in each of these seventeen cases and in default of payment to undergo simple imprisonment for fifteen days.

HAYWARD, J.—These appeals raise the question whether the manager of a factory commits one or several offences by employing several persons illegally under section 41 (*a*) of the Indian Factories Act, XII of 1911.

It seems to me that he commits several offences according to the plain meaning of the words used. But it has been argued that a different meaning ought to be implied and that regard ought to be had not to the number of persons employed, but only generally to the employment. The argument is based on reasoning put forward, not without hesitation, by the learned Sessions Judge, who relied upon the provisions of section 15 of the old Act of 1881 as amended by Act XI of 1891 and upon the provisions of section 45 of the present Act XII of 1911.

It seems to me, however, that the commission of several offences by the employment of several persons was also the plain meaning of the similar words used in the old Act of 1881 as amended by the Act of 1891. There was no necessity otherwise for the proviso restricting the plain meaning, except in the particular instance of the employment of two or more persons, to several offences committed on different days. The effect of the exception was merely to limit the proviso and, therefore, could not be affected by the repeal of the proviso. The necessity of the exception ceased with the repeal of the proviso. It could not, therefore, be implied that the plain meaning of the words was not intended by reason of the omission of the proviso of the old Act from section 41 of the present Act of 1911.

It seems to me again that the commission of several offences on a particular day would nonetheless render the offender liable to separate punishments, because a repetition of those offences on succeeding days has specially been stated to involve liability for further punishments by the subsequent section 45 of the present Act of 1911. It is no doubt difficult to explain why this particular provision was limited to the employment of two or more persons. But whether this was merely a slip in drafting, as would appear to me probable, or whether it was intentional, would make no difference, because the repetition of offences on subsequent days has alone been in view in section 45 of the present Act of 1911.

It was also argued that more than one punishment could not be inflicted for the several offences by reason of the provisions of section 71 of the Indian Penal Code. But it seems to me that that argument merely begged the question. Those provisions could only apply if there were not several offences in the employment of several persons, but merely the general offence of employment. They would not restrict the infliction of punishment in respect of the employment of several persons if this involved several independent offences, but would only restrict the punishment if they involved merely the general offence of employment. It seems to me that recourse could not be had to section 71 of the Indian Penal Code.

It seems to me lastly that substantial punishments were necessary in view of what has been stated both by the Magistrate and the learned Sessions Judge. The punishment proposed, which would approximate in the aggregate to a fine of Rs. 1,000, should be a sufficient punishment for infliction by this Court.

Orders set aside.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 297 OF 1919.

May 15, 1919.

Present :—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

ATUL CHANDRA MANDAL—1ST PARTY—PETITIONER

versus

SRINATH LAIK AND OTHERS—2ND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Previous decree or order of Civil Court for possession, value of—Magistrate, duty of—Possession—Jurisdiction.

A previous order of a Civil Court relating to the property in dispute in a proceeding under section 145 of the Criminal Procedure Code might throw light upon the matter, but the evidentiary value to be attached to such a piece of evidence must depend upon the particular circumstances of each individual case. [p. 937, col. 2.]

There is no inflexible rule of law that in a proceeding under section 145, Criminal Procedure Code, the Magistrate is concluded by every previous order of a Civil or Criminal Court: each case must depend upon its particular circumstances [p 938, col. 1]

Per *Huda, J.*—Decrees of Courts, so far as third parties are concerned, may have different values in different cases. [p 938, cols. 1 & 2.]

In a proceeding under section 145, Criminal Procedure Code, a Magistrate cannot be said to have acted without jurisdiction simply because in making the order he went behind a decree or order of the Civil Court. [p. 938, col. 2.]

Rule against the order of the Deputy Magistrate, with 1st Class powers, Bankura, dated the 19th February 1919.

Babus *Jyoti Prosad Sarbadhikari* and *Jnanendra Nath Dutt*, for the Petitioner.

Babus *Bejoy Kumar Bhattacharyya*, *Rishindra Nath Sarkar* and *Sarat Chandra Da*, for the Opposite Party.

JUDGMENT.

WALMSLEY, J.—Atul Chandra Mandal, the petitioner, is the first party in a proceeding under section 145, Criminal Procedure Code, which ended in an order in favour of the second party, Srinath Laik and Kamalakhi Dasi.

The petitioner's case is that the land which formed the subject of the proceeding was held by his father under one Mohendra Chakravarty and that his father let it out to some Lohars in 1302 B. S.; that the latter failed to pay the rent, and the petitioner obtained a rent decree against them, caused the property to be sold in execution, bought it himself on June 13th, 1918, and took possession through Court on August 5th, 1918.

The case for the second party is this, that one Sujay Chandra Das was in possession of the village in which the land is situated, that he let the land in dispute to one Sarbeswar Mandal in 1912, that Sarbeswar let it to some Lohars, but bought it himself in 1915 in execution of a rent decree against them, that in 1324 B. S. Sarbeswar sold his rights to Kamalakhi Dasi wife of Sujay Chandra Das and that she let the land to Srinath Laik on May 2nd, 1918.

It is common ground, therefore, that some Lohars were in possession until recently and that Srinath was not in actual possession until May 1918, and Atul not until August 1918.

The trouble arose a few days after the delivery of possession to Atul on August 5th, 1918, but the proceedings were drawn up on December 12th, 1918, and the question which the Magistrate had to decide was which of the two parties was in possession on that date.

The grounds taken on behalf of the petitioner are three :—

(1) that the learned Magistrate has gone into ancient history, instead of confining his attention to the one question of which party was in possession on December 12th, 1918;

(2) that as one party said the land was in village Parulia while the other said it was in village Chaoari, an adjudication on that point was necessary to a decision of the case; and

(3) that the learned Magistrate ought to have held himself bound to uphold the order

of the Civil Court putting Atul Chandra Mandal in possession.

The first ground needs very few words. It is clear that the learned Magistrate appreciated that the question was who was in possession on December 12th, 1918, but to answer that question he had to examine the stories told by both sides.

As to the second ground, there is no dispute regarding the identity of the land: whether it is within the boundaries of one village or another makes no difference as to actual possession, although it would have an important bearing on title.

The third ground, however, is the one that has been pressed most strenuously and it is, no doubt, on this ground that the Rule was issued. The decree to which reference is made was a rent decree obtained by Atul Chandra Mandal against some Lohars: in execution of that decree the holding was put up to sale and bought by Atul on June 13th, 1918: possession was given to him by the Civil Court on August 5th, 1918. With regard to that decree it is to be noted that the defendants were not the Lohars mentioned by the second party, and that neither Srinath Laik nor Kamalakhi Dasi—the members of the second party—nor any of the Lohars mentioned by them were parties to the decree and that the decree was obtained *ex parte*. There has, therefore, been no adjudication by a competent Court between the parties now litigating. It is urged that this fact is of no consequence and that the second party should have been left to seek redress under Order XXI, rule 100. It is quite true that that provision gives a remedy to one who has been dispossessed, but their case is that they were not, in fact, dispossessed, and that appears to be the finding of the learned Magistrate although it is not very clearly expressed. Numerous authorities have been quoted before us on the question of the weight to be attached in proceedings under section 145, Criminal Procedure Code, to a decree of the Civil Court regarding the property in dispute, but I do not think it necessary to refer to them in detail, for they have been discussed at some length in the case of *Kulada Kinkar Roy* v *Danesh Mir* (1). It was there held that a previous order of the Civil Court relating to the property in dispute might throw light upon the matter, but the evidentiary value to be attached to such a piece of evidence must depend upon the particular circumstances of the individual case. This, I think, is the view that has been taken by the learned Magistrate, for he points out several facts about that rent suit, all tending to the conclusion that it was not a *bona fide* suit by a landlord against tenants in actual possession.

In my judgment the learned Magistrate has not committed any error in his treatment of the proceedings in the Civil Court. As the grounds taken by the petitioner fail, the Rule must be discharged.

SHAMSUL HUDA, J.—The petitioner purchased the land covered by the proceedings under section 145, Criminal Procedure Code, in execution of a rent decree and obtained symbolical possession. The sale took place on the 13th of June, possession was delivered on the 5th of August and the present proceedings were taken on the 13th of August 1918. The Magistrate has put the opposite party in possession of some of the lands purchased by the petitioner, finding that this land was never in possession of the tenants whose holding was sold, that it did not form a part of any such holding and that on the date of the proceedings it was the opposite party that was in actual possession inspite of the execution of the writ for delivery of possession.

In support of the Rule Mr. Sarbadhikari has contended that the Magistrate had no jurisdiction to go behind the Civil Court decree and he has relied on a number of rulings which support his contention more or less, and decisions taking a contrary view have also been placed before us by the learned Vakil who appeared to show cause against the Rule. These decisions are not wholly reconcilable.

In the case of *Doulat Koer* v. *Rameswari Koeri* (2) it appears that Doulat Koer had obtained Letters of Administration to the estate of her husband after a protracted litigation which went up to the Privy Council. The opposite

(1) 33 C. 33; 2 C. L. J. 271; 10 C. W. N. 257; 2 Cr. L. J. 670 (F. B.).

(2) 26 C. 625; 3 C. W. N. 461.

party Dulin Saheba claimed possession by right of purchase from one Mahadeb, in whose favour Doulat Koer was said to have created a Dur mukarari interest pending the suit for the purpose of defraying the expenses of the appeal to the Privy Council. During the pendency of the suit the property was in the possession of a Receiver, and it appeared that when the Receiver vacated, possession was made over to Doulat Koer. Prinsep, J., held that the Magistrate acted without jurisdiction in putting Dulin Saheba in possession. He observed: "It is not for the Magistrate in this summary proceeding to consider whether as against Doulat Koer this confers a perpetual title to possession. The duty of the Magistrate was to carry out the orders of the Civil Court and to maintain those orders by assisting the possession of any person whose title is found by that Court." In *Gordon Sims* v. *Joburry Lal* (3) Sale and Pratt, JJ, following the decision in *Doulat Koer's case* (2), said: "We are aware of no rulings which prescribe that the Magistrate is to maintain a party in possession in accordance with a decree of Civil Court only when the opposite party is a party to that decree." In the case of *Gulraj Marwari* v. *Sheik Bhatoo* (4) a Civil Court decree was held binding even against third parties. The tendency of later decisions has, however, been not to consider a Civil Court decree binding against third parties even for purposes of proceedings under section 145, Criminal Procedure Code. To this class belong the cases of *Bloomfield* v. *Gangadhar Kundu* (5) and *Jogabandhu Shaha* v. *Raj Kumar Roy Chowdhury* (6). Between these two views we may safely adopt a middle course, and I feel no hesitation in following the decision of Rampini and Mookerjee, JJ., in *Kulada Kinkar Roy* v. *Danesh Mir* (1) in which it was observed that there is no inflexible rule of law that a Magistrate is concluded by every previous order of a Civil or Criminal Court and that every case must depend on its own particular circumstances.

Decrees of Courts, so far as third parties are concerned, may have different values in different cases. Where, for instance, there has been a real contest between the parties to a suit and upon an adjudication regarding title or possession a party has been awarded a decree and has been put in possession in execution of such a decree, it may not be enough for a party claiming adversely to such a decree to show that he was not a party to it.

Cases of money decrees followed by sale of properties would stand on a different footing. In these cases the sale in execution only passes the right, title and interest of the judgment-debtor. Consequently, there is no adjudication regarding his title to the property, except where an attachment gives rise to a claim and there is an adjudication on such claim or where the delivery of possession leads to an investigation under Order XXI, rules 97 to 100 of the Civil Procedure Code.

In estimating the value of delivery of possession against third parties it is also material to see what is the true nature of the possession said to have been delivered.

In the present case there was a suit for rent, there was no contest and there was an *ex parte* decree. There was no adjudication of any kind regarding the title and possession of the tenants whose holding was brought to sale and all that was done in delivering possession was the posting of a bamboo, and it does not appear that the second party were present when the bamboo was posted or had any opportunity of offering resistance to such delivery of possession. The Magistrate who tried the case was also not satisfied that the proceedings in the rent suit were *bona fide*.

Under these circumstances I do not think the Magistrate went beyond his jurisdiction in disregarding the decree of the Civil Court and I agree with my learned brother in discharging the Rule.

Rule discharged.

(3) 5 C. W. N. 563.
(4) 32 C. 796; 2 Cr. L. J. 761.
(5) 4 C. L. J. 562; 4 Cr. L. J. 503.
(6) 15 Ind. Cas. 999; 13 Cr. L. J. 583.

SHEO NARAIN SINGH *v.* RAM PERTAP RAI.

PATNA HIGH COURT.

CRIMINAL REVISION No. 66 OF 1919.

March 24, 1919.

Present:—Mr. Justice Roe and Mr. Justice Coutts.

SHEO NARAIN SINGH AND OTHERS—PETITIONERS

versus

RAM PERTAP RAI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 203, 437—Dismissal, order of, under s. 203 – Further inquiry, order for—Notice to accused, whether necessary—Procedure—Summons, whether can be issued to accused before judicial inquiry is complete.

A party who is not being tried for an offence is not an accused person. [p. 941, col. 2.]

Satyanarain Tewari v. *Emperor*, 32 C. 1085; 10 C. W. N. 51; 3 Cr. L. J. 138, followed.

In revising under section 437 of the Criminal Procedure Code an order of dismissal under section 203 or 204 (3) of the Code it is not necessary to issue notice to the other side. [p. 941, col. 2.]

Hari Dass Sanyal v. *Saritulla*, 15 C. 608 (F. B.); 13 Ind. Jur. 55; 7 Ind. Dec. (N. S.) 939, followed.

Where a case is dismissed under section 203 of the Criminal Procedure Code and the Magistrate is directed under section 437 of the Code to hold a further judicial inquiry, he has no jurisdiction to issue summons to the accused, until he has completed the judicial inquiry and a *prima facie* case is disclosed against the accused. [p. 941, col. 2; p 942, col. 1.]

Criminal revision against the order of the Sessions Judge, Shahabad, dated the 10th February 1919, directing further inquiry into the case of a complaint dismissed by the Sub-Divisional Officer, Buxar.

The case was originally heard by Jwala Prasad, J., sitting singly who in view of the importance of the matter involved in this case referred it to the Bench.

FACTS will appear from the following judgment of

JWALA PRASAD, J.—(*March* 21, 1919).—This is an application against an order of the Sessions Judge of Shahabad, dated the 10th February 1919, under section 437 of the Code of Criminal Procedure directing further enquiry into a complaint which was dismissed by the Sub-Divisional Officer of Buxar under section 203 of the Code of Criminal Procedure. The complaint was lodged in respect of offences under sections 395, 379 and 147, Indian Penal Code, on the 10th of January 1919 and the complainant was examined on oath the same day. The Magistrate, without giving any reason for postponing the issue of processes, passed the following order on the back of the petition :—"Inspector Dumraon to treat this as a first information and make careful enquiry reporting by 18th January 1919."

On 17th January the Inspector submitted his report for judicial enquiry for an offence under section 323, Indian Penal Code. On receipt of this report the Magistrate on 18th January 1919 dismissed the complaint under section 203, Criminal Procedure Code.

The order of the Magistrate dismissing the complaint has, however, been set aside by the learned Sessions Judge of Shahabad and further enquiry into the complaint under section 437 of the Code has been directed.

Mr. Manuk on behalf of the petitioners attacks the order of the Sessions Judge on various grounds, the principal one being that no notice was given to the petitioners by the Sessions Judge before directing further enquiry under section 437 of the Code of Criminal Procedure. It is not necessary for me to mention, or deal with, the other grounds taken by Mr. Manuk on behalf of the petitioners, inasmuch as I consider it desirable that the principal question, whether the order of the Sessions Judge under section 437 should be set aside as being bad for want of notice to the petitioners, should be decided by a larger Bench. Section 437 itself does not provide for any notice being given to any person affected by an order under that section. Mr. Manuk, however, invokes the aid of the general principle of law that no order should be passed against any person without notice to him and without giving him an opportunity of being heard against the proposed order. In support of this contention a number of authorities of the various High Courts, notably of the Calcutta High Court, has been cited to me. It is needless to refer to all of them, as they have been enumerated in almost all the annotated editions of the Code of Criminal Procedure. The leading decision is that of the Full Bench of the Calcutta High Court in the matter of *Hari Dass Sanyal* v. *Saritulla* (1). That was a case where the accused person was discharged under section 253 of the Code. It is, however, observed in the judgment of the learned Chief Justice and Prinsep, J., that no notice would be necessary in case of a complaint

(1) 15 C. 608 (F. B.); 13 Ind. Jur. 55; 7 Ind. Dec. (N. S.) 989.

dismissed under section 203 where the accused person had not appeared or was not summoned to appear before the Magistrate—a distinction is made between a discharge of an accused under section 253 and a dismissal of a complaint under section 203. Mr. Yunus appearing for the opposite party relies upon this distinction and contends that no notice at all was necessary, inasmuch as the learned Sessions Judge in directing further enquiry under section 437 was making the same order as the Magistrate would have made upon the complaint, namely, directing processes to issue against the accused behind their back and without a notice to them. Mr. Yunus further relies upon the case of *Girish Chunder Ghose* v. *Emperor* (2) and the view taken by the Allahabad High Court in several cases, particularly in *Angan* v. *Ram Pirbhan* (3) and *Liaqat Husain* v *Emperor* (4). A contrary view appears to have been taken in 1906 by the Calcutta High Court in the cases of *Brij Kishore Ghose* v. *Gopal Rai* (5) and *Bhagwat Prasad Singh* v. *Bishuni Darzi* (6). In the latter case the report of the case is too short to give us a detailed account of the facts of that case, but the following observation appears in the body of the judgment :—"It is a rule which has been consistently followed in this Court that notice should be served unless the case is a very clear one." Mr. Manuk relies upon this observation for his contention that in the case of dismissal of a complaint under section 203 also the practice of the Calcutta High Court had been to require a notice to be given to the accused before directing further enquiry into the complaint under section 437 of the Code.

In view, however, of a different opinion expressed by the Calcutta High Court in the Full Bench case of *Hari Dass Sanyal* v. *Saritulla* (1) and the positive decision in the case of *Girish Chunder Ghose* v. *Emperor* (2) it is impossible to say that the invariable rule of practice of that Court was to require a notice to be given before directing further enquiry under section 437.

(2) 29 C. 457; 6 C. W. N. 638.
(3) 18 Ind. Cas. 146; 10 A. L. J. 531; 35 A. 78; 14 Cr. L. J. 2.
(4) 43 Ind. Cas. 622; 16 A. L. J. 30; 40 A. 138; 19 Cr. L. J. 206.
(5) 11 C. W. N. 3 6; 5 Cr. L. J. 1:2.
(6) 11 C. W. N. xxxv (35 *Notes*).

My attention has been drawn to a judgment of Mr. Justice Imam, sitting singly, in an unreported case of *Hari Lal Chowdhry* v. *Emperor* (7). In that case on a complaint some of the accused persons mentioned in the petition were tried and convicted. The Magistrate refused to issue summons against the remaining persons accused in the complaint petition. On motion to the Sessions Judge the order of the Magistrate was set aside and further enquiry was directed under section 437 of the Code. This order was passed without any notice to the persons affected by the order. Mr. Justice Imam adopted the view of the Calcutta High Court in *Girish Chunder Ghose* v. *Emperor* (2) and the principle enunciated in the judgment of Mr. Justice Prinsep in *Hari Dass Sanyal* v. *Saritulla* (1), and held that where the accused persons had not entered appearance in the Court of the Magistrate no notice was necessary.

I have already said that section 437 itself does not expressly provide for a notice to be given to the person affected by the order under that section. The decision of this case, therefore, involves laying down an important rule of procedure to be followed by the lower Courts in this Province in dealing under section 437 of the Code with complaints dismissed under section 203. In view of the fact that cases of this kind very frequently occur, I feel it desirable that the question be set at rest by a definite and authoritative decision on the point of a larger Bench of this High Court. Let the case be placed before a proper Bench for decision as early as possible.

Mr. *P. C. Manuk* (with him Mr. *Nirsu Narayan Sinha*), for the Petitioners:—(1) Notice should be issued "unless the case is very clear," Quotes 11 C. W. N. 35, notes portion. Calcutta practice is not consistently against me, only *Girish Chunder Ghose* v. *Emperor* (2) is against me.

In Bombay, notice was given in *Queen-Empress* v. *Gajankhan* (8), where the accused was an Honorary Magistrate. In the present case the accused was also a respectable person; reads *Ruxmani Bhogilal, In re* (9).

(7) 53 Ind. Cas. 931.
(8) 2 Bom. L. R. 586.
(9) 6 Bom. L. R. 479.

In Madras, *Beauchamp* v. *Moore* (10) distinguishes illegal from improper order of discharge.

Allahabad is against me altogether. I submit that the rule should be left elastic and the hands of the High Court should not be tied down where there has been injustice to the accused.

In the Punjab, opinion is divided: reads *Paras Ram* v. *Emperor* (11).

How can it prejudice or affect justice by hearing me or accused except in spec al cases, when notice to the accused would give him an opportunity to run away or abscond?

If the Sessions Judge can interfere with an order dismissing a complaint under section 203 without notice to me, where is the good of section 203?

Discretion should not be arbitrary or it would be intolerable. It is to guard against a misuse of such discretion that it is desirable that accused should be present at this further proceeding under section 437 which may result in his prejudice.

Mr. *M. Yunus* (with him Mr. *S. P. Varma*), for the Opposite Party, was not allowed to argue inasmuch as he represented the private prosecution and the Crown was not represented in this case.

JUDGMENT.—The petitioners in this case are aggrieved, firstly, by an order of the Sessions Judge directing a further judicial enquiry, upon which the District Magistrate directed a specified Deputy Magistrate to hold that judicial enquiry; and secondly, by the further proceedings in which the Deputy Magistrate ignored both the orders of the Sessions Judge and the District Magistrate and summoned the accused to answer charges which everybody who had looked into the matter at all had declared either to be largely exaggerated or wholly false as regards a number of the accused who have been summoned.

Two grounds are taken, firstly, that the order passed by the Sessions Judge was without notice to the accused and, secondly, that the Deputy Magistrate had no jurisdiction to issue summonses until a judicial enquiry had been made. The whole case-law with regard to notice has been clearly and fully stated by our brother Jwala Prasad. It is sufficient for us to say that the view taken by the Full Bench in Calcutta in the case of *Hari Dass Sanyal* v. *Saritulla* (1) was that in the case of a dismissal under section 203 or section 204 (3) notice to the other side is not desirable. The other side has never yet had notice, the proceedings not having reached the stage of summoning them as accused persons and in this regard such cases are distinguishable from cases in which accused persons have been tried and discharged. Action in contravention of that Full Bench decision should not, we respectfully think, have been taken without further reference to a Full Bench. We see no reason to refer this matter to a Full Bench of this Court, for the reason that we accept the argument suggested by the Full Bench of the Calcutta High Court. It seems to us illogical that an accused should not be allowed to appear in proceedings under section 202 (and this is the settled practice of this Court frequently and forcefully laid down) but that he should be allowed to appear in proceedings purporting to revise proceedings under section 202 and that if under that section the proceedings are continued, he should again be precluded from appearing. It seems to us far better that until the accused has been brought before the Court either by summons or by warrant, he should not be allowed to come before the Court at all. The view taken in *Sat Narain Tewari* v. *Emperor* (12) that a party who is not being tried for an offence is not an accused person is clearly the correct view.

As regards the merits of the learned Sessions Judge's original order we feel that it, as framed by him and interpreted by the District Magistrate, was a sound order. The Police had desired a further investigation and the complainant had prayed for a further investigation. We can see no objection to the form of the orders made by the heads of the district. We regard the proceedings of the Deputy Magistrate, Mr. Kaviraj, as a defiance of the orders of his official superiors. He should not have issued these summonses until he had made a judicial enquiry, and we are of opinion that in the circumstances of the case the issue of the summonses against all the accused

(10) 26 M. 43; 2 Weir 232; 12 M. L. J. 43.
(11) 12 Ind. Cas. 991; 44 P. W. R. 1911 Cr.; 12 Cr. L. J. 615.

(12) 32 C. 1085, 10 C. W. N. 51; 3 Cr. L. J. 138.

was outside his powers. We, therefore, cancel the order instituting proceedings against the accused named by Mr. Kaviraj and direct that no summons or warrant be issued until a judicial enquiry has been made and a *prima facie* case disclosed against them.

Order cancelled.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1081 OF 1918.

February 7, 1919.

Present :—Mr. Justice Richardson and Justice Sir Syed Shamsul Huda, KT.

MAJID ALI SARDAR *alias* MAJID ALI CHAKAR—PETITIONER

versus

ALI ASRAB AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 522—Order restoring possession to complainant, setting aside of—Notice to complainant, whether necessary.

An order under section 522 of the Code of Criminal Procedure ought not to be declared as of no effect without hearing what the complainant, who is the party most interested in the maintenance of the order, has to urge in support of it. [p. 944, col. 1.]

Rule against the order of the Sessions Judge, Backergunj, dated the 29th October 1918.

Babus *Dasarathi Sanyal* and *Suresh Chandra Talukdar*, for the Petitioner.

Babu *Monmotha Nath Mukherjee*, for the Opposite Party.

JUDGMENT.

HUDA, J.—This is a Rule calling upon the opposite party to show cause why the order of the Sessions Judge of Backergunj, dated the 29th of October 1918, declaring that the order made by the trial Court under section 522, Criminal Procedure Code, should be treated as void, should not be set aside on the 7th and 8th grounds mentioned in the petition or why such other order should not be made in the matter as may seem fit.

The circumstances of the case leading up to the order under consideration are shortly these. In execution of a rent decree against Atabaddi Howladar, Akram Ali Howladar, and several others, Howla Mohamad Ghazi was sold and purchased by Annada Charan Singh and his cousin Chandi Charan Singh on the 29th of November 1915. Ali Asrab, opposite party No. 1, is the son of Atabaddi, since deceased. The complainant Majid Ali Sarkar is a servant of Annada Singh. The homestead of Atabaddi Howladar and Akram Ali Howladar was included in the Howla. The purchasers seem to have met with considerable opposition in Court from the judgment-debtors but afterwards succeeded in obtaining an order for delivery of possession from the Munsif. Apprehending that the proceedings for delivery of possession might lead to a breach of the peace, the Munsif ordered on the 13th of October 1917 that the writ for delivery of possession should be executed with the aid of a Police force. Thereupon on the 5th of November 1917 the Civil Court peon went to the spot with the writ for delivery of possession. A force of six armed Constables under one Havildar and one Subadar was deputed to help him. What the peon did there may be gathered from his report, dated the 6th of November 1917, submitted to the Court. In this report the peon stated that he went to the spot with the assistance of the Police, published the *parwannah* and put the purchasers into possession in the usual way by beat of drum. There are no grounds for questioning the correctness of this report and the Court below does not say that the peon did not do what he stated in the report that he had done.

The divergence between the prosecution and defence stories may be said to begin from here. It is alleged on behalf of the prosecution that on the 5th of November 1917 the auction-purchasers obtained actual possession, that the judgment-debtors with their family and goods left the *bari* and removed to another *bari*, taking down one of the huts and agreeing to remove the others within 3 or 4 days, that on the 6th of November the auction-purchasers erected a new hut on the site of the old hut thus removed, and this hut was occupied by the guards placed in the *bari* by the auction-purchasers and one Constable also remained there to keep the peace, that two other huts were removed shortly after and re-built in the new *bari*

to which the judgment debtors had removed, that on the 10th of November 1917 Atabaddi Howladar and Akram Ali Howladar with their sons Asrab Ali and Ali Akbar and a number of others forcibly entered the *bari* armed with *lathis* and spears and threatened to beat the auction-purchasers' men unless they left the *bari*, that they re entered the old huts which still stood in the *bari*, that information was lodged at the Thana and the Sub-Inspector took up the investigation of the case on the 25th of November 1917 and arrested Atabaddi and Akram Ali, that after the Sub Inspector had left the *bari* the accused-opposite party with a number of men armed with *lathis* and *sarkies* attacked and wounded the men of the auction purchasers and thus regained possession of the *bari*. There can be no doubt that it was a most determined attack and the men of the auction purchasers were severely wounded.

The accused opposite party were on these facts charged with rioting and various other offences and in the result Ali Asrab was convicted under sections 148 and 324, Indian Penal Code, Karamat Ali was convicted under sections 147 and 323, Indian Penal Code, and they were sentenced respectively to 7 months and 5 months' rigorous imprisonment on each charge, the sentences to run concurrently; accused Islam Farazi and Azizur Rahaman were convicted under section 147, Indian Penal Code, only and sentenced to 4 months' rigorous imprisonment each. The Magistrate also passed an order under section 522 of the Criminal Procedure Code restoring Annada Singh and Chandi Singh to the possession of the *bari*.

On appeal the learned Sessions Judge was of opinion that on the 5th of November 1917 the auction-purchasers had not obtained actual possession, that the judgment-debtors did not leave the *bari* on that day as alleged by the prosecution nor did they remove any of the huts, that the story of the auction-purchasers erecting a new hut in the *bari* or placing their guards in it was untrue, that the defence story that they were given 5 days by way of grace to enable them to come to some arrangement with the auction-purchasers was true and that although on the expiry of the period of grace their continuance on the land was wrongful, nonetheless they remained on the land and were in possession of it on the 25th of November 1917 when the riot took place. Upon this view of the case the learned Judge held that the common object charged, *viz.*, to take possession of the *bari* by force, failed and the conviction under section 148 or section 147, Indian PenalCode, could not, therefore, stand. After stating that the possession of the *bari* at the time of the riot was clearly wrongful and *mala fide*, the learned Judge proceeded as follows:—

"Nevertheless, it was possession and this is sufficient to exonerate them from the charge of rioting as framed by the lower Court. The charge under section 147 or 148, IndianPenal Code, must, therefore, fail."

He, however, affirmed the conviction of the opposite party Ali Asrab under section 324, Indian Penal Code, and of Karamat Ali under section 323, Indian Penal Code, and maintained the sentences passed upon them by the Magistrate.

"The judgment debtors," observed the learned Judge, "managed to retain possession by the device of asking for 5 days grace. It is now contended in effect that by the breach of faith the appellants acquired the right of private defence." This contention he found no difficulty in rejecting.

Regarding the order under section 522, Criminal Procedure Code, the learned Judge recorded the following order in the Order Sheet under date 21st of October 1918:—

"The order under section 522 of the Criminal Procedure Code will continue to be in abeyance pending a reference to the High Court."

On the 29th of October 1918 he recorded another order in the following terms:—

"I do not think any reference to the High Court is necessary as regards the order under section 522, Criminal Procedure Code. In view of my finding in appeal that the auction-purchasers did not get possession, the order for restoring possession to them does not arise and automatically ceases to have effect. It will, therefore, be treated as void." The Rule, as I have said, is directed against this last order.

It is stated in the petition to this Court, and the statement is supported by an

affidavit, that this order was passed after hearing the Pleader for the accused but in the absence of the complainant or his Pleader or of the Public Prosecutor who had appeared for the Crown. It is clear that the complainant was most interested in the maintenance of this order and it ought not to have been declared as of no effect without hearing what the complainant had to urge in support of it On this ground alone the order is liable to be set aside. The question, however, remains whether we should set aside the order of the learned Judge, unless we are satisfied that the complainant had good grounds to urge against it if he had the opportunity to do so. I think he had. It seems to me that the mere fact that the appeal was partially allowed or the finding of the Appellate Court that the accused were in wrongful possession on the date of occurrence did not *ipso facto* render the order void. The judgment of Stevens and Harington, JJ., in the case of *Gourhari Gope* v. *Alay Gopini* (1) would seem to support this view, as upon any other view of the case the learned Judges would not have thought it necessary to send the case back to the Appellate Court in order that that Court should deal with the order under section 522 of the Criminal Procedure Code. The learned Judge could no doubt set aside the order under section 423 (*d*); if he thought it was just and proper to do so.

Having regard to the facts of the case and the conclusions arrived at by the Judge, it seems to me that if he had thought he had discretion in the matter he might not have exercised that discretion in favour of the opposite party. I cannot shut my eyes to the fact that the complainant's conduct disclosed a spirit of lawlessness which certainly deserved no encouragement. Here are the auction-purchasers who encounter every opposition in getting possession of the property they had purchased. At last a peon of the Civil Court with the help of an armed force gives them such possession as he could. The opposite party ask for 5 days grace to enable them to come to some settlement with the auction-purchasers. They come to no such arrangement and the five days of grace extend to twenty and when the auction purchasers' men then enter the *biri* in a peaceful manner unarmed, they are attacked with various deadly weapons and severe injuries are caused to the complainant and three others of his party by *lathis* and spears Even the Constable Jagadish Chandra did not go unhurt, for he too bore marks of slight injuries.

In a case like this to relegate the auction-purchasers to another suit in the Civil Court and possibly to a repetition of all their troubles and difficulties is a result which the Appellate Court was bound to take into consideration after hearing the party most vitally interested in the matter. It also seems to me that in coming to the conclusion that the auction purchasers did not obtain possession of the *biri* on the 5th of November 1917, the learned Judge put a very narrow construction on the meaning of the word 'possession'. As observed by West, J., in the case of *Shaik Ibrahim* v. *Shaik Suleman* (2), "an appropriate intention where two are present on the same premises may put the one out as well as the other into possession without any actual physical departure or formal entry." It seems to me that on that day the auction-purchasers did get possession of the *bari* and that its possession by the accused from that day till the 25th of November 1917 was possession by leave and license of the auction purchasers, so that it cannot be said that there was no question of restoring the auction-purchasers to possession.

I would make the Rule absolute on the short ground that the order complained of should not have been passed behind the back of the party affected by it.

RICHARDSON, J.—I agree.

Rule made absolute.

(1) 29 C. 724; 6 C. W. N. 713.

(2) 9 B. 146.

SRINATH BOSE *v.* NIBARAN CHANDRA ROY.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 507 OF 1917.

April 25, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Duval.

SRINATH BOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NIBARAN CHANDRA ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Family dispute, settlement of, by female—Court, duty of—Reversioners, whether can question settlement.

Where the several members of a family effect a settlement of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively, and the settlement thus effected is a *bona fide* settlement for the benefit of the family, and a partition of the estate follows thereupon, the Courts are bound to give full effect to it, and such settlement cannot be questioned by the reversioners by means of a suit to establish their right to some of the properties dealt with thereby.

Appeal against the decree of the Additional Judge, Midnapore, dated the 14th December 1916, modifying that of the Officiating Subordinate Judge of that District, dated the 10th April 1915.

Babus *Jyotish Chandra Hazra* and *Satcowripati Roy*, for the Appellants.

Babus *Bipin Behary Ghose* and *Sarada Ch. Maity*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for establishment of the plaintiffs' right to, and possession of, the properties in dispute, which are described in the four schedules to the plaint.

The plaintiffs are the daughter's sons and sole heirs of one Radha Krishna Roy. Radha Krishna left a daughter Sital Moni and the plaintiffs, grandsons, by that daughter. The defendants are the heirs of Ram Kanai and Dinabandhu, who were the brothers of Radha Krishna The name of one Kumeda Charan Roy, who was the father of the defendants Nos. 1 to 4, may be mentioned here. It appears that after the death of Radha Krishna, Kumeda Charan asserted that he had been adopted by Radha Krishna and laid claim to the estate left by him. In the year 1883, Sital Moni brought a suit for establishment of her right to a share of the estate as the heiress of her father Radha Krishna. The suit was brought against Kumeda Charan and the other heirs of Ram Kanai and Dinabandhu. It was contested by Kumeda alone and it appears that the other defendants were subsequently discharged from the action. The suit was terminated by a Solenamah entered into between Sital Moni and Kumeda Charan on the 24th July 1883. Under this Solenamah, the dispute between the parties was settled; Kumeda Charan, defendant No. 1 in that suit, gave up his claim as the adopted son of Radha Krishna and his claim to certain properties; Sital Moni also gave up certain properties in favour of Kumeda Charan and her right to the rest of the properties was declared. There was subsequently a suit for partition brought by Sital Moni which was based upon the Solenamah; and lastly there was a suit for mesne profits brought by the lady against the defendants, which again ended in a compromise. Sital Moni died in January 1902 and the present suit was instituted by her sons, plaintiffs Nos. 1 and 2, for establishment of their right in respect of certain properties, their title to which had been denied or of which they had been dispossessed by the defendants.

The Court of Appeal below, agreeing with the Court of first instance, has given a decree declaring the right of the plaintiff in respect of the lands of Schedule I and disagreeing with that Court has given a decree for possession and mesne profits in respect of a one-third share of the lands of Schedule II. The claim with respect to the lands of Schedules III and IV has been dismissed by both the Courts below.

The plaintiffs have appealed with reference to the lands of Schedules III and IV and the defendants have preferred a cross-objection in respect of the lands of Schedule II.

The main question for consideration in this appeal is whether the compromise entered into by Sital Moni is binding upon the plaintiffs.

There can be no doubt that there was final settlement of disputes and of the rights of each party and that if the settlement was *bona fide*, it was binding upon the reversioners.

In the case of *Khunni Lal* v. *Gobind Krishna*

Narain (1) the Judicial Committee observed that that they had no hesitation in adopting the view taken in the case of *Oudh Beharee* v. *Ranee Mewa Koonwer* (2), where the learned Judges say as follows: "The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light rather than as conferring a new distinct title on each other that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement."

That case was followed by their Lordships in the case of *Hiran Bibi* v. *Sohan Bibi* (3). Their Lordships were of opinion that the facts of the case brought it within the decision in *Khunni Lal* v. *Gobind Krishna Narain* (1), in other words, that the compromise in question was in no sense of the word an alienation by a limited owner of the family property but a family settlement in which each party took a share of the family property by virtue of the independent title which was to that extent and by way of compromise admitted by the other parties. See also the cases of *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (4) and *Shyam Lal Ghosh* v. *Rameswari Pasu* (5).

It is contended on behalf of the appellant that no independent title was recognised by the petition of compromise and that, therefore, the case does not come within the purview of the decisions of the Privy Council. This argument is based upon the ground that the petition of compromise does not state that Kumeda Charan had set up his right as the adopted son of Radha Krishna; but we have to take the petition of compromise along with the plaint and written statement in that case. The plaint in that case distinctly stated that Kumeda had set up his rights as the adopted son and had dispossessed the plaintiff in that suit from her father's share in the family estate, and that it was for that reason that the suit was instituted. There is no doubt, therefore, that there was a dispute between the parties and it had been proved that Sital Moni and the present plaintiffs, who are the reversioners, would have been entirely deprived of the estate but for the compromise which was arrived at. By the compromise Sital Moni gave up some of the properties, similarly Kumeda Charan gave up some of the properties to which he had asserted his right as adopted son. The plaintiff No. 1, one of the sons of Sital Moni, was an attesting witness to the petition of compromise. The plaintiff No. 1 appears to have been an accountant in the District Judge's office and was quite capable of protecting the interest of his mother and his future interest as a reversioner. After a decree had been passed upon this petition of compromise, a suit was instituted by Sital Moni for partition of the estate. The estate was accordingly partitioned and it appears that Sital Moni and after her death her sons, plaintiffs Nos. 1 and 2, have been in enjoyment of the properties according to the result of the partition. Lastly, there was a suit for mesne profits brought by Sital Moni and that suit was ultimately compromised by her. Both the present plaintiffs looked after that case and were attesting witnesses to the petition of compromise.

That there was a *bona fide* compromise entered into in 1883 cannot be, and is not, disputed. The very fact that one of Sital Moni's sons was an attesting witness to the petition of compromise negatives the possibility of any collusion between the parties. In the circumstances under which the suit was instituted by the lady, the compromise was beneficial to the estate, and was certainly not entered into for the personal benefit of the lady herself. In all these circumstances, the Courts below were right in holding that the compromise is binding on the plaintiffs so far as the lands of Schedule IV are concerned.

With regard to the lands of Schedule I,

(1) 10 Ind. Cas. 477; 38 I. A. 87 at p. 102; 33 A. 356; 21 M. L. J. 645; (1911) 1 M. W. N. 432; 10 M. L. T. 25; 13 Bom. L. R. 427; 13 C. L. J. 575; 8 A. L. J. 552; 15 C. W. N. 545 (P. C.).

(2) 3 Agra H. C. R. 82 at p. 84.

(3) 24 Ind. Cas. 309; 18 C. W. N. 929; 27 M. L. J. 149; 1 L. W. 648 (P. C.).

(4) 27 Ind. Cas. 954; 21 C. L. J. 157 at pp. 162, 163; 19 C. W. N. 1280.

(5) 33 Ind. Cas. 273; 23 C. W. N. 82 at p. 89.

the lands which the plaintiffs claim as having been allotted to Sital Moni on partition, the Court below has declared the right of the plaintiffs. The defendants in this Court say that they did not dispossess the plaintiffs from this land and that the plaintiffs have no cause of action against the defendants. The respondents do not dispute the right of the plaintiffs to these lands and have no objection to the decree passed by the Court below for lands of this schedule, provided there is no decree for mesne profits. We think that the decree of the lower Court in so far as the lands of Schedule I are concerned should stand.

With regard to lands of Schedule II, the lower Appellate Court gave a decree to the plaintiffs for a one-third share of these lands. A cross-objection has been filed on behalf of the defendants so far as these lands are concerned. It is contended that the lower Court has proceeded upon some presumption. It appears, however, that there was no denial in the written statement that the lands of this schedule formed part of the joint family property and we are told that there is some evidence in support of the finding of the lower Court. We think that the cross-objection should be dismissed.

There remain only the lands of Schedule III. Both the Courts have held that no cause of action has been disclosed in the plaint and that it does not appear that these lands belong to the estate held by Radha Krishna. We are not disposed to interfere with the order of the lower Court so far as these lands are concerned.

On behalf of the appellant, objection was taken to the order for separate sets of costs to the defendants. The question of costs, however, is in the discretion of the Court and we do not wish to interfere in the matter.

The result is that both the appeal and the cross objection are dismissed. Each party will bear his own costs in this Court.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 87 B OF 1915.

November 20, 1915.

Present:—Mr. Stanyon, A. J. C.

SHRIPUJA—PLAINTIFF—APPELLANT

versus

KANHAYA LAL—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 90—Ancient document—Presumption as to execution and attestation—Document, whether must be produced—Custody, proper, proof of—Interpretation of Statutes—Court, duty of.

The rule of presumption embodied in section 90 of the Evidence Act must be applied with exceeding caution in India, where forgery and fraud are not of rare occurrence. The necessity for such caution makes it necessary to give a strict and narrow, and not a loose and liberal, interpretation to the provisions of the law. [p. 951, col. 2.]

The Legislature, by the plain language used in section 90 of the Evidence Act, has limited the power of the Court to dispense with proof of the execution of documents relied on as evidence, to ancient documents produced in Court at the trial; and the Courts in India have no power to enlarge this legislative provision so as to apply it to cases clearly outside the enactment. [p. 953, col 2.]

The law makes the production of the document a *sine qua non* for the application of section 90. [p. 953, col. 2.]

Every ancient document for which a presumption of due execution is claimed, must be produced before the tribunal which is asked to make the presumption in its favour, so as to place it in a position to see for itself whether it bears upon the face of it such indications as convince the mind that it is genuine or "betrays from some anachronism or other inconsistency" that it is a fabrication. [p. 951, cols. 1 & 2.]

(Authorities reviewed and discussed.)

It is the duty of a party, who claims that an ancient document should be presumed to have been executed, to prove by clear evidence the fact of custody, in order that the Court may determine whether or not such custody was proper. [p. 954, col 1.]

The execution and registration of a deed of sale in Berar in favour of a person who does not take possession of the property which the deed purports to sell, but leaves it with the apparent vendor, raises no presumption that the apparent vendee ever had custody of the deed for the purposes of section 90 of the Evidence Act. [p. 955, col. 1.]

In interpreting Statute Law in British India the Courts must give effect to the plain language employed by the Legislature, even if it conflicts with what they conceive to be the policy or the intention of the law. [p. 953, col 1.]

While the Law of Evidence is designed to render the utmost assistance in the discovery of the truth, it does not relieve against the necessity of giving legal proof, any party who may be unable to adduce evidence [p. 953, col. 1.]

It is one of the canons of interpretation that every legislative exception to a general rule of law must be literally and stringently construed, and that there

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is no justification for extending it by analogy to include cases not reasonably within the purview of the language employed. [p. 951, col. 2]

Appeal from the decree of the Additional District Judge, Akola, dated the 22nd October 1914

Mr. *J. Mittra* and Sir *Bipin Krishna Bose*, for the Appellant.

Messrs. *F. W. Dillon* and *R. B. Oka*, for the Respondents.

JUDGMENT.—The facts of this case are given in detail in the judgment of the lower Appellate Court, but a synopsis of them is necessary to appreciate the questions of law involved in this appeal. The property in dispute is a house in the Akola District of West Berar which once belonged to one Ratanchand, who has now been dead for many years. The plaintiff, who represents a sect of Gujarathi Jains, having a temple to the north of the said house, claims title under a deed of sale, dated the 13th February 1896, executed by Gulab Bai, the widow of Ratanchand, the allegation being that Gulab Bai continued to occupy the house after the sale as tenant of the plaintiff till July 1900 when the defendants wrongfully ejected her.

The defendants represent another sect of Gujarathi Jains, having a temple to the south of the house in dispute, which thus lies between the properties of the rival litigants. The defendants' pleadings varied at different stages of the trial, but may now be stated thus:—Ratanchand sold the house to one Popatlal on the 14th February 1874; Ratanchand and Gulab Bai continued to hold possession as the tenants of Popatlal, rent free, upon consideration of keeping the premises in repair; and Popatlal sold the house to the defendants on the 13th April 1894.

The plaintiff denied the sales: he objected to Popatlal's deed of 1894 as not duly registered: he asserted that though Popatlal may have contracted to sell to the defendants in 1894, the contract fell through owing to the failure of the defendants to pay the price within the time stipulated: and he pleaded that any title Popatlal acquired by his alleged purchase in 1874, was extinguished by the adverse possession of Ratanchand and his widow and heir from 1874 to 1900.

The suit out of which this appeal has arisen was filed on the 13th August 1907. It was decided by the first Court on the 6th December 1911 and by the lower Appellate Court on the 22nd October 1914. Both Courts concurred in dismissing the suit, and the plaintiff has made the present appeal.

In its judgment the lower Appellate Court has set out the findings of the first Court in these words:—

1. "That the sale-deed, dated 13th February 1896, executed by Gulab Bai in favour of the plaintiff was proved.

2 That the defendants could give secondary evidence of the transfer in favour of Popatlal, as Popatlal was dead and his son stated that he could not find the sale deed.

3. That the sale deed of Popatlal being 30 years old and its copy having been produced, its genuineness was presumed.

4. That Ratanchand executed the sale-deed and sold the house to Popatlal on 14th February 1874.

5. That Ratanchand till his death and after him his widow Gulab Bai occupied the house as tenants of Popatlal.

6. That Gulab Bai had no title to transfer the house to the plaintiff".

In these findings the lower Appellate Court concurred. It also recorded further findings as given below:—

(7) That the occupation of Gulab Bai extended without interruption till the defendants ejected her in 1910.

(8) That the deed of 1894 executed by Popatlal was duly registered.

(9) That there was no agreement fixing a time for payment of the price by the defendants to Popatlal, and payment was duly tendered though acceptance was refused at the time of registration.

(10) That non-payment of the purchase-money did not invalidate the sale.

In accordance with these findings, and certain other findings on technical objections which require no mention here, the plaintiff's appeal was dismissed by the lower Appellate Court.

In second appeal the objections taken may be summarised in these words:—

1. That the defendants' title deed of 1894 was not registered.

2. That their failure to pay the price vacated the contract to sell

3. That the possession of Ratanchand and Gulab Bai should have been held adverse to Popatlal.

It will thus be seen that no objection was taken to the procedure of the Courts below in applying section 90 of the Evidence Act to this case: but as it seemed to me that my decision of the appeal might be materially affected by a consideration of that matter I gave full opportunity to the parties to argue the point, and advantage having been taken of it, I am competent under Order XLI, rule 2, of the Civil Procedure Code to rest my decision upon the conclusion which I may form in respect to the law connected therewith.

It will be seen that the title set up by the defendants primarily rests upon proof of the fact that on the 14th February 1874 Ratanchand sold the house in dispute to Popatlal. The allegation is that the sale was effected by a deed duly registered. The original of that deed should now be in the hands of the defendants. It has not been produced, and in the pleadings the defendants made no statement as to what had become of it It is now admitted that the deed was never delivered by Popatlal to the defendants. The defendants called Sonlal (D W No. 11), the son of Popatlal, as a witness. He was adopted as a son by Popatlal's widow after Popatlal's death, which took place in 1903. He was asked to produce the sale-deed of 1874, and a rent note said to have been executed by Ratanchand. He said he could not find them. He had evidently never seen them. This has been accepted in the Courts below as sufficient to prove that the original sale deed has been lost. Kanhayalal (P. W. No. 11) is one of the defendants. He was evidently called to prove that there was an agreement between Popatlal and the defendants regarding payment of the consideration of the sale of 1894. In the course of his testimony this witness made the following statements:—

"The house in dispute originally belonged to Ratanchand * * * Popatlal sold the house to me 15 or 16 years ago. As Popatlal held a sale deed of the house and other property, I took the sale of the house from him * * *. The sale in favour of Popatlal by Ratanchand was not executed in my presence. I saw the deed for the first time when Popatlal executed the sale in my favour * * *. The original sale deed by Ratanlal in favour of Popatlal may be with the latter. The rent note referred to in that sale deed is not with me. It was with Popatlal."

This is all the available evidence on the record relating to the original other than can be obtained from Exhibit D 2, which is a certified copy of the copy of the original retained by the registering officer. This copy was obtained from the registration office by the defendants in 1907, obviously for the purposes of this suit. The endorsement upon the copy proves that an original was presented for registration by Popatlal on the 14th February 1874, that execution of the original was admitted by a person identified to be Ratanchand Hirachand Guzrathi of Balapur in the Balapur Taluq of the Akola District, and that the document was duly registered. It is also fair to presume that the original document was returned to the custody of the person who produced it, though there is no entry to that effect in the registration record now before me. It will be remembered that Exhibit D-2 is not a copy of any part of the original document. It is a copy made in 1907 of a copy made from the original deed and its endorsements at the time of registration in 1874. It is to such facts that the Courts below have applied section 90 of the Indian Evidence Act, and have presumed not only that Ratanchand, the owner of the house in dispute, executed and registered an original in the terms set out in Exhibit D-2: but also that he thereby actually sold everything which the document purports to transfer to Popatlal. It is very obvious that there has been some confusion between secondary evidence of a lost original admissible under section 65, Evidence Act, and a presumption under section 90 of that Act in favour of the lost original based upon a copy thereof, and I wish to make it clear that I am now dealing only with the question of the applicability of section 90 of the enactment. That section is worded thus:—

"Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of

such document which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable."

This explanation applies also to section 81. I am alive to the danger of paraphrasing an enactment, and I have no intention of doing so in the present case when I say that the section requires in the most unambiguous language the presence of three conditions to bring it into operation, namely:—

(1) a document which purports or is proved to be thirty years old;

(2) its production before the Court; and

(3) its appearance from "proper custody" as defined in the section.

This provision of the law deals with an instance of what is sometimes called "real" evidence—that of which the tribunal itself is the original percipient witness. The Judge sees for himself that the appearance of the document, its paper, ink, phraseology, handwriting and other things indicative of age are consistent with the claim that it is not less than thirty years old: and he then exercises his discretion in two matters, namely (1) as to the propriety of the custody from which the document is produced, and (2) as to the genuineness of the document. It is a fundamental rule of the Law of Evidence that in all cases the best evidence must be given, and it is a rule which the Legislature and the Courts jealously safeguard. It is simply an amplification of the obvious maxim that if a man wishes to know all that he can know about any matter, his own senses are to him the highest possible authority. If a hundred witnesses of unimpeachable character were all to swear to the contents of a sealed letter, and if the person who heard them swear opened the letter and found its contents were different, he would conclude, without the intervention of any conscious process of reasoning at all, that they had sworn what was not true. It is in obedience to this fundamental rule that 'hearsay' is treated as practically synonymous with 'irrelevant' for the purposes of the Law of Evidence.

Now section 90 of the Indian Evidence Act embodies an exception to the hearsay rule which has become established by judicial decisions in England, and in no way enlarges the scope of the exception recognized and laid down by the English Courts. It is, therefore, expedient to give some consideration to the English law on the point. The following remarks, taken from Taylor on Evidence, 10th Edition, are instructive and sufficient for our purpose:—

"Another conclusive presumption made by the law is that in favour of the due execution of ancient deeds and Wills. When these instruments are 30 years old, and are unblemished by any alterations, they (as it is said) prove themselves; their bare production is sufficient, and the subscribing witnesses are conclusively taken to be dead * * But it must appear that the instrument comes from custody, which (even though it is not in point of law strictly proper) affords a reasonable presumption in favour of its genuineness; and that it is otherwise free from just ground of suspicion * * * (Section 87).

The presumption in their favour, if they come from the proper custody, and purport to be thirty years old, is not confined to deeds and Wills, but extends equally to *letters, entries, receipts, settlement certificates*, and indeed to all other written documents; and in such cases the signatures and handwriting need not be proved. The rule is founded on the great difficulty nay, impossibility, of proving the handwriting of the party after such a lapse of time.' (Section 88).

* * * *

A third exception to the general rule by which hearsay evidence is rejected, exists in favour of *ancient documents* (by which is meant documents more than thirty years old), when they are tendered in support of *ancient possession*. These are often the only attainable evidence of ancient possession, and, therefore, the law, yielding to necessity, allows them to be read on behalf of persons claiming under

them, and against persons in no way privy to them * * *

This species of proof demands careful scrutiny, for, first, its effect is to benefit those from whose custody they have been produced, and who are connected in interest with the original parties to the documents, and next, the documents are not proved, but are only *presumed* to have constituted part of the *res gestæ*. Forgery and fraud are, however, matters, comparatively speaking, of rare occurrence, and a fabricated deed generally betrays, from some anachronism or other inconsistency, internal evidence of its real character. The danger of admitting these documents is, consequently, less than might be supposed. It is more expedient to run some risk of occasional deception, than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance of evils, this kind of proof has, subject to certain qualifications, for many years past been admitted. (Section 658).

But care is especially taken to ascertain the genuineness of the ancient documents produced; and this may in general be shown, *prima facie*, by proof that they come from the *proper custody*. (Section 659)."

The leading case on the subject of proper custody is *Bishop of Meath* v. *Marquess of Winchester* (1), in which the character and description of custody were clearly defined by Tindal, C. J., and section 90 of the Indian Evidence Act is obviously intended to reproduce as far as possible the principles laid down by that eminent Judge in respect of what is proper custody for the purposes of the section.

It is manifest from the above quotation that the idea of making a presumption of execution in favour of ancient documents not produced or tendered in evidence is foreign to the English law, and that it is apparently assumed that every ancient document for which a presumption of due execution is claimed, must be produced before the tribunal which is asked to make the presumption in its favour, so as to place it in a position to see for itself whether it bears upon the face of it such indications as convince the mind that it is genuine, or "betrays from some anachronism or other inconsistency" that it is a fabrication. I have been unable to find any English case in which a Court was asked to make a presumption in favour of an ancient document which it did not see.

It has repeatedly been held, and the soundness of the decision cannot be questioned, that the rule of presumption embodied in section 90, Evidence Act, must be applied with exceeding caution in India, where forgery and fraud cannot be said to be of rare occurrence. *Phool Bibee* v. *Goor Surun Doss* (2), *Uggrakant* v. *Hurro Chunder* (3), *Trailokia Nath* v. *Shurno Chungoni* (4), *Raikunt Nath* v. *Lukhun Majhi* (5), *Timangavda* v. *Rangangavda* (6), reported at page 94 as a Note appended to *Hari Chintaman* v. *Moro Lakshman* (7). The relevant passage is at page 98. It may be said that such decisions merely lay down a rule of caution and do not affect the scope of the enactment. It seems to me, however, that the necessity for such caution makes it necessary to give a strict and narrow, and not a loose and liberal, interpretation to the provisions of the law. Moreover, it is one of the canons of interpretation that every legislative exception to a general rule of the law must be literally and stringently construed, and that there is no justification for extending it by analogy to include cases not reasonably within the purview of the language employed. It seems to me that section 90 of the Evidence Act can apply only to documents produced before the tribunal invited to make the presumption which is allowed by the section in favour of them, and that it has been wholly misapplied in the present case. There is, however, authority against this view, and it is necessary to examine it. The first case is *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno* (8), which was decided by a single Judge. In that case a Will was allegedly executed more than 30 years before the suit and was proved to have been lost. A copy was tendered in evidence.

(1) (1836) 3 Bing (N. C.) 183 at p. 198; 3 Scott 561; 132 E. R. 336.

(2) 18 W. R. 485.
(3 6 C. 209 at p. 211.
(4) 11 C. 539.
(5) 9 C. L. R. 425 at p. 429.
(6) P. J. (Bom.) (1878) p. 240.
(7) 11 B. 89.
(8) 5 C. 886; 6 C. L. R. 199.

Wilson, J., held that under section 65 of the Evidence Act the copy was admissible to prove the contents of the Will: and that under section 90 of the same enactment execution of the Will could be presumed. The learned Judge's reasons for this extraordinary extension of the latter section are given in these words:—"Under the section the execution of a document produced from proper custody, and more than thirty years old, need not be proved, if the document 'is produced'. I do not think the use of these words limits the operation of the section to cases in which the document is actually produced in Court. I think that, as the document has been shown to have been last in proper custody, and to have been lost, and is more than thirty years old, secondary evidence may be admitted without proof of the execution of the original."

The concluding passage seems to confuse the grounds for admitting secondary evidence with the grounds for presuming execution of the original. The *dictum* seems, with due respect, to be wholly irreconcilable with the plain meaning of the words of section 90: and it is unsupported by any authority, English or Indian, dealing with presumptions relating to ancient documents. It cannot be claimed that a document which is lost is produced: nor can it be said in reason that a document which is proved to have existed is produced. Therefore, the decision treats the words 'is produced' as superfluous. It makes no pretence of giving them an extended meaning.

In *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (9) the document in question was a petition made to a Collector on the 28th September 1831. This was held to have perished with the records of the Collectorate destroyed during the Mutiny of 1857. A certified copy granted on the 20th October 1831, or less than a month after the original was filed, was produced in Court in proof of the original. It was held that the copy was admissible as secondary evidence, which cannot be questioned. It is also manifest that section 90 applied to the copy itself since it was more than 30 years old: that is, it could be presumed to be what it purported to be—a copy duly certified of an original document retained in a public record. There remained the question of a presumption under section 90 in favour of the unproduced original. The learned Judge wrote:—

"Under section 90 we may presume that the document was duly executed.....To this it was objected that section 90 does not apply so as to warrant the presumption in question where the original document is not produced in Court, and in support of this argument great stress is laid upon the word 'produced' in the section."

The *dictum* of Wilson, J., in the Calcutta case, above examined, was then referred to, and the judgment proceeds:—'Although the matter is not free from doubt, we think that we should follow this ruling."

Here again we have no analysis of the subject. In a particularly strong case, upon the production of a certified copy, itself more than 30 years old, of an original forming part of a public record, the learned Judges yielded to the temptation of brushing aside what was the law in favour of what they considered ought to be the law for the purpose of doing justice in that particular case, and they could give no better reason for that course than that another Judge had previously strained the law in the same way. No attempt was made to adjust the view taken to the language of the section. In a case of admitted doubt the Judges elected to follow the course which seemed to them to be most consistent with truth and justice in the particular case before them. The ruling cannot be accepted as an authority upon an interpretation of the section. The fact that the original in this case was in fact filed in a Court would not satisfy the requirements of the section. The law demands the production of the document after it has become an ancient document.

The above decisions were quoted with approval in *Sawan Singh* v. *Karim Bakhsh* (10), where the *dictum* of a single Judge reproduced the concluding passage in the judgment of Wilson, J., already quoted above, with a similar confusion of secondary evidence and presumption under section 90. The learned Judge wrote:

"To rule otherwise would, in my opinion, be to misunderstand the policy of the Legislature. The obvious intention of section 90 of

(9) 22 A. 294; A. W. N. (1900) 82.

(10) 8 Ind. Cas. 353; 93 P. R. 1910; 128 P. W. R. 1910; 186 P. L. R. 1910.

the Indian Evidence Act is not to make it too difficult for persons relying upon ancient documents to utilize those documents in proving their cases, and if the section is not to be applied to cases where the original is lost, that policy is not fully carried out; for when the original is lost, it is doubly difficult for the party concerned to prove the execution and handwriting and so on."

With due respect I would urge, first, that in interpreting Statute Law in British India the Courts must give effect to the plain language employed by the Legislature, even if it conflicts with what they conceive to be the policy or the intention of the law: and, next, that while the Law of the Evidence is designed to render the utmost assistance in the discovery of the truth, it does not relieve, against the necessity of giving legal proof, any party who may be unable to adduce evidence. If the argument of the learned Judge were carried to its logical conclusion, it would amount to this that, where a party is unable to prove his claim, *ipso facto* it must be presumed to have been proved. I am unable to assent to any such proposition, and I again point out that no attempt is made to find support for the view taken by the Punjab Court from any words appearing in the section itself.

In *Appathura Pattar* v. *Gopala Panikkar* (11) the Madras High Court refrained from expressing any opinion on the point, but in *Ponnambalath Parapravin* v. *Sankaran Nair* (12) a Division Bench, following the Calcutta and Allahabad cases, held that the presumption as to the genuineness of an ancient document under section 90 of the Evidence Act can be applied even where the original is not produced, but only a copy is produced. The judgment, so far as it turns on the question under discussion, is in these terms :—

"Whether the Court should presume the genuineness of the * * document is a matter that depends on the special circumstances of each case; and having regard to the circumstances proved in regard to the present document * * we think the Subordinate Judge was right in admitting it as evidence and in presuming that the original of it was genuine."

The document was filed in a public record and destroyed when the record was eliminated, and a certified copy was produced in proof. So the case somewhat resembled the Allahabad case. But here, as in the other cases, the learned Judges lay down a rule for which they make no attempt to find any support in the language of the enactment. In all the above cases the Judges were a law to themselves They did not interpret but legislated : and with due respect, I am unable to follow them. It seems to me indisputable that the Legislature, by the plain language used in section 90 of the Evidence Act, has limited the power of the Court to dispense with proof of the execution of documents relied on as evidence, to ancient documents produced in Court at the trial ; and that the Courts in India have no power to enlarge this legislative provision so as to apply it to cases clearly outside the enactment. Moreover, even if such a course were permissible, it seems to me a most unwise and unsafe precedent to lay down that, upon a production of a copy, the Court may presume that some document it has never seen was in fact an ancient document, was executed and attested by the persons whose names appear in the copy, and was in proper custody when lost. Such a precedent would strike at the very root of the rule of caution above laid down. It would be easy to say that presumptions based on copies in the absence of originals would be confined to special cases, such as that before the Allahabad Court in the rulling above quoted, and that the Courts must be trusted to act with due discretion. I cannot take that view. Once the presedent were laid down, it would be followed in all manner of cases and become a substantial aid to fraud and forgery. It is, however, not necessary to labour the point, as I am clear that the law makes the production of the ancient document at the trial a *sine qua non* for the application of section 90.

For the above reasons I hold that the Courts below erred in applying section 90 of the Evidence Act in this case, and as their judgments were influenced by presumptions which in law they were not competent to make, they are open to reversal by this Court : *Grant* v *Bynath* (13).

(11) 25 M. 674.

(12) 12 Ind. Cas. 453; 21 M. L. J. 991.

(13) 21 W. R. 279.

But even if section 90 of the Evidence Act had been applicable upon the production of a copy, what evidence is there that the original deed of 1874 was *in the custody* of Popatlal at any time, even suppose we believe every word stated in regard to it by the defendant Kanhayalal (P. W. No. 11)? He says that Popatlal "held a sale deed of the house". This may be merely a statement of what Popatlal told him. He also says that he "saw the deed for the first time when Popatlal executed the sale-deed" in his favour: but this does not show where and with whom the deed was at the time. It may be said that the evidence is vague because it was badly recorded, and that the witness may reasonably be taken to have intended to convey that he saw the deed in the possession of Popatlal and satisfied himself that Popatlal had a title to pass at the time when the purchase of 1894 was made from him. But is it justifiable to presume, not only that an ancient document is genuine, but also that its custody must have been proper though the evidence relating to such custody is uncertain? It is the duty of a party, who claims that an ancient document should be presumed to have been executed, to prove by clear evidence the fact of custody, in order that the Court may determine whether or not such custody was proper. In the present case custody should have been with the defendants. The lower Appellate Court gets over that by stating that "it is not always that the purchaser takes the title-deed from his vendor in these parts of the country" a statement for which there is no support to be found in any part of the evidence on record, and which is not the rule where the vendor has at hand and produces his title-deed at the time he makes his sale, as Popatlal is said to have done in this case. But suppose that the custody of Popatlal after 1894 was a proper custody for the purposes of section 90 aforesaid. I am clear that the evidence on record is legally insufficient to prove the fact of such custody. It was said that ordinarily a title deed presumably delivered by the registering officer to the person who presented it for registration may further be presumed to have remained in that custody subsequently. I should not be prepared to make that presumption in regard to any such document in Berar. It is a matter of common knowledge, of which I am entitled to take notice, that the people of Berar habitually execute and cause to be registered the most formal instruments which either represent no real transaction at all or give a wholly false colouring to the real agreement between the parties. As against the executants of such deeds it is no doubt the policy of the law to hold them bound by the writing, but for a collateral purpose, such as a presumption that the custody of a deed of sale must have been with the vendee, the execution, registration and delivery of the deed by the Registering Officer afford no safe basis, especially where, as here, there are circumstances which are contra-indicative of any delivery of the deed. Exhibit D-2 may be taken as good secondary evidence of the contents of the original deed, and the registration endorsement may be taken as some evidence of the execution thereof: *Gangamoyi Debi* v. *Troiluckhya Nath*(14)—though I do not understand that case to rule that the endorsement is sufficient by itself to prove execution. But one of the most common forms of fictitious transactions in Berar is that by which an owner of property, by the simultaneous execution of an apparent deed of sale and an apparent rent note or lease counterpart—no lease being executed—transforms himself into the apparent tenant of another.

Exhibit D-2 proves that the original purported to sell the dwelling house of Ratanchand and some unspecified moveable property valued at Rs. 5 for Rs. 500 to Popatlal. It then recites that the vendor continues to occupy the house as the tenant of the vendee in accordance with the terms of a separately executed rent note. This rent note is also not forthcoming. There is not a shred of evidence beyond the recital that it was ever executed. Such recitals, like those as to delivery of possession, are habitually false or representative of a promise or intention never carried out. It is an admitted fact that Popatlal was a near relation of Ratanchand. It is also admitted, or at any rate held proved, that Popatlal never had physical possession of

(14) 33 C. 537 at p. 544; 3 C. L. J. 349; 10 C. W. N. 522; 8 Bom. L. R. 375; 1 M. L. T. 131; 16 M. L. J. 161; 33 I. A. 60 (P. C.).

the house for a single day, that Ratanchand continued to use and occupy it as before, and that after his death, more than 12 years before the suit, his widow, Gulab Bai, succeeded to such possession and occupancy exactly as if by inheritance. Neither ever paid a rupee as rent to Popatlal or to the defendants. These being the circumstances, no Court would be justified in law in presuming that in 1894, when he executed the deed of sale in favour of the defendants, Popatlal had custody of the original deed executed in his favour twenty years before, even if it could be safely assumed that the Registering Officer returned the deed to him after registration.

My decision, therefore, amounts to this :—

(1) That no presumption can be made under section 90, Indian Evidence Act, 1872, as applied to Berar, in favour of any document unless such document is itself produced before the Court invited to make the presumption :

(2) the execution and registration of a deed of sale in Berar in favour of a person who does not take possession of the property which the deed purports to sell, but leaves it with the apparent vendor, raises no presumption that the apparent vendee ever had custody of the deed for the purposes of the above section.

It follows from this that the foundation of the title relied on by the defendants fails, and that the plaintiffs are entitled to succeed. Two other points were pressed on behalf of the appellant, and I will merely state them.

It is an admitted fact that the defendants have never paid the price of the house to Popatlal or to his representatives, and that they have not filed the same in Court or made any deposit of it. The deed of sale was executed by Popatlal on the 13th April 1894: it was presented for registration by the defendants on the 13th August 1894 before a Sub-Registrar whose original power to register expired on that day. Popatlal's attendance was subsequently secured by the issue of process. He appeared on the 12th October 1894 and repudiated the deed on the ground that the agreement was that the price of the house was to be paid within one week of the execution of the deed, and as this was not performed, the sale had fallen through. The vendees offered to pay the price before the Sub-Registrar but Popatlal refused to receive it. The Sub-Registrar then registered the document. There is no evidence whatever to show that he obtained the sanction of the Registrar to do so after expiry of the four months to which his own jurisdiction extended. On these facts the contentions for the appellant are

(1) that the deed of 1894 is in law unregistered :

(2) that the alleged sale to defendants remains a disputed agreement.

It is not necessary to decide these points. The appeal is allowed. The decrees of the Courts below are reversed and the plaintiff will be given a decree for possession of the house in dispute. The defendants must pay and bear all costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3274 OF 1915 AND 833 TO 855 OF 1916.

March 13, 1919.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Walmsley.

RAMGOPAL MANDAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KUMAR KAMALA RANJAN ROY AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), s. 14—Suit filed in wrong Court—Plaint returned for presentation to proper Court—Time within which plaint must be re-presented—Limitation, extension of.

The latest date for filing a suit for possession of certain lands was the 16th May 1911. The suit was filed in the Court of a Munsif on the 15th May 1911. On the 4th May 1912 the Munsif returned the plaint for presentation to a Court having jurisdiction to try the suit and directed that this should be done within one month. The plaint was filed in the proper Court on the 1st June 1912:

Held, that the suit was barred by limitation; that the only period which the plaintiff was entitled to exclude was that provided in section 14 of the Limitation Act, *viz.*, the period between the 15th May 1911 and the 4th May 1912 and that in order to save the bar of limitation the plaint should have

been re-filed on the 5th May 1912, inasmuch as the Munsif had no power to alter the period within which the suit ought to have been filed. [p. 957, col. 1.]

Appeals against the decrees of the District Judge, Birbhum, dated the 2nd July 1915, affirming that of the Subordinate Judge of that District, dated the 25th March 1914.

FACTS appear from the judgment.

Babu *Dwarkanath Chakravarti* (with him Babu *Baranashibasi Mookerji*), for the Appellant. —The settlement was made by the Government under Act VI of 1870 on 16th May 1899, so the cause of action of the appellant arose on that day. The suit was filed within time in the Munsif's Court on 15th May 1911. But on 4th May 1912 the learned Munsif returned the plaint, giving the plaintiff one month's time to present the same to the proper Court. On 1st June 1912 the plaint was filed in the Subordinate Judge's Court. Under section 151 of the Civil Procedure Code the Court has inherent power to make such orders as may be necessary for the ends of justice. I further submit that the time should not be computed from the date of the actual settlement by the Government with the Zemindar but from the date when the Zemindar's possession became adverse to the Patnidars and the Dar patnidars. Refers to *Ranjit Singh* v. *Maharaj Bahadur Singh* (1).

The lower Appellate Court has assessed the Zemindar's share of the profits of the lands on a wrong basis. The lower Appellate Court should not have taken into consideration the present produce of the lands but ought to have proceeded upon the letting value of the lands at the time of the resumption by the Collector. We are willing to abide by the agreement to which we came in the first Court with regard to the amount payable as between the Zemindar and the Patnidars. The variation of the decree of the first Court by the lower Appellate Court we cannot support.

Babu *Ram Charan Mitra* (with him Babus *Satindra Kumar Roy Choudhuri* and *Biraj Mohan Mozumdar*), for the Respondents.—The learned Munsif had no jurisdiction to extend the period of limitation, as that is tantamount to nullifying the provisions of the Limitation Act. Refers to *Haridas Roy* v. *Sarat Chandra Roy* (2). As regards the date from which limitation has to run, the other side makes out quite a new case here. Time was running against the Dar-patnidars from the date of settlement. *Ranjit Singh* v. *Maharaj Bahadur Singh* (1) has no application here.

As regards Second Appeal No. 853, etc., we are ready to abide by the agreement.

Babu *Baranashibasi Mookerji* replied.

JUDGMENT.

No. 3274.

CHITTY, J.—The only question in this appeal is whether the suit is barred by limitation. The plaintiffs were the Dar putnidars and they were suing the Zemindar and the Patnidars for possession of certain Chowkidari Chakran lands which had been resumed and settled by Government with the Zemindar. In their plaint the plaintiffs stated that the settlement was made by the Government under the provisions of Act VI of 1870 on 16th May 1899 and they further alleged that the cause of action arose on that day. The suit was originally filed in the Munsif's Court on 15th May 1911, one day within 12 years from the date specified in the plaint. On 4th May 1912 the plaint was returned by the Munsif for presentation to the proper Court, the Munsif finding that he had no jurisdiction. The Munsif directed that it should be presented to the proper Court within one month. The plaint was actually filed in the Subordinate Judge's Court on 1st June 1912.

Two questions arose: (1) whether the Munsif had any authority to extend the period of limitation for one month or any other time, and (2) what Article of the Limitation Act applies to the suit and whether it is barred by time.

As to the first point, it is clear that the Munsif could have no such power. If any Court had power to alter the period within which a suit might be presented, the Limitation Act would soon become a dead letter. It was suggested that the Munsif might have such power under section 151 of the new Code and we were told that a Bench of this Court had

(1) 48 Ind. Cas. 262; 29 C. L. J. 193; 16 A. L. J. 964; 35 M. L. J. 728; 23 C. W. N. 198; 25 M. L. T. 8; 46 C. 173; 1 U. P. L. R. (P. C.) 23; 21 Bom. L. R. 505; 10 L. W. 83; 45 I. A. 162 (P. C.).

(2) 18 Ind. Cas. 121; 17 C. W. N. 515.

expressed such an opinion. The case is not reported; but there is a reported case, *Haridas Roy* v. *Sarat Chandra Roy* (2), which takes a contrary view and distinctly lays down that the only period which can be excluded is that provided for in section 14 of the Limitation Act. With this opinion we entirely agree. In that view of the case, excluding under section 14 the period from 15th May 1911 to 4th May 1912, in order to be within time the suit must have been filed in the proper Court at the latest on the 5th May. Being filed on 1st June 1912 it was clearly out of time if the time runs from 15th May, as alleged by the plaintiffs in their plaint. In the Court of first instance, as also in the lower Appellate Court, this was the case which was put forward by the plaintiffs. In second appeal it has been urged on their behalf that the date should not be from the actual settlement by the Government with the Zamindar but from some subsequent date not specified, when it is said that the Zamindar's possession became adverse to the Putnidars and the Dar-putnidars. It was suggested by the appellants' Pleader that it might be 28th August 1911, when the Zemindar first settled the lands.

This is a case not made in the Courts below and, as I have said, no date was specified nor have any facts been put before the Court which would justify such a conclusion. But it is really immaterial to go into that question, because it is clear that time was running against the Dar-patnidars from the date of the settlement. We were referred to the case of *Ranjit Singh* v. *Maharaja Bahadur Singh* (1). That was a case under appeal to the Judicial Committee of the Privy Council from a Bench of this Court of which I was a member. In that case another Bench of this Court in an interlocutory matter had expressed an opinion that Article 113 of Schedule I to the Limitation Act (the Article dealing with specific performance of contracts) applied and not Article 144 (the Article dealing with recovery of possession of immovable property). This Court held that Article 144 applied and that opinion was affirmed by the Judicial Committee. It does not appear that any question was raised in that case that the period of limitation would run from any date other than that of the settlement with the Zamindar. In my opinion, it is clear that that must be the starting point of limitation. To hold otherwise would be to extend the period indefinitely; for instance, in the case of the Zamindar holding the lands in *khas* and not doing anything which was obviously hostile to the title of the Putnidars or the Dar-putnidars. Taking that to be the starting point of limitation, which was moreover the point taken by the plaintiffs themselves before they come to this Court, the suit is clearly barred and the appeal must, in my opinion, fail.

The appeal for the appellants was argued yesterday by Babu Dwarkanath Chackrabutty. He asked leave to allow his arguments to be continued this morning by his junior. We were not disposed to grant that request. There did not seem to be any reason why he should not appear here and continue his argument if incomplete, but we did give permission to his junior to cite two cases which he mentioned but had not been able to cite last evening. It is now objected that we have this morning declined to hear from the junior Pleader further arguments. In my opinion we are perfectly justified in so doing, and he could not claim to be heard.

The appeal is dismissed with costs.

Nos. 853, 854 AND 855.

The only question arising in these appeals is as to the assessment of the mesne profits in favour of the plaintiffs as the result of their decree. The point taken is clearly set out in the second and third grounds of appeal. It is urged that the lower Appellate Court has assessed the Zemindar's share of the profits of the lands on a wrong principle and that in assessing the Zemindar's dues the lower Appellate Court should not have taken into consideration the present produce of the lands but ought to have gone upon the letting value of those lands at the time of the resumption by the Collector. It is not now suggested that the time of the origin of the Putni or Dar-putni should be taken. It has not been seriously contended on the other

side that this is not correct or that the sum at which the Collector valued the produce of these lands at the time of the resumption should not be taken as the basis. The parties came to an agreement in the first Court with regard to the amount payable as between the Zemindar and the Putnidars, and to that the appellants are willing to adhere. The result is that the variation of the decrees of the first Court by the lower Appellate Court must be set aside and the decrees of the first Court restored in all these cases with costs in this Court against the defendant No. 1 and the heirs and legal representatives of defendant No. 2 and in the lower Appellate Court against the defendant No. 1 only.

WALMSLEY, J.—I agree.

Order accordingly.

MADRAS HIGH COURT.
CIVIL REVISION PETITION No. 1296 OF 1919.
July 29, 1919.
Present:—Mr. Justice Krishnan.
KANDASWAMI ASARI—PURCHASER—DEFENDANT No. 3—PETITIONER
versus
SWARNAVELU STAPATHI *alias* SWAMINATHA STAPATHI AND OTHERS.—PETITIONER—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *O. XXI, r.* 89, *O. XLIII, r.* 1 (j), *O. L, r.* 1 (*a*)—*Scope of O. XXI, r.* 89—*Execution of decree—Sale subject to mortgage—Mortgagee, right of, to apply to set aside sale—Small Cause decree—Execution by ordinary Court—Order setting aside or refusing to set aside sale of immovable property—Appeal, maintainability of—Revision to High Court, whether lies.*

The words "where immovable property has been sold" in Order XXI, rule 89, Civil Procedure Code, are not restricted to the actual interest that passes by the sale. [p. 959, col. 1.]

It is open to the holder of a mortgage on property sold in execution of a decree to apply under Order XXI, rule 89, Civil Procedure Code, to set aside the sale, even though his mortgage is admitted in the sale and the sale is subject to his right. [p 959, col. 1.]

Muhammad Ahmadullah Khan v. *Ahmad Said Khan*, 10 Ind. Cas. 863; 33 A. 481; 8 A. L. J. 356, not followed.

Kashmiro Bibi v. *Hatim Ali*, 27 Ind. Cas. 831; 13 A. L. J. 273; *Srinivasa Ayyangar* v. *Ayyathorai Pillai*, 21 M. 416; 8 M. L. J. 54, followed.

Where the decree of a Small Cause Court is being executed by an ordinary Court, an order made by the latter under rule 89, Order XXI of the Civil Procedure Code, is appealable to the District Judge, and the High Court can entertain an application under section 115 of the Code from the order of the District Judge. The Provincial Small Cause Court Act would have no application to such a case. [p. 959, col. 1.]

Petition under section 25 of Act IX of 1887, praying the High Court to revise the order, dated the 26th September 1918, of the Court of the District Judge, Chingleput, in Miscellaneous Appeal No. 11 of 1918, preferred against the order, dated the 6th March 1918, of the Court of the District Munsif, Conjeevaram, in Civil Miscellaneous Petition No. 48 of 1918, in S. C. No. 1457 of 1908.

FACTS appear from the judgment.

Mr. *M. Patanjali Sastri*, for the Petitioner.—The mortgagee had no right to apply to set aside the sale under Order XXI, rule 89, Civil Procedure Code. The property was sold expressly subject to the mortgage. The mortgagee's interest was only in the equity of redemption. See *Muhammad Ahmadullah Khan* v. *Ahmad Said Khan* (1).

Mr. *V. Narayana Aiyar*, for the Respondents.—The scope of rule 89 should not be cut down. Whether the property is sold subject to a mortgage or otherwise, the mortgagee's rights are not affected when he was not a party to the sale. See *Kashmiro Bibi* v. *Hatim Ali* (2), *Srinivasa Ayyangar* v. *Ayyathorai Pillai* (3).

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act.

The first point taken is that no appeal lay to the District Judge. The appeal was under Order XLIII, clause (*j*), Civil Procedure Code; and it seems to have been competent. It is argued by the learned Vakil for the appellant that Order L, rule 1

(1) 10 Ind. Cas. 863; 33 A. 481; 8 A. L. J. 356.
(2) 27 Ind. Cas. 831; 13 A. L. J. 273.
(3) 21 M. 416; 8 M. L. J. 54.

(a), excludes the application of Order XLI, clause (j), to this case. This is not so, as the small cause decree was being executed by the original Court, as that Court alone and not the Small Cause Court had jurisdiction to attach immoveable property. In fact the revision to this Court does not lie under section 25 of the Provincial Small Cause Courts Act, as the order in question here was in execution by an original Court. I am, however, of opinion that the petition may be treated as one under section 115, Civil Procedure Code.

The second and the main question argued is whether the respondent, who is the mortgagee of the property sold in execution, is entitled to apply under Order XXI, rule 89, Civil Procedure Code, to set aside the sale. The lower Appellate Court has upheld his right to do so. The learned Vakil for the appellant urges that, as the property was sold expressly subject to the mortgage, the mortgagee has no interest in what was really sold, which according to him was only the equity of redemption. The sale proclamation shows that what was sold was the property itself, though subject to the mortgage, and not the equity of redemption. I do not see any good reason for cutting down the words "where the immovable property has been sold" in rule 89, as referring only to the actual interest that passed by the sale. The rule is a beneficient provision and it seems to me its scope should not be cut down unnecessarily. By its application, the decree-holder gets his money in full and the purchaser gets 5 per cent. for his trouble.

The case in *Muhammad Ahmadullah Khan* v. *Ahmad Said Khan* (1) has been relied on by the appellant. That is no doubt somewhat in his favour but that case was not followed by Knox, J, in the case reported as *Kashmiro Bibi* v. *Hatim Ali* (2), who pointed out that that case proceeded on its own peculiar facts. It thus loses much of its authority. The case in *Srinivasa Ayyangar* v. *Ayyathorai Pillai* (3) on the other hand gave an extended meaning to the old section 310 (a) so as to include mortgagees. The wording of section 310 (a) was somewhat more restricted in scope than the wording of the present rule 89, which allows anyone who has an interest to apply under it. It seems to me rule 89 clearly includes a mortgagee. It makes no real difference, in this connection, if the property sold was sold expressly subject to the mortgage or otherwise. In either case the mortgagee's rights cannot be affected when he is not a party to the sale. The appellant's Vakil concedes that in a case when the sale is not made expressly subject to the mortgage, the mortgagee can apply under rule 89. I think the position is the same even when the sale is made subject to the mortgage. The only difference is that in one case the purchaser may perhaps not be able to dispute the mortgage but in the other case he may. This difference, however, is not one that changes or alters the interest of the mortgagee in the property, but is only one that is in the nature of an estoppel.

I am, for the above reasons, of opinion that it is open to the holder of a mortgage on property sold, created prior to the sale, to apply under rule 89, even though his mortgage is admitted in the sale and the sale is subject to his right. The application fails and is dismissed with costs.

Petition dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1468 OF 1919.

July 4, 1918.

Present:—Mr. Justice Newbould.

PANCHU KAPALI AND RAJARAM KAPALI, MINORS, BY THEIR GRANDMOTHER, NEXT FRIEND AND GUARDIAN BIJOYA KAPALI PLAINTIFFS—APPELLANTS

versus

JAJNESWAR MAJHI AND ROHINI DASYA WIDOW OF ABHOY CHARAN MAJHI—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), Sch. III Art. 3—Licensee refusing to vacate on expiry of license effect of—Possession, suit for—Limitation.

Where the licensees of a tenant refuse to vacate on the expiry of the period of their license, such refusal amounts to a dispossession of the licensor within the meaning of Article 3, Schedule III of the Bengal Tenancy Act, and unless a suit to recover possession is brought within the period prescribed by that Article, it must be dismissed as barred by limitation. [p. 961, col. 1.]

PANCHU KAPALI *v.* JAJNESWAR MAJHI.

Appeal against the decree of the Additional Subordinate Judge, Khulna, dated the 8th May 1918, affirming that of the Munsif, 2nd Court at Khulna, dated the 6th June 1917.

FACTS appear from the judgment.

Babu *Ramgoti Sarkar*, for the Appellant.—Article 3 of Schedule III of the Bengal Tenancy Act does not apply to the case, but the 12 years' rule of limitation provided for in the Limitation Act applies to this case. The onus of proving that a case is not governed by the general law of limitation but by the special rule of limitation is on the person who alleges it: *Rudra Narain Maity* v. *Natabar Jana* (1). This the defendant has not done in this case.

Then, there was no dispossession in this case within the meaning of Article 3, Schedule III, of the Bengal Tenancy Act, because it is the defendant's case that possession was never delivered to the plaintiffs. "Dispossession" presupposes "possession." As to the meaning of dispossession, see *Brojendra Kishore Roy* v. *Bharat Chandra Roy* (2), *Sundara Sastrial* v. *Govinda Mandroyan* (3). See also Pollock and Wright on Possession, page 86

My next point is that the landlord did not dispossess the plaintiff but that he was the licensee of the plaintiff, and Article 3 does not apply to the case of a licensee. See *Basanta Kumari* v. *Nanda Ram* (4)

Babu *Sajani Kanta Sinha*, for the Respondent.—The plaintiff was in possession of the major portion of the holding although he was kept out of possession of a small portion of the holding. There is no doubt that it is, as has been found by the Court of Appeal below, a case of dispossession of tenant by the landlord, and so the special period of limitation provided in the Bengal Tenancy Act applies to the case.

Babu *Ramgoti Sarkar* replied briefly.

JUDGMENT.—This appeal arises out of a suit for declaration of the plaintiff's title to 5 *cottas* of land and for possession thereof. Both Courts, after deciding in the plaintiffs' favour on the facts at issue, have held that the suit must be dismissed as being barred by limitation under Article 3, Schedule III of the Bengal Tenancy Act.

The facts as found are as follows:—The plaintiffs' father on the 7th Magh 1315 B. S. was granted a *potta* by the defendants. At the time of granting this *potta* the defendants were in possession of 5 *cottas* of the land and obtained permission of the plaintiffs' father to remain in possession during three months to enable them to remove their huts on the land. But after this period had elapsed, the defendants did not remove their huts and remained in possession adversely to the plaintiffs' father and afterwards to the plaintiffs.

It is first contended that the special limitation of the Limitation Act did not apply, because there is no evidence on the record to prove that the plaintiffs were *raiyats*. This point was not taken in the grounds of appeal to this Court. In both the lower Courts it appears that there was never any dispute that the plaintiffs' status was that of *raiyats* and I, therefore, refused to allow this point to be urged before me.

The next point taken was that the suit was not of the nature contemplated by Article 3, Schedule III; that it could not be a suit for recovery of possession, since the plaintiffs had never been in possession and that the Article could not be applicable as the plaintiffs never having been in possession, there can be no date of dispossession from which the period of limitation would commence to run. In my opinion there was in law dispossession of the plaintiffs. After the execution of the lease the plaintiff was put in actual possession of 7 *cottas* of the property demised, which amounted to delivery of possession of that property. The defendants' possession under their former right ceased and, therefore, the possession for three months after the lease was that of licensees of the plaintiffs. When the plaintiffs possessed part of the land themselves and the remainder was in the possession of their licensees, the plaintiffs were in actual or constructive possession of the whole of the 12 *cottas*. When their licensees, at the end of the period of three months for which their license was granted, refused to quit part of the land, they did in effect dispossess

(1) 21 Ind. Cas. 431; 18 C. L. J. 89; 41 C. 52; 18 C. W. N. 353.

(2) 31 Ind. Cas. 242; 22 C. L. J. 283 at p. 286; 20 C. W. N. 481.

(3) 4 Ind. Cas. 619; 5 M. L. T. 136; 19 M. L. J. 309; 31 M. 528.

(4) 20 Ind. Cas. 350; 18 C. L. J. 83 at p. 87; 17 C. W. N. 1149.

the plaintiffs. I would, therefore, hold that there was such dispossession as to make Article 3 Schedule III of the Bengal Tenancy Act applicable.

It is lastly contended that the dispossession was not by the defendants in their capacity as landlords. The suit being one in which the tenants are the plaintiffs and the landlords are the defendants and the allegation being one of actual dispossession by the landlords, there can be no question of the applicability of the special period of limitation provided by the Bengal Tenancy Act. The question of limitation is the only point that arises in this appeal and as I hold the decision of the lower Court on this point was right, the appeal must be dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 60 OF 1917.

June 25, 1919.

Present:—Mr. Lyle, A. J. C., and Mr. Ashworth, A. J. C.

ASHFAQ HUSAIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Syed NAZIR HUSAIN—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 91, 92, 99—Oral evidence to show that a deed purporting to be a sale-deed is a deed of gift, admissibility of—Benami *transaction—Adverse possession as against transferor*—*Civil Procedure Code (Act V of 1908), s. 66—"Certified purchaser," whether includes representative.*

Proviso 1 to section 92 of the Evidence Act only permits failure of consideration to be proved by extrinsic evidence as between the parties to a deed and when such failure is pleaded for the purpose of invalidating a document. [p. 964, col. 1.]

Section 91 of the Evidence Act, read with section 99 of the Act, prevents a party to a deed in a suit against a third person from furnishing extrinsic evidence for the purpose of showing that the deed which purports to be a sale-deed is really a deed of gift. [p. 964, col. 1.]

When one member of a family transfers property to another member of the family and the transaction is a sham one designed to save the property from the creditors but not intended to transfer it to the transferee, any ostensible possession of the latter must be deemed to have been with the object of maintaining this design and it cannot be deemed to be adverse to the transferor. [p. 966, col. 1.]

The words "certified purchaser" in section 66 of the Civil Procedure Code include persons standing in the shoes of the Court purchaser. [p. 967, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Lucknow, dated the 25th January 1917.

The Hon'ble Mr. *Wazir Hasan* and Mr. *Haider Husain*, for the Appellants.

Mr. *M. Wasim*, for the Respondent.

JUDGMENT.—In this case the plaintiff-respondent has sued for a declaration that he is the owner of a 12 annas 8-pies share in village Saraiyan, district Barabanki, now standing in the name of the defendants-appellants Nos. 1 and 2. The suit arose out of a suit for partition brought by defendants Nos. 1 and 2 against the plaintiff in the Revenue Court. The plaintiff objected that he was the owner of the whole of the village of Saraiyan and not merely of a 3 annas 4 pies share. The Revenue Court referred him to the Civil Court for a decision on this question of title. In order to understand the case it is desirable to set forth the relationship between the parties by the following pedigree:—

ABID ALI,

- Mansab Ali (has children or grandchildren alive); died 1908.
- *Musammat* Zainab-un-nissa, died 1913. Married to Mohammad Husain, died 1910.
  - Nazir Husain, (Plaintiff.)
  - Sadiq Husain, died 1899.
  - Altaf Husain, died 1910 (after Mohammad Husain).
    - Afzal Husain, (Defendant No. 2.)
    - Ilham Husain, (died a year or two after 1910.)
  - Dildar Husain, died 1904.
  - Ashfaq Husain, (Defendant No. 1.)

ASHFAQ HUSAIN *v.* NAZIR HUSAIN.

The facts, so far as they are necessary for the decision of this case, are as follows:—

The village of Saraiyan belonged to Mansab Ali, who was a Talukdar. On the 28th March 1879 Mansab Ali executed what purported to be a sale deed of this village in favour of the plaintiff in consideration of a sum of Rs. 4,000. The plaintiff was admittedly a minor of eleven or twelve years at the time. It is stated by the plaintiff also that his brothers were not in existence at the date of this deed, though it is scarcely credible that his mother after giving birth to no child for eleven years should subsequently have four other sons. This sale deed was immediately followed by the entry of the plaintiff's name in the village register as owner. In 1895, that is sixteen years later, the entry in the village papers was changed so as to show the plaintiff as owner of 4 annas and each of the other four brothers as the owner of 3 annas. The plaintiff maintains that he effected the alteration in entry for a double reason. He had intended to go to a Native State for employment and so wanted to facilitate the management of the property by his brothers. He also was indebted to some persons and thought that the alteration in the entry would save his property. Sadiq Husain was the first of the brothers who died. He died in 1899 and his share was entered in the name of his mother Zainab-un-nissa. The plaintiff's contention is that this entry was effected by himself for motives of policy but was not intended to indicate any transfer of ownership. In 1904 Dildar Husain died and his 3 annas share was likewise recorded in the name of *Musammat* Zainab-un-nissa. The plaintiff says that this was also effected by him but that he continued to retain possession as usual. In 1895 the plaintiff had mortgaged the 4 annas share standing in his name and in 1896 had executed a deed of further charge on it. To pay off these mortgage-debts he executed a mortgage deed in favour of another person in August 1897. His equity of redemption in this share was sold by the Court in execution of a simple money decree against the plaintiff and purchased by Mohammad Husain, the plaintiff's own father. The plaintiff maintains that the property was purchased by his father out of his, the plaintiff's, money and that, although mutation was effected in the name of the father, the plaintiff's title or possession was not transferred to the father. In 1910 Mohammad Husain died and the 4-annas share entered in his name in the Khewat was transferred to the name of *Musammat* Zainab-un nissa. The plaintiff maintains that he was responsible for this entry and that it did not effect any change in possession. At this time it will be seen *Musammat* Zainab un-nissa was entered in respect of 10 annas of the whole village. Later on in 1910 Altaf Husain died and on his death his 3-annas share was entered in the names of his sons Afzal Husain and Ilham Husain. As Ilham Husain subsequently died and his $1\frac{1}{2}$ annas share was entered in the name of Afzal Husain, Afzal Husain ultimately got the whole 3 annas. The plaintiff claims that these entries in favour of Afzal Husain were merely fictitious. On the death of *Musammat* Zainab-un nissa in 1913 the 10 annas standing in her name were entered in equal shares in the names of the plaintiff and the two defendants. Thus at the date of suit the plaintiff was entered in respect of 3 annas, 4 pies, Ashfaq Husain in respect of 6 annas 4 pies and Afzal Husain in respect of a like share. In his plaint the plaintiff claimed that he was entitled to the whole village by virtue of the sale-deed of 28th March 1879 by Mansab Ali in his favour. He maintained that all the proceedings by way of entering the names of his father, mother, brothers and nephew in the revenue papers were purely fictitious, as would be evident from the fact that he had held possession of the whole village all along.

In defence both the defendants allege that the sale-deed of 1879 executed by Mansab Ali in favour of the plaintiff was a *benami* transaction. Defendant No. 2 stated that the money came out of the pocket of both *Musammat* Zainab-un-nissa and her husband Mohammad Husain, while defendant No. 1 stated that it was paid alone by *Musammat* Zainab-un-nissa. They both maintained that the proceedings stated in mutation, which on their face indicated that the property was held in separate portions by the plaintiff and the other members of the family, were genuine. They denied that the plaintiff has been in possession of the whole village and pleaded estoppel against the plaintiff on two grounds. One ground was that the plaintiff by

his action in consenting to the entries in the defendants' favour of the several shares was estopped from claiming those shares: the other ground was that he was estopped by section 66 of the Code of Civil Procedure from claiming that the 4 annas share purchased by Mohammad Husain at execution sale was purchased *benami* for him, the plaintiff. After the written statement had been filed, the plaintiff was allowed to put in a replication. In this he resiled from his allegation that the property was sold to him by Mansab Ali as he could not pretend that at the age of eleven he had any money to pay Rs. 4,000, purchase price. He claimed, however, that the sale-deed could be treated as a deed of gift and alleged that Mansab Ali, seeing no chance of saving his property from his creditors and having great affection for the plaintiff, had gifted the village to him.

The learned Subordinate Judge has decreed the plaintiff's suit on the following findings:— He found that on the evidence of the plaintiff's own witnesses it was impossible to hold that the deed of the 28th March 1879 was a deed of gift. On the other hand, he held that the defendants' plea that this deed was a sale-deed nominally in favour of the plaintiff but really in favour of *Musammat* Zainab-un nissa could not be accepted in view of the evidence of Haji Mohammad Abbas, plaintiff's witness No. 26, who was brother-in-law of Mansab Ali and who attested the deed and in view of the fact that Mansab Ali had purchased (or rather repurchased) the village of Saraiyan only a few days before executing the deed in question, so that it was unlikely that he went to the trouble of purchasing the village merely in order to transfer it to the plaintiff. After these findings, which have not been seriously contested in the appeal before us, he went on to hold that, although the deed represented merely a sham transfer, yet, in view of the fact that neither the creditors of Mansab Ali nor Mansab Ali himself had ever challenged it, it must be deemed a valid transfer in favour of the nominal transferee Nazir Husain plaintiff. Having thus found that the title to the village vested in the plaintiff from 1879, he went on to find that the plaintiff had remained in possession of the village up to 1895, rejecting the defendants' evidence that the tenants paid *Musammat* Zainab-un-nissa their rent during this period. As to the mutation effected in the names of the plaintiff's brother he accepted the plaintiff's plea that this mutation was effected by the plaintiff to save the village from the plaintiff's creditors. In coming to this decision he rejected the plaintiff's evidence as to the existence of one of the two debts said by him to have been due at the date of mutation but accepted the plaintiff's own statement as to the other debt. He adds that, in coming to the conclusion that mutation in favour of his brothers was effected by the plaintiff owing to his being in debt, he is influenced by the failure of the defendants to prove their allegation that the village had been purchased by their mother under the deed of 1879. He rejects the defendants' plea that the mutation in 1895 was effected in consequence of a family arrangement on the ground that *Musammat* Zainab-un-nissa was found to be in possession even after that mutation, inasmuch as her husband Mohammad Husain continued to collect the rents for her. He also rejects the plea of the defendants that on the death of one brother Sadiq Husain in 1899 and of another brother in 1904 the mutation effected in favour of *Musammat* Zainab-un-nissa represented a gift by the heirs to her. Likewise, he rejects the defendants' plea that the 4-annas share purchased by Mohammad Husain in execution proceedings (which the plaintiff says was purchased nominally by Mohammad Husain but really by himself) was entered in the name of Mohammad Husain's widow after his death in pursuance of a previous gift by him to his wife in lieu of dower. (Neither of these two pleas have been pressed or the Subordinate Judge's finding impugned in appeal.) He finds that all the proceedings in mutation afford no help in finding out who was the owner of the village and consequently holds that the ownership of the village must be deemed to have remained with the plaintiff in consequence of his finding that the plaintiff acquired the ownership by the deed of the 28th March 1879. He accepted the plaintiff's plea that the purchase in execution sale by Mohammad Husain was really a purchase on his, the plaintiff's, behalf. As regards the question of possession he finds that the evidence afforded by the revenue receipts raises no inference as to possession. On the other

hand be found that the present possession of the plaintiff was proved by the evidence of 25 tenants in the village. In any case he held that even if this evidence was inconclusive, possession must be deemed to follow title. Accordingly he also found that the plaintiff was in actual possession and so could bring a suit for mere declaration and that no question of limitation arose.

The first question that arises in this appeal is, did the plaintiff acquire a title to the village by the deed executed by Mansab Ali on the 28th March 1879? In our opinion he did not. The plaintiff has abandoned the plea taken in his plaint that the deed was a deed of sale as it purports to be. It is clear that this plea could not be sustained in view of the evidence and the impossibility of the plaintiff at the age of eleven having the Rs. 4,000 purchase-money. The plea taken up by him in his replication that the deed of sale was really a deed of gift has been rejected by the learned Subordinate Judge, on the ground that the evidence shows that Mansab Ali could not have intended to part with the ownership of the village and as a matter of fact continued to collect the income subsequent to the deed. This plea that the deed was a gift might also, in our opinion, have been rejected under section 91 read with section 99 of the Evidence Act. The plaintiff, being a party to that deed, was not entitled to furnish extrinsic evidence for the purpose of showing that the deed which purported to be a sale-deed was really a deed of gift. Proviso 1 to section 92 of the Evidence Act will not apply. That proviso only permits failure of consideration to be proved by extrinsic evidence (*a*) as between the parties; and (*b*) when such failure is pleaded for the purpose of invalidating a document. Neither of these two conditions obtained here. If the deed in question is invalid as a sale-deed, then it cannot be used as a deed of gift. A separate deed of gift is not set up.

It remains then to consider whether the learned Subordinate Judge's finding that the deed of 1879 acquired retrospective validity by reason of the failure of the creditors of Mansab Ali and of Mansab Ali himself to impugn it can be sustained. In the first place, we are of the opinion that it was not open to the learned Subordinate Judge himself to set up this new case on behalf of the plaintiff or permit it to be set up. No such case was set up until the case came to be argued. Certainly there is no hint of such a case in the plaintiff's plaint or replication. Apart from this, however, we agree with the appellant's Counsel that unless the deed of 1879 vested the village in the plaintiff, there must be some subsequent investitive fact and that the mere failure of the creditors and of Mansab Ali to impeach the deed cannot make the deed effective unless it was effective originally. The respondent's Counsel indeed has not seriously contended that this finding of the learned Subordinate Judge can be upheld in the particular form in which it was expressed. The form in which he would frame the plea is that a formal assignment not meant to effect a real transfer becomes an effective transfer when the transferor abandons all intention to take means to set it aside. It seems desirable to point out that where a debtor transfers his property with the intention of defrauding or defeating his creditors, the transfer may be either one or other of two kinds. It may be a transfer made by the transferor with the genuine intention of securing the property to the transferee, as the transferor prefers the transferee getting it to the creditors. In this case if the creditors do not get the transfer set aside, the transfer will be a valid one. The respondent is not entitled, however, to plead that the deed of 1879 represented a transfer of this kind, for two reasons. One is that, even if the deed was executed by Mansab Ali with the genuine intention of transferring the property to the plaintiff, still the deed failed to do this as there was no consideration. The other reason is that the lower Court has clearly shown that Mansab Ali had no intention of parting with the title to the plaintiff. The other kind of transfer made by a debtor to defeat his creditors is where the transfer is a sham one and is not intended to divest the transferor of the property. We concur with the lower Court that the transfer by Mansab Ali of 1879 was a transfer of this kind. As held in *Petherpermal Chetty* v. *Muniandy Servai* (1),

(1) 35 I. A. 98; 10 Bom L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 35 C. 551 (P. C.); 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266.

the deed of sale was inoperative and did not require to be set aside. It did not divest Mansab Ali of his title in the village or vest that title in the plaintiff. The respondent's Counsel has used the expression "title by estoppel." By this he appears to mean that, on the assumption that Mansab Ali was not entitled to sue to recover the property from Nazir Husain because the deed of 1879 was a fraudulent one to defeat his creditors, then Nazir Husain would become the owner by estoppel. This position is, in our opinion, untenable for two reasons. In the first place, there is no evidence that the creditors were defrauded and so we must presume that they were not defrauded on the principle of *quod non apparet non est*. If the creditors were not defrauded, Mansab Ali would not be estopped from avoiding the deed. (See the Privy Council ruling just quoted.) In the second place, supposing that it were proved that the creditors had been defrauded, an estoppel could be pleaded by the plaintiff as against Mansab Ali in a suit by the latter but cannot be pleaded by him in a suit against third parties like the defendants. There is in fact no such thing as "title by estoppel" in this connection. The respondent's Counsel also appears to think that, if Mansab Ali has not sued to set aside the deed or to recover the property from the plaintiff, then on the principle that a person who is in possession of land, although wrongfully, has a title to the land against all except those who can show a better title, Nazir Husain should be regarded as the owner of the village. As will be seen later, however, Nazir Husain has not been able to prove that he is or ever has been in exclusive possession of the land. In the second place, he is not basing his claim for a declaration on the title of mere possession but on the title of ownership.

The next question is whether the plaintiff can rely on title by adverse possession. This plea was not considered by the Subordinate Judge, who merely found that the plaintiff acquired ownership and possession by the deed of 1879 and did not lose possession by any subsequent event such as the mutations. The plea also was not raised in the plaintiff's pleadings. We might, therefore, refuse to consider it. Assuming that it is open to us to consider it, it is necessary to point out that possession adverse to the defendants is a different thing from possession adverse to Mansab Ali. As the defendants have been held not to have acquired any title by the deed of 1879, their plea that the sale deed was really in favour of themselves or their mother or their father having been rejected, there can be no question of adverse possession against the defendants. What appears to be really contended is that the plaintiff was in exclusive possession of the village for a period of twelve years or more preceding the year 1895 when mutation was effected in favour of his brothers and himself and that such exclusive possession was adverse to the real proprietor, Mansab Ali. Doubtless if this could be proved, the plaintiff would by 1895 have acquired absolute title against all the world under section 28 read with Article 144 of the First Schedule of the Limitation Act. It is clear, however, in view of the fact that the whole family lived together in harmonious relations up to the year 1913 when *Musammat* Zainab-un-nissa died, that the evidence does not support the view that the plaintiff was in exclusive possession. The learned Subordinate Judge has rightly pointed out that the revenue receipts furnish no evidence. They are all in the name of the father of the plaintiff or of a *karinda*. The Subordinate Judge has held at one place in his judgment that these payments must have been made by Mohammad Husain acting as guardian of the plaintiff, but this conclusion is based on the hypothesis that the plaintiff became owner of the property at the date of the deed in 1879, as will be obvious from the remark of the Subordinate Judge later on :—"If Mohammad Husain made collections, the presumption will be made that he made them on behalf of the owner of the village. The plaintiff is the owner of the village." There is no evidence whatever that Mohammad Husain acted solely as guardian of the plaintiff and as the plaintiff must have been of age in 1886, it is inconceivable that the father was acting as his guardian from that year up to 1895. Exhibits 76B, 75 and 71 are receipts for money paid by Mohammad Husain in the years 1889, 1891 and 1892. Indeed elsewhere in his judgment the Subordinate Judge assents to the truth of the

following statement made by defendant No. 1:—"Up to the time my father was alive he realised the profits of the entire family property." Again it is clear that this possession, such as it was, cannot have been adverse to Mansab Ali. On the finding that the deed of 1879 was a sham one designed to save the property from the creditors but not intended to transfer it to the plaintiff, any ostensible possession of the plaintiff must be deemed to have been with the object of maintaining this design and it cannot be pleaded as adverse to Mansab Ali. The plaintiff's Counsel at the conclusion of his argument admitted that, if the title to the village had not become vested in the plaintiff by the year 1895, it would be impossible to hold that he subsequently acquired title to the village by adverse possession or in any other way. It does not, therefore, appear necessary to comment at length on the evidence of the plaintiff's possession of the village subsequent to 1895. It may be stated that the revenue receipts are distinctly against such possession, several of them being in the name of Altaf Husain. (See the receipts Exhibits A4, A8, A14 and A22) As to the evidence of the 25 tenants that they have always seen the plaintiff in possession and that they have always paid rent to him, we regard this as only showing that, since the death of his mother in 1913 and the birth of dissension among the brothers, the plaintiff has been attempting to assert his sole possession of the village. Not a single receipt or lease executed by the plaintiff in favour of these tenants has been produced. As the eldest brother, the plaintiff would be the right hand of the mother and the business-man of the family. He may therefore, well have acted as manager of the village in his mother's lifetime and after her death irrespective of any title in it. In this connection we have to decide whether the appellants are to be allowed to produce in evidence two *siyahas* printed on pages 147 and 158 of the appellants' printed record and bearing the dates of 1319 and 1320 Fasli, corresponding to 1912 and 1913 A. D. The learned Subordinate Judge refused to admit these documents, which were put in by the defendants to prove that possession in the years 1912 and 1913 A. D. of the village was not with the plaintiff, on the ground that the papers were produced too late. Without going further into the matter, in view of the latitude given to the plaintiff in altering his pleadings after the framing of issues, we allow these documents to be admitted in evidence. They do not appear to be of much importance. Read with the evidence of the defendants' witness Abdul Hai Ziladar they prove that in 1319 and 1320 Fasli=1912 and 1913 A. D. collections were made on behalf of the mother of the plaintiff by Abdul Hai and not on behalf of the plaintiff. The plaintiff cannot avoid the effect of the several mutations made with his knowledge and consent in favour of the other members of the family, by his unsupported statement that the first transfer in favour of his brothers in 1895 was with a view to avoiding his creditors and that all later transfers were with a view merely to keeping up the pretence that the property was not his. The learned Subordinate Judge has found that of the two debts set up by the plaintiff as a reason for a fictitious transfer by himself one, being a secured debt, would not support his explanation and that as regards the other, there was no evidence except the bare statement of the plaintiff coupled with the failure of the defendants in proving anything to the contrary. This bare statement is obviously insufficient to prove that mutation was made to defraud the creditors. The plaintiff cannot succeed on the weakness of the defendants' case. We, therefore, hold that the plaintiff has not proved that he has been in exclusive possession of the village at any time or that his possession has been adverse either against the defendants or against Mansab Ali. We may next consider the question whether the plaintiff is estopped from pleading that the 4-annas share purchased about 1898 by his father Mohammad Husain was purchased *benami* by the father on his, the plaintiff's, account and out of money furnished by the plaintiff. The learned Subordinate Judge held that the plaintiff would have been estopped from pleading this under section 66 of the Code of Civil Procedure, if the sale certificate of the Court had been produced and had shown

that the purchase was made by Mohammad Husain. He refused, however, to admit a copy of the sale certificate on the ground that the appellants filed it too late. It appears to us that the appellants have shown good reason for not being able to produce this certificate sooner. In any case we doubt whether it is necessary for the certificate to be produced in view of the fact that the plaintiff has in paragraph 8 of his plaint admitted that the property was purchased in the name of Mohammad Husain. We are, therefore, of opinion that at any rate as regards this 4 annas share the plaintiff is estopped from claiming title to it. The words "certified purchaser" in section 66 include persons standing in the shoes of the Court purchaser. The defendants are standing in the shoes of their father Mohammad Husain.

On these findings it is clear that the plaintiff's suit for declaration should have been dismissed owing to his failure to prove that he was entitled to any such declaration. The appellants' Counsel has, however, urged that the appellants have, apart from this failure on the part of the plaintiff, themselves proved their title to a 12-annas 8 pies share in the village. It does not appear necessary to deal at length with the questions raised by this contention. We concur with the learned Subordinate Judge in finding that the defendants have failed to prove that the deed of 28th March 1879 was executed *benami* in the name of the plaintiff or was really intended to transfer the property to their mother for the benefit of the whole family. We also concur with him that the defendants have failed to prove that they were exclusively in possession of the shares entered in their names from 1895 onwards. We concur again with the learned Subordinate Judge in holding that the applications for mutation in the names of the defendants with which the plaintiff concurred do not estop the plaintiff from bringing this suit. There is no question that when these mutations were effected, the defendants must have been aware of the true state of affairs, whatever it was, and so they cannot have been misled by any application made or supported by the plaintiff for the entry of their names. Reliance has been placed by the appellants' Counsel on the Privy Council ruling *Jagannath Prashad Singh* v. *Abdullah* (2). In that ruling at page 919* it was held that where the real proprietor of any estate caused a second person, whose right to get a conveyance from him of the estate had become extinct by renunciation or limitation, to execute a conveyance in favour of a third party and assisted that third party in effecting mutation in his favour, then the proprietor was estopped from claiming the property on the ground that he had caused the third party to change his position by assuming liability for the payment of revenue. This ruling, in our opinion, is not applicable to the present case, where no transaction through a second party intervenes and where it is not shown that there was anything more than a nominal liability incurred by the defendants to pay the revenue for the shares entered in their names. There is more force in the contention of the appellants' Counsel that the fact of the mutation in 1895 in favour of the defendants, coupled with a long series of admissions by the plaintiff of the defendants' rights to the shares so entered in their names, should be deemed to prove some family arrangement in 1895, whereby the various members of the family agreed to the property being owned or rather held in such separate shares. Three mortgage deeds, Exhibits A29, A30 and A31, were filed by the defendants for the purpose of showing that the plaintiff in them had admitted that he was only owner of a 3-annas 4 pies share. These deeds were not admitted in evidence by the Subordinate Judge on the ground that their execution was not proved. It is maintained by the appellants' Counsel that no proof of their formal execution was necessary as they were not being sued on but were only filed as admissions by the plaintiff. It was, however, at any rate necessary to ask the plaintiff whether he executed them, and this was not done. We, therefore, think that they were rightly excluded from evidence. But the statements made by Nazir Husain in mutation proceedings

(2) 45 Ind. Cas 770; 45 C. 903; 16 A. L. J. 578; 5 P. L. W. 83; (1918) M. W. N. 403; 22 C. W. N. 891; 8 L. W. 163; 24 M. L. T. 63; 23 C. L. J. 192; 20 Bom. L. R. 851; 35 M. L. J. 43; 45 I. A. 97 (P. C.).

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Exhibits B4, B5 and B17 and Nazir Husain's evidence in a resumption case, Exhibit A33, are statements of the plaintiff which, although they do not operate as estoppel, certainly operate as admissions. It is to be remarked, however, that no such family arrangement was set up in the written statement, and it appears doubtful to us whether such a family arrangement can be held to be proved merely by the fact that certain subsequent events are satisfactorily explained on the hypothesis that it took place. On the other hand we do not agree with the Subordinate Judge that the collection of rents by her husband after 1895 was on *Musammat* Zainab-un-nissa's behalf and thus negatived the possibility of any such family arrangement. The collection of rents by Mohammad Husain is compatible with his being the common manager of the several members of the family in their separate interests.

For the reasons stated above we allow this appeal and dismiss the plaintiff-respondent's suit with costs in both Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1627 OF 1918.

April 11, 1919.

Present:—Mr. Justice Chatterjea and Mr. Justice Newbould.

RAJANI NATH PRAMANIK AND OTHERS] DEFENDANTS—APPELLANTS

versus

MANARAM MANDAL AND OTHERS— PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), Ch. X, ss. 103A, 106—Record of Rights, entry in—Presumption of correctness—Suit for declaration that entry is wrong—Limitation.

The period of limitation applicable to a suit for the correction of an entry in a Record of Rights is contained in Article 120 of Schedule I to the Limitation Act, and must be computed from the date the cause of action arises, that is to say, the date of the final publication of the Record, and not the date on which the certificate of final publication is signed by the Revenue Officer. [p. 969, cols. 1 & 2.]

A certificate signed by the Revenue Officer is conclusive evidence of the publication of the Record, but the presumption as to the correctness of the entry arises from the publication which is provided for by section 103A of the Bengal Tenancy Act. [p. 969, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Backergunge, dated the 27th of March 1917, reversing that of the Munsif, 1st Court at Perojpur, dated the 17th of March 1915.

FACTS appear from the judgment.

Babu *Gunada Charn Sen* (with him Babu *Bimal Chandra Das Gupta*), for the Appellants.—The learned Munsif was right in holding that the suit was a declaratory one and regard being had to this and other circumstances, he held quite rightly that the suit of the plaintiff was governed by Article 120 of the Limitation Act. The Court of Appeal below discussed the whole matter and was against the plaintiff but as there was a prayer for confirmation of possession, it thought that the suit was governed by the 12 years' rule of limitation and not the 6 years'. And here the learned Judge was wrong. Article 120 of the Limitation Act is clearly applicable to a suit of this nature, being one for the correction of an entry in the Record of Rights, and the 6 years are to be computed from the time of the final publication of the Record of Rights and not from the certificate.

Babu *Broja Lal Chackerbutty* (with him Babu *Suresh Ch. Talukdar*), for the Respondents.—If Article 120 applies, I submit the time must run from the certificate and if that is so, I am within time as my cause of action arose on 6th January 1908—the date of the certificate of final publication of the Record. Refers to section 103 A of the Bengal Tenancy Act and section 104 A (2) and section 106 of the Bengal Tenancy Act and also section 111 B.

Babu *Gunada Charn Sen* replied.

JUDGMENT.—This appeal arises out of a suit for a declaration of the plaintiff's Karsha right to the lands in dispute, and also for a declaration that an entry in the Record of Rights with respect to the holding is incorrect. The plaintiff also prayed for confirmation of his possession of the lands.

The Record of Rights was finally published on the 16th December 1907 and the suit was brought on the 6th January 1914, *i. e.*, more than 6 years from the date of the final publication of the Record of Rights

The cause of action was stated in the plaint to have arisen on the 6th January 1908, the date of the certificate of final publication of the Record.

Article 120 of the Limitation Act applies to a suit for a declaration that an entry in the Record of Rights is incorrect, and the period of six years is to be computed from the date when the cause of action arose. It is contended that the cause of action arose on 6th January, the date of signing of the certificate of the final publication. Now section 103A of the Bengal Tenancy Act lays down that "the Revenue Officer shall finally frame the Record and shall cause it to be finally published in the prescribed manner, and the publication shall be conclusive evidence that the Record has been duly made under this Chapter." Section 103B provides that a "certificate signed by the Revenue Officer stating that a Record of Rights has been finally published under this Chapter shall be conclusive evidence of such publication and every entry in a Record of Rights so published shall be presumed to be correct until the contrary is proved."

A certificate signed by the Revenue Officer is, therefore, conclusive evidence of the publication, but the presumption as to the correctness of the entry arises from the publication which is provided for by section 103A.

It is true that the period of limitation for certain suits provided for in Chapter X of the Bengal Tenancy Act commences from the date of the certificate of the final publication of the Record of Rights [for instance, see section 104A (2), section 106]. But that is expressly provided for in the Act, and that fact in no way supports the contention of the appellants.

The Courts below, therefore, were right in holding that the plaintiff was not entitled to compute the period of limitation from the date of signing of the certificate (6th January 1908).

It was contended that as section 111B provides for stay of suit for the decision of certain issues (which includes the issues raised in the present case) within three months of the certificate of the final publication of the Record, the plaintiff is entitled to a deduction of three months.

But the Eastern Bengal and Assam Amending Act must be taken to have come into force on the 10th June 1908, the day on which it was published in the Gazette (as the Act does not mention the date on which it was to come into force) and three months from the date of the certificate (6th January 1908) had expired before the Act came into force. Section 111B, therefore, does not help the respondent.

The Court of Appeal below, however, held that as there was a prayer for confirmation of possession, the suit was governed by the 12 years' rule of limitation and not by the 6 years' rule. It is contended before us that a suit for confirmation of possession is governed by Article 120.

It is unnecessary, however, to decide in the present case the question whether a suit for confirmation of possession is governed by Article 120 or by the 12 years' rule of limitation. The plaintiff did not allege that his possession had in any way been disturbed or threatened to be disturbed by the defendants. The only cause of action alleged in the plaint was the alleged wrong entry in the Record of Rights. In the 7th paragraph of the plaint the plaintiff stated: "For the purposes of jurisdiction the suit is valued at Rs. 40, being the market value of the disputed lands, but the suit being declaratory one the plaintiff institutes the same on payment of a Court fee of Rs. 10 only." The Munsif treated the prayer for confirmation of possession as a prayer for "*declaration* of possession," and the plaintiff himself stated, as pointed out above, that the suit was a declaratory one. Under the circumstances we think the suit is governed by Article 120 of the Limitation Act.

The decree of the lower Appellate Court is accordingly set aside and that of the Court of first instance restored with costs of both Courts.

Decree set aside.

AZIZ UN-NISA *v.* AHSANASHRAF.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 49 OF 1918.

July 15, 1919.

Present :—Mr. Lyle, A. J. C., and Mr. Ashworth, A. J. C.

Musammat AZIZ UN-NISA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AHSAN ASHRAF AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 41—Transfer by ostensible owner—Transferee taking in good faith after enquiry—Real owner, position of—Estoppel—Intention to deceive, whether necessary.

The object of section 41 of the Transfer of Property Act is to protect a *bona fide* transferee for good consideration, who has made proper inquiries, from being prejudiced by the conduct, however innocent, of the real owner in allowing the world at large to think some one else the owner of the property. In order to invoke the aid of this section it is not necessary to prove an intention on the part of the real owner to deceive, much less to deceive any particular person. [p. 972, col. 2.]

Appeal against the decree of the Subordinate Judge, Bara Banki, dated the 28th February 1918.

Messrs. *M. Wasim* and *Hyder Husain*, for the Appellants.

Messrs. *Bisheshwar Nath Srivastava* and *Rameshuri Prasad*, for Respondent No. 8.

JUDGMENT.—This appeal arises out of a suit brought by one of three sisters and the husband and daughter of another sister (as her representatives) for possession of a 7/36th share of three villages and one half of a building. The suit is brought against the three brothers of the three sisters and their three wives in whose favour those brothers have transferred some of the property in suit, against the third sister who has not joined as plaintiff and against a transferee of the three brothers of the rest of the property in suit. The suit was based on the following allegations. The father Imdad Ashraf possessed an eight-annas share in Husainabad, an eight-annas share in Karmayman and a six-annas share in Ulhepur. At the time of his death the first two properties were mortgaged to defendant No. 8, under a deed, dated the 23rd January 1905, for Rs. 14,500. Some of this mortgage-debt had been paid off by the sale of some property with which we are not concerned. The father died on the 11th May 1906. Mutation was effected in favour of the three brothers on the 28th August 1906, and on the 11th October 1906 the three brothers hypothecated by a simple mortgage the eight-annas share in Husainabad and the eight-annas share in Karmayman to defendant No. 8 for Rs. 14,500. The consideration was made up by the balance due from the father in respect of the deed executed by him on the 23rd January 1905 and by other advances to the brothers, secured and unsecured. On the 3rd of August 1909 two possessory mortgages were substituted for the simple mortgage. Again on 23rd August 1910 the six-annas share in Ulhepur was mortgaged by the three brothers to defendant No. 8 who obtained a decree for foreclosure, which was made absolute on 19th December 1914. Meanwhile the equity of redemption in the eight-annas share of Husainabad had been sold by the three brothers on the 27th June 1913. The three brothers later on executed transfers of the house to their wives. The plaintiffs in paragraph 4 of the plaint state in anticipation of the defence that the original mutation, five months after their father's death, was effected in favour of the three brothers without their knowledge. The plaintiffs base their claim to the property on the ordinary Muhammadan Law whereby daughters get a share, and urge that nothing which has been done by the brothers can affect their right to recover the property from the brothers and the transferee. None of the parties contested the suit except defendant No. 8. He got up a custom whereby the daughters were excluded. He also urged section 41 of the Transfer of Property Act pleading that by allowing the mutation to go unchallenged, the sisters had given their implied consent to the brothers being in ostensible possession and that he, the transferee, was a transferee in good faith and for consideration after due inquiry. The learned Subordinate Judge found that the custom was not proved, but he found that the plea that the sisters were estopped under section 41 of the Transfer of Property Act was made out and dismissed the suit.

In appeal to this Court it is urged that the lower Court's finding was wrong, because the brothers were not ostensible

owners in possession with the consent, express or implied, of the plaintiffs and also that the defendant No. 8 had not taken reasonable care to ascertain that the brothers had power to make the transfers in his favour. No objection was taken by the plaintiffs-appellants to the dismissal of the suit as against the wives of the three brothers. The appellants' Counsel seeing the significance of this fact stated to this Court that this omission was a mistake but we are disposed to think that the omission was not due to a mistake but to the fact that the brothers have sided with the plaintiffs in attempting to prevent defendant No. 8 from getting advantage of his transfers.

The point then for us to decide in this appeal is whether the lower Court is right in finding that the plaintiffs are estopped under section 41 of the Transfer of Property Act. The ground may be cleared by our stating that we fully agree with the learned Subordinate Judge that the inquiries made by defendant No. 8, when the brothers executed the mortgage-deed of 11th October 1906, were sufficient. We see no reason to disbelieve the evidence of the defendant No. 8 as to the inquiries he made. The plaintiffs' witness Ekram Ashraf (one of the three brothers) would have us believe that he at the time of the mortgage protested to defendant No. 8 that the sisters had a share in the mortgaged property and that, notwithstanding this, the defendant No. 8 accepted the three brothers as sole owners. His evidence is transparently false. Defendant No. 8 is a banker and would not have knowingly accepted a transfer which was bound to lead to objection and litigation. It has been urged that the defendant No. 8, Chhote Lal, though he inquired from the Patwaris and from the Registrar Kanungo whether any objections had been made by the daughters or the widow of Imdad Ashraf to mutation, did not call the Registrar Kanungo or question the Patwaris (who were produced as witnesses) as to this. It was very unlikely that the Registrar Kanungo or the Patwaris would remember whether he asked them or not. He proves that he saw certified copies of the mutation orders. The mutation orders in respect of Husainabad and Ulhepur are on the file. They do not show that the names of the three brothers alone were entered, but it is not disputed that their names alone were entered and *khewats* prove this. We are, therefore, only concerned with the question whether the conduct of the sisters in not objecting to the mutation in favour of the three brothers alone and the execution of the mortgage-deed by the three brothers alone, amounts to implied consent. It is common ground that there was no express consent. It is to be observed *in limine* that the plaintiffs' case is not that, while aware of the mutation in favour of the three brothers alone and of the execution of the deed of the 11th October 1906 by the three brothers, they were ignorant of the possible effect of allowing such mutation and such execution to go unchallenged. In other words, it is not their case that they gave a consent but not an intelligent one. For this reason we would rule out at once all the arguments based on an alleged practice in India not to press a presumption by acquiescence against *pardanashin* ladies, especially Muhammadan ones. If there was no consent whatever, the question of an unintelligent consent does not arise. The only question indeed which has to be decided is whether the sisters knew of the mutation proceedings and the execution of the deed by the brothers. The lower Court has inferred their knowledge of these facts from the conduct of the sisters at a later date. In particular it points out the fact that, when the simple mortgage of the 11th October 1906 was changed in 1909 to usufructuary mortgages, these sisters must at once have become aware of the diminution of the income of the family. It is not denied that the sisters and all the brothers lived together with the mother. It is true that if these sisters first came to know of what happened in 1906 by loss of income in 1909, this fact could not be used in itself to make the mortgage of 1906 binding on them. We agree, however, that their failure to make any protest in 1909, when they should have been put on their guard to find out what was the reason of the diminution of the family income, and when, if they had made inquiries, they would have found out about the mutation and execution

of the deed in 1906, does suggest that they really knew of the proceedings in 1906. This inference is further strengthened by other considerations. We cannot believe that the three brothers entered into a conspiracy within six months of their father's death to defraud the sisters of their share. The evidence of their own witness (one of the brothers Ekram Ashraf), though quite useless to prove anything for the plaintiffs, does show that it was incredible that the brothers were trying to defraud the sisters. In this case the brothers are obviously working with the sisters. Ekram Ashraf himself does not admit any such dishonesty on the part of himself or his two brothers. There is also the presumption in favour of the brothers having acted honestly as regards the sisters. Now if the brothers were not conspiring against the sisters, it was inevitable that the sisters should know in a united household what was going on. In our opinion, they must have known not only that the brothers were obtaining mutation but also that they were raising money on the property. The money was needed for the funeral ceremonies of the father. The tightness of money and the necessity of spending it on their father's funeral ceremonies must have been known to the sisters. The defendant No. 8 deposes that the three brothers represented to him that the sisters were excluded by custom from any share. We see no reason to disbelieve this. If this was the case, the inference is that the sisters believed the same, rightly or wrongly, and we are constrained to hold that the reason for their not offering opposition to the mutation in favour of the three brothers only and the execution of the mortgage deed by those three brothers only was that they shared their brothers' belief that they had no right to any share. Their case not being that they allowed the brothers to be ostensible owners by reason of their ignorance of their rights, it does not appear necessary to set up a case for them on this basis. Assuming, however, that they allowed the brothers to be ostensible owners owing to their ignorance of their rights, this is no bar to the application of section 41. It is quite a different thing from an unintelligent consent. They were labouring under a mistake of fact and their amount of intelligence does not affect the matter. If it be argued that more intelligent persons would not have so readily accepted the fact that they had no title, the answer is that, as we have already stated, the brothers themselves were under that belief. It is to be noted that these sisters have not come into the witness-box themselves. In conclusion, therefore, we find that the plaintiffs, who had to make out their case, have failed to prove that the mutation and execution of the deed was behind their back and that if we allow them to change their case and plead that they gave an unintelligent consent to their brothers being ostensible owners by reason of their ignorance as *pardanashin* Muhammadan ladies, the answer is that the consent they gave was based on a belief shared by the brothers and, as shown by the evidence of the defendant No. 8, shared by the oldest and also the most influential person in the village. In these circumstances we do not think that the consent could be called an unintelligent one, even if this plea were permissible.

It merely remains to refer to two arguments of the learned Counsel for the appellants. He states that mere acquiescence does not amount to consent under section 41 of the Transfer of Property Act unless there is a duty to speak. The duty he refers to is a moral one and not legal one. No one can deny that when the sisters knew that the brothers were dealing with the property as sole owners and when they knew that mutation had been effected in their names alone, it was their duty to protest. His second argument is that to constitute an estoppel the sisters must have intended to deceive, by conduct amounting to misrepresentation, the defendant No. 8. In our opinion in order to invoke section 41 it is not necessary to prove an intention to deceive, much less an intention to deceive any particular person. The object of section 41 is to protect a *bona fide* transferee for good consideration, who has made proper inquiries, from being prejudiced by the conduct, however innocent, of the real owner in allowing the world at large to think some one else the owner of the property. For the above reasons we agree with the finding of the lower Court.

Having regard to this finding it is un-

necessary for us to go into the question whether the lower Court was right in finding that the custom of exclusion was not proved. We dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 3026, 3307 AND 3308 OF 1915.

June 26, 1919.

Present:—Justice Sir Ernest Fletcher, Kt., and Mr. Justice Cuming.

AMRITA LAL GHOSE AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

NARAIN CHANDRA CHAKRABARTI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 20—Receiver, position of—Suit against Receiver—Sanction of Court, whether necessary—Contract, joint—Insolvency of one co-contractor, whether absolves others—Suit against solvent contractors, maintainability of.

A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy. The whole of the property of the insolvent vests in him and he remains the owner thereof uutil he is discharged, and in this respect there is a difference between the appointment of such Receiver and one appointed in an action. The sanction of the Court, therefore, is not necessary to the institution of a suit against a Receiver appointed under the Provincial Insolvency Act. [p. 973, col 2.]

A plea that a co-contractor was discharged by bankruptcy or an order of discharge is a good replication to a plea in abatement of the suit for non-joinder. It is no answer to a claim that if one of the co-contractors becomes insolvent the others are not liable. [p. 973, col. 2, p. 974, col. 1.]

Appeals against the decrees of the 2nd Additional District Judge, 24-Pargunnahs, dated the 23rd of August 1915, modifying that of the Munsif, 2nd Court at Baruipore, dated the 22nd of December 1913.

Babu *Pyari Mohan Chatterjee*, for the Appellants.

Babus *Sarat Chunder Roy Chowdhury*, *Bimala Churn Deb*, *Baranasibashi Mookerjee* and *Biraj Mohan Mozumdar*, for the Respondents.

JUDGMENT.

No. 3026 of 1915.

FLETCHER, J.—This is an appeal arising out of a suit to recover rent in arrears. Three persons were originally joined. They were three tenants. There is not a word in this case that they are the heirs, or are holding the property as the heirs, of the former owner. The case against them is that they are three tenants on the land and they are liable to pay. It is quite true that they are brothers and, therefore, they would have a common ancestor; but the suit was not framed on that ground, nor was that the question in debate in the lower Courts. In this case the defendant No. 1 was adjudicated an insolvent under the provisions of the Provincial Insolvency Act prior to the institution of the suit. There seems to be a little misunderstanding in the lower Courts as to the effect of the insolvency. The first defendant was stated as being represented by a Receiver, the Nazir of the Alipore Judge's Court. That was not a strictly accurate position either. A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy. The whole property of the insolvent is vested in him and he is the owner of the property until he is discharged. In the present case, the learned Judge of the lower Appellate Court seems to have considered that the plaintiff was in contempt in instituting this suit against the Receiver without the previous sanction of the Judge having the carriage of the proceedings in which the Receiver had been appointed. That is obviously a mistake. That rule only applies to cases where the Receiver is appointed in an action and does not apply to a Receiver as mentioned in the Provincial Insolvency Act, who is really what is known in the old English Law as an Assignee in bankruptcy. There is nothing in that point. What happened is this. The suit was dismissed as against the insolvent and decreed as against the solvent tenants. It is said that the defendants are entitled to plead in abatement and as the suit has not been successful as against the insolvent, therefore, it must be equally unsuccessful against the solvent tenants. The law in England clearly was not so under the old form of pleadings. Replication to a plea of non-joinder that a co contractor was discharged by bankruptcy or an order of discharge was a perfectly good replication to a plea in abatement. It is no answer to the plaintiffs'

claim against the defendants Nos. 2 and 3 that if one of the co-contractors becomes an insolvent the other persons are not liable to pay the rent. In my opinion, the conclusion arrived at by the learned Judge of the lower Appellate Court is correct. The present appeal, therefore, fails and must be dismissed with costs to be paid by the defendants Nos. 2 and 3. The insolvent must make such arrangement as he thinks fit for the payment of his own costs.

Any rights that the defendants Nos. 2 and 3 may have under the provisions of the Provincial Insolvency Act to prove against the estate of the insolvent, if and when they pay and satisfy the decree, will not be prejudiced by the present judgment.

Nos. 3307 AND 3308 OF 1915.

These cases will be governed by the judgment that has just been delivered in Appeal No. 3026.

CUMING, J.—I agree.

Appeals dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 381 OF 1918.

June 23, 1919.

Present:—Pandit Kanhaiya Lal, J. C.

JANKI—PLAINTIFF—APPELLANT

versus

JANGA PAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Sanklap, *whether under-proprietary holding—Interest created—Grant, terms of.*

Some *sanklaps* are under-proprietary holdings, while others are not. [p. 975, col. 1.]

A *sanklap* is a grant, but a grant may be a grant of a lease-hold or a heritable but non-transferable tenure, not liable to termination at the will of the grantor or on the happening of any contingency: the former invests the *sanklap*-holder with the status of a mere privileged lessee and the latter makes him an under-proprietor. [p. 975, col. 1.]

The terms of the *sanklap* grant have to be ascertained in each case for the determination of the nature of the interest created. [p. 975, col. 1.]

Appeal against the decree of the Subordinate Judge, Partabgarh, dated the 12th June 1918, upholding that of the Munsif, Partabgarh, dated the 28th February 1918.

Mr. *Har Dhian Chandra*, for the Appellant.

Mr. *Ali Mohammad*, for Respondent No. 1.

JUDGMENT.—The plaintiff is a perpetual lessee of some land in the village Bhadohi. He issued a notice of ejectment against the defendants in October 1915, treating them as tenants-at-will. The defendants contested the propriety of that notice on the ground that they held the said land as *sankalpdars*. The Revenue Court held that they were *sankalpdars* and cancelled the notice. The plaintiff thereupon brought the present suit for a declaration that the defendants were not *sankalpdars* or under-proprietors of the land in suit but were mere tenants. The Courts below dismissed the claim. Their finding is that the defendants never claimed under-proprietary rights and that the plaintiff had, therefore, no cause of action.

It appears from the written statement filed by the defendants in this suit that their allegation was that they held the disputed land as *sankalpdars* from the Shahi time, that the predecessors-in-title of the plaintiff sought to eject the predecessors of the defendants from the said land along with other plots, but the latter contested the notice and a compromise was entered into by which the right of the predecessors-in-title of the defendants as *sankalpdars* of the said land was recognised, and that the claim was barred by section 11 of the Code of Civil Procedure. It was not, however, sufficiently clear from the written statement whether the defendants were claiming under-proprietary rights or merely the rights of a privileged tenant. The Court of first instance, therefore, called upon the Pleader for the defendants to state what the nature of their claim was. His reply was that the defendants had been in possession of the land in suit as *sankalpdars* on a favourable rate of rent for over 50 years, and that they might be declared as under proprietors of the land by the Rent Court under the Resumption Chapter of the Oudh Rent Act, but no declaration had till then been made. He further said that the rights of the defendants had ripened into under-proprietary rights under section 107H of the Oudh Rent Act.

As pointed out in *Janki Prasad* v. *Salig Ram* (1) and *Sita Ram* v. *Deputy Commissioner*

(1) 2 O.C. 96 at p. 98.

of *Fyzabad* (2) some *sankalps* are under-proprietary holdings, while others are not. A *sankalp* is a grant; but a grant may be a grant of a lease hold and heritable but non-transferable tenure, not liable to termination at the will of the grantor or on the happening of any contingency. The former invests the *sankalp* holder with the status of a mere privileged lessee; but the latter makes him an under-proprietor. The decision in *Kalka Singh* v. *Suraj Bali Lal* (3) is an instance of the former and that in *Data Ram* v *Deokali* (4) is an instance of the latter. The terms of the *sankalp* grant have to be ascertained in each case for the determination of the nature of the interest created. Here no evidence was adduced by the defendants to show the terms of the grant, and it must be taken as if in fact the defendants admitted that their position was not higher than that of privileged tenants, holding by reason of the *sankalp* at a favourable rate of rent. The vagueness as to the nature of the rights which the defendants possessed, renders it desirable that the Civil Court should expressly declare that except as regards such under proprietary rights as may be acquired by the defendants under section 107H of the Oudh Rent Act, they hold no pre existing under-proprietary rights by virtue of the original grant. Such a declaration will set at rest the possibility of a future controversy with regard to the same. The order of the Revenue Court, cancelling the notice of ejectment, left the matter in an uncertain state and the present suit, which was filed in order to clear up the position, cannot, therefore, be regarded as completely devoid of any cause of action. But for the statement made by the Counsel for the defendants in the Court of first instance on the date of the settlement of the issues, the matter may well have remained in hopeless uncertainty.

The appeal is, therefore, allowed and the plaintiff is granted a declaration that except in so far as any under-proprietary rights may be acquired by the defendants under section 107H of the Oudh Rent Act (XXII of 1886), they hold no pre-existing under-proprietary rights in the disputed land by virtue of the original grant as *sankalpdars*. The parties will in the circumstances bear their own costs throughout.

Appeal allowed.

(2) 49 Ind. Cas. 457; 6 O. L. J. 37.
(3) 45 Ind. Cas. 203; 5 O. L. J. 80.
(4) 25 Ind. Cas. 855; 17 O. C. 293; 1 O. L. J. 483.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1160 OF 1918.

July 22, 1919.

Present:—Justice Sir Syed Shamsul Huda, KT.

NIROD KRISHNA PAL AND OTHERS —PLAINTIFFS—APPELLANTS

versus

INDRA BHUSAN GUPTA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pleadings—Procedure—Issue not raised in pleading —Court, whether can frame issue.

An issue which does not arise upon the pleadings of the parties ought not to be raised by the Court. The fact that the parties are ready with evidence upon the issue is no justification for raising and trying it [p. 976, col. 2.]

Appeal against the decree of the Special Judge, Dacca, dated the 14th of March 1918, reversing that of the Assistant Settlement Officer of that district, dated the 23rd of May 1917.

Dr. *Sarat Chandra Basak* and Babu *Debendra Chandra Pal*, for the Appellants.

Babus *Gunada Charan Sen* and *Prasanta Bhusan Gupta*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought under the provisions of section 106 of the Bengal Tenancy Act and relates to Dag No. 129 of the Settlement Khatian. In the record the plaintiffs' names are entered as occupancy *raiyats* in respect of an undivided $\frac{1}{3}$rd share of this plot and as tenure-holders in respect of the remaining $\frac{2}{3}$rds. Plaintiffs' case is that the whole Dag is within Mehal No. 2685 and they have Howla right to the whole of the Dag. This Dag is according to the Thak included in two different Mehals Nos. 2661 and 2685, $\frac{1}{3}$rd falling within the former and $\frac{2}{3}$rds within the latter. The Assistant Settlement Officer decreed the plaintiffs' suit and held

that they were Howladars in respect of the whole Dag. He doubted the correctness of the Thak, but held that even if correct there is no proof that some arrangements were not made between the proprietors of the two estates after the Thak survey by which the entire plot in suit came to be held by proprietors of estate No. 2685. He accordingly held that plaintiffs' title as Howladars to the whole Dag was established and that the plaintiffs had proved their possession for more than 12 years of the land in suit in assertion of their Howla right to the knowledge of the landlords.

The finding regarding the plaintiffs' title was largely based on certain documents to some of which the defendants' predecessors were parties and in which the plaintiffs' Howla right in respect of certain lands, which were described in those documents as Radha Krishna Khet, was recognised. The evidentiary value of these documents depended on the identity of Radha Krishna Khet with the land in suit. The Assistant Settlement Officer held that the identity was established. The learned Special Judge was, however, of opinion that this identity was not established. He accordingly thought that the documents relied on were of no value in establishing the plaintiffs' title. He was also of opinion that the plaintiffs had failed to prove their case, that the Thak survey was accurate and was supported by evidence adduced on behalf of the defendants, and that there was nothing to show that any exchange had taken place between the proprietors of the two estates. Upon this view of the case he held that the plaintiffs' title was not established. This is a question of fact as to which the decision of the learned Special Judge is final.

The finding of the Assistant Settlement Officer on the question of adverse possession was also to a large extent based on the same assumption regarding the identity of Radha Krishna Khet with the land in dispute. However, the learned Special Judge reversed the finding of the Assistant Settlement Officer on the question of adverse possession on another ground. He was of opinion that the issue was improperly allowed to be raised after the evidence was closed and inspite of the protest of the defendants. It has been argued that the learned Special Judge was under a misapprehension and that the issue was raised before the witnesses were examined. This may be so, but I do not think the appeal should succeed on this ground.

In this case the possession of the plaintiffs is not denied and in order to get a decree against their landlords the plaintiffs were bound specially to allege, not only that they were in possession for a long time, but also that they were in such possession on the assertion of their Howla right to the knowledge of the defendants. No such allegation is to be found in the plaint. The plaint was at no time sought to be amended. On the same day that the new issue was framed the parties were ready with their witnesses and these witnesses were examined on the same day. The defendants, therefore, were quite justified in objecting that they were taken by surprise and that the issue should not have been framed at that stage as it did not arise upon the pleadings of the parties. I think, therefore, the learned Special Judge was right in ruling out the issue relating to adverse possession.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

REFERRED CASE No. 4 OF 1919.

October 1, 1919.

Present:—Sir Abdur Rahim, KT., Officiating Chief Justice, Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

THE SECRETARY TO THE COMMISSIONER, SALT, ABKARI AND SEPARATE REVENUE, MADRAS—PETITIONER

versus

S. R. M. A. R. RAMANATHAN CHETTI, MINOR, BY GUARDIAN VALLIAMMA ACHI—RESPONDENT.

Income Tax Act (VII of 1918*), ss.* 3, 9, 51—*Reference to High Court under s.* 51—*Right to begin*—*Business carried on outside British India*—*Income, whether liable to assessment.*

In the case of a reference made to the High Court under section 51 of the Income Tax Act by the Board of Revenue, the assessee on whose application the reference is made is entitled to be heard first. [p. 977, col. 1.]

Where the only part taken by the proprietor of a business, carried on on his behalf by his agents outside British India, is to acquaint himself with

the state of the business and occasionally to issue instructions, he is not liable to be taxed under the Income Tax Act in respect of the income of such business. [p. 981, col. ; p. 982, col. 2; p. 986, col. 1.]

Case stated under section 51 of the Income Tax Act of 1918 by the Secretary to the Commissioner, Salt, Abkari and Separate Revenue, Madras.

FACTS.—Reference by the Board of Revenue under section 51 of Act VII of 1918 (The Indian Income Tax Act). The assessee was the sole owner of a *hundi* business carried on outside British India through an agent. The question arose whether he was liable to be assessed in respect of the profits of such business, he being a permanent resident in British India. It was found that the assessee was in the habit of issuing "general instructions" to his agent but the reference did not disclose what the nature of such instructions was. The Board, however, inferred a control of the business from the fact of such instructions being given.

This case came on for hearing on 2nd September 1919 and Mr. *A. Krishnaswami Aiyar*, for the Respondent, having raised the preliminary question as to who has the right to begin the arguments in the case, upon perusing the letter of reference and hearing the arguments of Mr. *A. Krishnaswami Aiyar* and Mr *M. Subbaraya Aiyar*, for the Respondent, and of the Hon'ble the Advocate-General, for the Petitioner, the Court made the following

ORDER.—We think that on this reference made under section 51 of the Indian Income Tax Act VII of 1918, the assessee on whose application reference was made by the Board of Revenue is entitled to be heard first. The Board of Revenue under the section is bound to refer the question on an application made for the purpose by the assessee, and when the question is referred to the High Court, the High Court after hearing the case is to deliver judgment and the judgment so delivered will be sent to the Revenue Authorities. There is no ruling on the point, and we have not been able to ascertain whether there has been any uniform practise on any similar reference, but having regard to the nature of the reference in this case and how it originated, that is, on the motion of the assessee who is aggrieved by the order of the Revenue Authorities, we are of opinion that the assessee's Pleader ought to be heard first.

This case came on for hearing on the merits on the 2nd and 3rd September 1919.

Messrs. *A. Krishnaswami Aiyar* and *M. Subbaraya Aiyar*, for the Assessee.—What is liable to be assessed under the Act is income which "accrues or arises or is received in British India or is deemed to so accrue, etc"—section 3. In this case, the *hundi* business being carried on outside British India, any income in the nature of interest, etc., "accrues, etc.," only outside British India. That there is such a distinction is clear from section 6 (2). There is nothing in the Act which would go to show that by exercise of control such income could be deemed "to accrue, etc., in British India." The word 'accrue' means grow or arise' See Wharton's Law Lexicon, Stroud's Judicial Dictionary, Murray's Century Dictionary. Residence of the person to whom the income accrues is not the criterion but the place where it accrues. See sections 31 and 33 referring to non resident foreigners. The English Law expressly makes "carrying on business" the criterion. Under it the question of control would certainly be material. *Cf.* 5 and 6 Vict Chap. 35, 16 and 17 Vict. Chap. 34, 4 and 5 Geo. V, Chap. 10. See also 8 and 9 Geo. V, Chap 40, Schedule D. See also *Colquhoun* v. *Brooks* (1). The word 'accrue' has been construed in *Colquhoun* v. *Brooks* (2). The Newzealand Act is similar in terms to the Indian Act, the words being "income derived from and received in Newzealand", and has been construed in *Lovell & Christmas, Limited* v. *Commissioner of Taxes* (3) and *Commissioner of Taxes for Newzealand* v. *Eastern Extention Australasia and China Telegraph Company Limited* (4). Under the Indian Act of 1886 (Act II of 1886) professional fees earned in Native States by British Indian subjects were not chargeable. But

(1) (1888) 21 Q. B. D. 52 at p. 65; 57 L. J. Q. B. 439; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645.

(2) (1889) 14 App. Cas. 493 at pp. 495, 502; 59 L. J. Q. B. 53; 61 L. T. 513; 38 W. R. 289; 54 J. P. 277.

(3) (1903) App. Cas. 46; 77 L. J. P. C. 31; 97 L. T. 651; 24 T. L. R. 32.

(4) (1906) App. Cas. 526 at pp. 530, 532.

now that is stated specifically in section 10 (3). The present Act, therefore, does not include income earned outside British India unless specifically included.

Section 3 makes no reference to the person to whom the income "accrues, etc." "Accrue to a person" is a phrase which finds no place in the Act. It is the place where the income accrues, etc., that alone is material: See also the previous practice of the Board of Revenue in the Madras Income-Tax Manual, pages 63, 64, 65, 82 (and other proceedings). If that practice had been altered by the Act of 1918, there should have been express provision therefor. Past practice is a sure guide in such cases. See *Oriental Bank Corporation* v. *Wright* (5), *Mathura Mohan Saha* v. *Ramkumar Saha* (6).

A debt has its *situs* at the place where the debtor resides and not where the creditor lives, *Rex* v. *Lovitt* (7), as the assets are at the former place.

The Hon'ble the Advocate-General, for the Board of Revenue.— As a matter of fact there is nothing like past practice in the present case. Even under the old Act, such assessments have been made at least from 1915 onwards and been submitted to.

Further, past practice can never be a guide to the interpretation of an enactment passed much later, especially when such practice is the practice of the executive Government which can never have the force of judicial decisions. See *Trustees of the Clyde Navigation* v. *Laird* (8).

The words "accrue," "arise," etc., are merely descriptive of a right to receive. *Colquhoun* v. *Brooks* (1). See also *Colquhoun* v. *Brooks* (2), *Mitchell* v. *Egyptian Hotels Limited* (9).

The assessee in the present case is the sole owner of the business in question. So, whatever the place of such business, the assessee, who is a permanent resident of British India, has a right to receive the income, accruing from such business, in British India. Further, the business is carried on by an agent appointed in British India, so that the assessee has a right of suit in British India in respect of the agency dealings.

The income cannot be said to accrue to the agent but only to the principal. The principle is applied in section 31 and to a non-resident foreigner in section 33. In the present case, the principal is resident in British India, and so the income accrues in British India. Section 9 of the Income-Tax Act, 1918, expressly says that "tax shall be payable" "in respect of the profits of any business carried on" by the assessee. "Carrying on business" comprises various operations, one of which is control or supervision. It is 'carrying on business' within the meaning of the Act if the sole owner of a business controls it from British India.

[ABDUR RAHIM, OFFG. C. J.—Issuing general instructions is not the same thing as controlling.]

The instructions comprise the outline of the work to be done by the agent. The agent is thereby restricted. That is control, though it may not be efficient or complete control. That is also found in the reference.

ABDUR RAHIM, OFFG C. J.—How do you reconcile section 3 and section 9?]

The actual conduct of the business may be outside British India but so far as the assessee is concerned, he controls the business from British India and has a right to receive the income in British India.

The Indian Act is based on the English Act and there is no difference in substance. *San Paulo (Brazilian) Railway Co. Ltd.* v. *Carter* (10), *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (11), *Mitchell* v. *Egyptian Hotels Limited* (9), *Colquhoun* v. *Brooks* (2).

Mr. *A Krishnaswami Aiyar*, in reply.— The mere right to interfere is not control. Interference in the actual conduct of the business is necessary.

A mere right to receive is not what is specified in section 3. It is actual receipt. See also *Yewens* v. *Noakes* (12). See also Beal on Legal Interpretations, 2nd Edition, page 369.

(5) (1880) 5 App. Cas. 842; 50 L. J. P. C. 1; 47 L. T. 177.

(6) 35 Ind. Cas. 305; 23 C. L J. 26 at p. 38; 20 C. W. N. 370; 43 C. 790.

(7) (1912) App. Cas. 212; 81 L. J. P. C. 140; 105 L. T. 650; 28 T. L. R. 41.

(8) (1883) 8 App. Cas. 658 at p. 672.

(9) (1915) App. Cas. 1022; 84 L. J. K. B. 1772; 6 Tax. Cas. 542; 59 S. J. 649; 31 T. L. R. 546.

(10) (1896) App. Cas. 31 at p 42; 65 L. J. Q. B. 161; 73 L. T. 538; 44 W R. 336; 60 J. P. 84.

(11) (1891) App. Cas. 531 at p. 591; 61 L. J. Q. B. 265; 65 L. T. 621; 55 J P. 805.

(12) (1880) 6 Q. B. D. 530; 50 L. J. Q. B. 132; 44 L. T. 128; 28 W. R. 562; 45 J. P. 468.

JUDGMENT.

ABDUR RAHIM, OFFG. C. J. - This is a case stated by the Board of Revenue, under section 51 of the Income Tax Act, VII of 1918, in which the question involved is whether the assessee, a Nattukottai Chetti, who is the proprietor of a money-lending business carried on on his behalf by his agents in various places including Saigon, Sodac and Khando situated in French Cochin China, is liable to be taxed, under the provisions of this Act, in respect of the income of the business, though not received in British India.

The learned Advocate-General on behalf of the Crown has based his contention on two grounds; firstly, that the income in question accrued or arose to the assessee in British India inasmuch as he was entitled to call upon his agents to pay the income to him in British India, and, secondly, that, upon the case stated by the Board, the business the income of which is sought to be taxed must be held to have been carried on in British India, and, therefore, the income of that business is taxable.

It will be convenient to dispose of the last contention first. The facts in this connection as submitted are as follows:— The entire business operations producing the income are conducted at the places above mentioned outside British India by agents appointed for fixed periods, who use their own discretion in lending money to customers. The only part taken by the proprietor in connection with the business is to acquaint himself with the state of the business abroad and occasionally to issue general instructions. It is impossible for us, on these facts, to hold that the business is one carried on in British India. The learned Advocate-General cited several English rulings in support of his arguments, but as, pointed out by Lord Halsbury in *San Paulo (Brazilan) Railway Co. Ld.* v. *Carter* (10) [see also per Lord Loreburn in *De Beers Consolidated Mines, Limited* v. *Howe* (13)], it is a question of fact where the trade is carried on; at all events it is an inference to be drawn from the facts and circumstances of each case. In that case the railway in Brazil, the earnings of which were sought to be assessed, was owned by a company whose registered office was in England; the business of the company was managed by the directors in England; the directors purchased in England and sent out to Brazil the materials and plant necessary for the purposes of the Railway; and the accounts were kept and the balance sheet and reports were made out in London where also the meetings were held, and all dividends were declared and paid. On those facts, the learned Lords held that the trade was carried on in England and was, therefore, assessable, under the first case of Schedule D of 5 and 6 Vict. C. 35, section 100. The business here is that of money-lending and the mode of carrying it on is left entirely to the discretion of the agents in the places where the lending operations are conducted. The mere issuing of general instructions occasionally by the proprietor in British India and the fact of his being supplied with information from time to time as to the state of the business would not at all bring the case within the purview of the ruling referred to. As in no sense, in my opinion, could the business in this case be said to be managed and controlled by the proprietor in British India, the statement of Lord Loreburn in *De Beers Consolidated Mines, Limited* v. *Howe* (13) "that the real business is carried on where the central management and control actually abides" has no application. On the other hand, the observations of the Privy Council in *Lovell & Christmas Limited* v. *Commissioner of Taxes* (3) apply rather closely to the facts of the case. Their Lordships observe: "One rule is easily deducible from the decided cases. The trade or business in question in such cases ordinarily consists in making certain classes of contracts and in carrying those contracts into operation with a view to profit; and the rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carrried on within the meaning of the Income Tax Acts, so as to render the profits liable to income-tax." It is, therefore, unnecessary to express an opinion on the question whether the income of a business controlled and managed by a person residing in British India, although the actual operations giving rise to the income are carried on, as in this case

(13) (1904) App. Cas. 455 at p. 458; 75 L. J. K. B. 868; 95 L. T. 221; 22 T. L. R. 756; 13 Mans. 391.

outside British India, would be assessable to income tax.

At one time the Advocate-General seemed even to argue that it is section 9 (1) by which the tax payable on account of income derived from business is to be determined. All that it says is that "the tax shall be payable by the assessee under the head 'Income derived from business' in respect of the profits of any business carried on by him," and the rest of the section deals with the mode in which such profits shall be computed. If section 9 (1) be taken to furnish the whole test, then section 3 (1) would have to be excluded from consideration in dealing with the income derived from business. But the Advocate-General was not really prepared to go so far; at any rate, there can be no doubt that section 9 (1) must be read along with section 3 (1) and that it is the latter that lays down the test to be applied in determining all incomes assessable to the tax, including income derived from business. If a certain income derived from business cannot be said to accrue or arise or to be received in British India, that income would not be assessable by virtue of anything contained in section 9. In fact, the main argument in this connection has been that the income of a business, which is managed and controlled by the proprietor in British India, accrues or arises in British India within the intendment of law and, because it so accrues or arises, it is taxable.

The first part of the argument does not really present any difficulty, for the language of section 3 seems to be unambiguous. The tax is leviable with reference to the place where the income accrues or arises or is received, and not with reference to the residence of the person who is entitled to the income. This seems to be the entire scheme of the Act and sections 31 and 32 would appear to be illustrations of that principle. Whatever meaning be attached to the words 'accrues' or 'arises' such as, 'grows' or 'becomes due or payable,' it is impossible to hold that the income in this case could be said to have accrued or arisen in British India. If loans are made and the borrowers reside outside British India and if accounts are adjusted, the moneys lent are realized with profit or are capable of being realized and the profits are periodically ascertained and dealt with outside British India, it is impossible to hold that the income of such business accrued or arose in British India.

A number of English decisions were discussed before us but it is unnecessary to deal with them in any detail, because the English Statute under consideration in those cases differs in many material respects from the Indian Act. In the English Statute the place of residence of a person is a basis of assessment but is not so, as pointed out above, in Act VII of 1918. The case of *Colquhoun* v. *Brooks* (1) [in the Court of Appeal and 14 App. Cas. p. 493 *Colquhoun* v. *Brooks* (2) in the House of Lords] does not lay down any principle of construction which can be of use in this case.

Then the learned Advocate-General at one stage of his argument seemed to contend that the income sought to be assessed should be deemed to accrue or arise or to be received in British India under the provisions of this Act, but this argument is clearly untenable. In the first place, this phrase refers to cases set out in the Act itself [see for instance section 6 (2), section 8], and none of them have any application to the case under consideration, and in the second place, as I have shown, there is no general rule of law by virtue of which the income sought to be assessed could be said to accrue or arise in British India.

If we look at the history of this enactment, the case sought to be made on behalf of the Crown appears to be still more untenable. The provision of Act VII of 1918, so far as the present question is concerned, is practically in the same words as that of the Income Tax Act of 1886. There the word 'income' used in the Act is defined as "income and profits accruing and arising or received in British India", and the present Act says that it shall apply to "all income if it accrues or arises or is received in British India." Whether there is any difference intended at all between the phrase "accrues and arises" and the phrase "accrues or arises," it could not reasonably be said that there has been any such change as to affect the question we are dealing with. The Act VI of 1886 was in force for more than thirty years before the present Income Tax Act was enacted, and the Advocate-General

himself has informed us that, at least before 1915 or 1916 when he was consulted with respect to certain cases of a nature similar to this, the general practice of the Revenue Department was not to assess income of business carried on outside British India but the proprietor or proprietors of which resided in British India. We are justified in assuming that the Legislature was aware of this practice, and if with that knowledge they repeated in the new enactment the same words on which the practice of the Government was founded, it gives rise to the presumption that they did not want to assess such incomes. If the Legislature intended to tax these incomes and it would have been a very substantial source of public revenue, they could have easily said, as in the English Statute, that income accruing *to a person* in British India from any business wherever carried on is liable to be assessed.

I would hold, therefore, that the income of the business under reference is not liable to be assessed under the provisions of Act VII of 1918.

OLDFIELD, J.—The question referred is of considerable importance. But the considerations, which are really material, can be stated shortly.

Respondent has in the French territory of Saigon a money-lending business conducted by an agent, and (according to the statement in his petition, which is adopted in the case submitted to us) keeps himself acquainted with its progress and occasionally issues general instructions. He, however, resides in this Presidency and receives no income from Saigon. On these facts is he liable for tax on the profits of this business or, as he contends, will he be so, only if and when the profits are remitted to him here?

I agree with the learned Chief Justice that the answer to the first of these questions must be in the negative; and to justify that conclusion I refer to the scheme of the Income Tax Act of 1918, under which the case has to be decided. Section 3 (1) of that Act runs, "save as hereinafter provided this Act shall apply to all income from whatever source it is derived, if it accrues or arises or is received in British India or is under the provisions of the act deemed to accrue or arise or to be received in British India." After sections 3 (2) and 4 which specify certain general exclusions not at present material, there is the charging section, section 5, in which six classes of income are enumerated with the statement that, save as thereinafter provided, they shall be chargeable in the manner thereinafter appearing; and the ensuing sections 6 to 11 specify the manner, in which each class is to be assessed, each beginning "The tax shall be payable by an assessee under the head—", and then one of the six classes in section 5 is specified and the manner of assessment appropriate to it is described. Of the remaining provisions only sections 7, 10 (3), 31 and 33 have been relied on and to them I return. The point is at present that section 3 (1) affords a comprehensive definition of income for the purpose of the Act and that this definition is to be regarded as controlling, not as enlarged by, the language subsequently used in classifying the different descriptions of such income and prescribing the method of assessment for each.

This is important, because the main argument for the Crown is that the description of one such class in section 9 "income derived from business" and the direction to assess such income on "the profits of any business carried on by" the assessee are either supplementary to or can be substituted for the definition of income in section 3(1); and that the carrying on of the business in British India, which, for the purpose of argument, may be regarded as established, is sufficient to render respondent chargeable. For the reasons given I am unable to accept that construction and I, therefore, turn to the distinct line of argument also attempted, that income accrued to respondent here with direct and exclusive reference to the wording of section 33 (2), because in the alternative he has carried on here the business in which the income originated, or he was here when his right to the income in his agent's hands elsewhere became enforceable. That argument is not in my opinion tenable in either of these forms with reference to any legitimate interpretation of the word "accrue" or to the provisions of the Act, which have also been relied on.

The primary meaning given for the word in the Oxford Dictionary is "to arise or spring as natural growth or result;" in Webster's Dictionary, "to come by way of increase", and in Wharton's Law Lexicon "to grow to or arise." These, the only authori-

ties referred to, show that the origin of the thing, which accrues, in the exertions of some person or otherwise, is not an essential element in the definition of the word "accrue" and cannot affect its application. This is fatal to the attempt made in the first form of the argument to identify the place of accrual referred to in section 3 (1) with the place, in which such exertions, in the present case by carrying on business, have taken place. I, however, refer at once to sections 10 (3), 31 and 33 of the Act, in the light of which it is contended that section 3 (1) should be construed. It might be sufficient to say that the first, in which a very definite exception is specified, and the others, occurring in a chapter headed "Liability in special cases," cannot be invoked as exemplifying any general principle or controlling a general definition. But in fact the sole similarity between the cases dealt with in these provisions and the case before us is that all relate to profits earned where they are not enjoyed. The special provision in section 10 (3) for liability to assessment in British India of professional fees, which a resident there has received elsewhere, can be referred to no general foundation and is merely the recognition of a presumption of law that the earnings of a resident in British India will be brought there for enjoyment, whilst sections 31 and 33 (of which the former statedly deals only with income chargeable under the Act) are easily intelligible provisions for the liability to the tax of the person, through whose hands in one capacity or another the profits in question will pass in British India and whom, therefore, the Crown can reach in order to collect it. It may, on the other hand, be observed that the existence of special and explicit provision in section 10 (3) for the taxation of one kind of income not received in British India is strong reason for refusing to hold others liable by implication. The argument of the learned Advocate General in its first form is accordingly unsustainable with reference either to the significance of the word "accrue" or to any construction of section 3 (1) with reference to other parts of the Act; and it must be rejected.

His argument in its second form derives at first sight some support from the secondary meanings of "accrue" given in the Century Dictionary as used in law for "to become a present and enforceable right" and in Bouvier's Law Lexicon as "to become a present right of demand," the suggestion being that respondent's profits in Saigon accrued to him in British India, when, being in the latter place, he had a right to demand them of his agent in the former; and to show that income is regarded in the Act as accruing before it is received and when there is only a right to receive it, reference has been made to the use of the word "receivable" in section 7. There is, however, a short answer to this. Firstly, this meaning of "accrue" is excluded by the context in section 3 (1). For it is not the right to demand the profits which it is proposed to tax, but the profits themselves. And, secondly, if the word "receivable" in section 7 is interpreted in the light of the provision in section 15 (3) for the method of payment of the tax on interest on securities, the description of income with which section 7 deals, its use will be seen to involve recognition, not of any kind of income as existing independently of and before its receipt, but of income, to which liability for the tax attaches at the moment of its receipt, when the tax is to be deducted by the person responsible for its disbursement.

Some attempt has been made to support this argument by reference to English decisions. But it is useless to deal with them at length in view of the material differences between the wording of the Act before us and that of the English Statute in question in *Colquhoun* v. *Brooks* (2) and of the New Zealand Statute in *Commissioner of Taxes for New Zealand* v. *Eastern Extension Australiasia and China Telegraph Company Limited* (4) and *Lovell & Christmas, Limited* v. *Commissioner of Taxes* (3). My conclusion is that respondent has not been shown to be liable for assessment; and that disposes of the main question raised by the case submitted to us.

It does not, however, dispose of the subsidiary question, which the learned Advocate-General has also argued, whether respondent carries on business in British India within the meaning of the Act. A decision on that question has been unnecessary, because even on the assumption that it should be answered in the affirmative, a conclusion in favour of respondent's liability cannot be reached. If we had had to decide it, we should have had to call for much more definite informa-

tion as to the facts than we have been given; and I am constrained to express my doubts whether a question, which is so largely one of fact with reference to the method of carrying on the business of a particular assessee, is in any substantial degree one with reference to the interpretation of the Act, which we can deal with to advantage under section 51.

SESHAGIRI AIYAR, J.—The undisputed facts are these. The principal (he is a minor) resides in Kanadugathan in the Madura District. He carries on the business of money lending in and out of British India. Some of the places are within the British Empire, though outside British India, others are in foreign territory subject to the rule of France, Holland, etc. The trade in question is in Saigon, which is outside the Empire. The point of agreement in all these businesses is that they are owned by a principal residing in British India and are worked by agents residing outside. On these facts the question for our opinion is whether the income from the trade in Saigon is assessable to income tax in British India. It is assumed and not disputed that that income has not been transmitted to the principal in India.

The question has been very elaborately argued. I shall in the main content myself with an examination of the Statute Law, because case-law is not likely to help us much. Before doing that, I wish to draw attention to some well-recognised principles bearing on the theory of legislation regarding income-tax. It is pointed out in Bar's International Law that "it is the principle of domicile that regulates the levy of income tax." It is said again :—"This is certainly the rule in most of the systems and that it should be so is perhaps to some extent accounted for by the fact that attempts to levy and to collect income-tax in a foreign country would very frequently encounter insurmountable difficulties." The same principle has been a little more clearly stated in Wharton's Conflict of Laws, Volume I, section 80 (*a*). That learned author says :—"The power of taxation of any state is, of necessity, limited to persons, property or business within its territorial jurisdiction." He further on states that "the principle is so fundamental that it has been declared that an act of state legislature in violation thereof would be as much a nullity as if in conflict with the most explicit constitutional inhibition. The *situs* of personal property for the purposes of taxation is, therefore, of the utmost importance in determining the limitations of the taxing power and the principles which should control the exercise of that power." He also refers to another maxim '*Mobilia sequuntur personam*', and concludes that Legislatures should adopt either the one or the other and that the comity of nations can be preserved only if there is a clear understanding on this question. The English Income Tax Acts appear to have been based on the first of these principles. Lord Herschell in *Colquhoun* v. *Brooks* (2) says: "The Income Tax Acts, however, themselves impose a territorial limit; either that from which the taxable income is derived must be situate in the United Kingdom or the person whose income is to be taxed must be resident there." The same principle is traceable in the provisions of the Indian Income Tax Act. There is no reason for imputing to the Indian Legislature an intention to depart from the principle which has been so well recognised in England. One other observation preliminary to the examination of the sections may be made and that relates to the rule of construction of all income-tax enactments. In *Partington* v. *Attorney-General* (14) Lord Cairns stated the rule thus:—"As I understand the principle of all fiscal legislation, it is this. If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax cannot bring the subject within the letter of the law the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any Statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing Statute where you should simply adhere to the words of the Statute." In *Coltness Iron Company* v. *Black* (15) Lord Blackburn stated the same rule somewhat differently. The noble Lord said: "No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him. But when that intention is suffi-

(14) (1869) 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370.

(15) (1881) 6 App. Cas. 315; 51 L. J. Q. B. 623; 45 L. T 145; 29 W. R. 717; 46 J. P. 20.

ciently shown, it is not open to speculate on what would be the fairest and most equitable mode of levying that tax." Bearing the above two considerations in mind, the one which is a guide to the principle of legislation and the other which is a guide to the construction of the language of the Statute, I shall proceed to examine the sections of Act VII of 1918 and see whether the contention of the Board of Revenue is sustainable.

It was not seriously disputed by the learned Advocate-General that section 3, clause (1), is the governing section in regard to income tax. The scheme of the Act seems to be this. There is first a general provision as to the *locale* of the income which is to be taxed. That is contained in section 3, clause (1). There are two parts of that clause. The first part deals with income actually accruing or arising or received in British India. The second introduces a fiction by which certain incomes are deemed to have accrued, arisen or received in British India. The same section in clause (2) gives various classes of incomes exempted from the payment of tax. Section 4 exempts agricultural income. In section 5 an enumeration of the classes of income referred to in section 3, clause (1), is made. Six categories are mentioned. From section 6 up to section 11 the mode of assessing income from the various heads tabled in section 5 is elaborated. The case we are dealing with comes under section 9, to which I shall advert later on. Sections 12 to 14 deal with the exemptions of a peculiar character. These sections exhaust Chapter I. Chapter II deals with the deductions of assessment with which we are not concerned. Chapter III deals with the procedure for what is known as summary assessment, with respect to a particular class of income. Then comes Chapter IV which was much commented upon during the argument. The scheme of this part of the Act is to amplify the principle stated in section 3, clause (1). It is intended to affect two classes of persons —persons who are not *sui juris* but who are resident in British India and carry on business through an agent or guardian of the Court of Wards and persons *sui juris* who are not resident in British India but who conduct their business in British India through an agent. This is really another illustration of the second clause of section 3 (1). It states a notional rule of law, the object aimed at being that the owner of the income should not escape liability either because he is not *sui juris* or because he is not a resident in British India, provided he receives the benefit of transactions in British India through somebody who represents him. The other chapters of the Act are not material and I shall not deal with them.

There is one section, however, on which a preliminary argument was addressed to us and it is as well that I should say a word about it.

The reference was made under section 51 to the High Court. It was not disputed that the reference was rendered necessary by the request of the assessee that in case the Board of Revenue did not agree with his view of the case, the matter should be placed before the High Court for their opinion. The learned Advocate-General contended that the Board of Revenue should have the right to begin the argument on the reference. Mr. Krishnaswamy Aiyar contended that his client, the assessee, was really in the position of the plaintiff and that he was entitled to begin. In my opinion the contention of the learned Vakil for the assessee is right. It is his case that was referred and it was at his instance that the reference was made. It is he that challenged the action of the Board, and although the letter has come from the Board of Revenue, it is as if he had preferred an appeal to the High Court against the conclusion of the Board of Revenue. In my opinion, therefore, the Advocate-General as representing the Board was not entitled to be heard first. But this is only by the way. I now come back to the discussion of the merits of the respective contentions.

If my analysis of the Act is right, it follows that our answer must depend upon the meaning we attach to the words, 'to all income from whatever source it is derived if it *accrues or arises or is received in* British India.' Reading both parts of section 3 (1) together, the income should either actually or notionally accrue, arise or be received in British India. Various definitions of the words "accrues or arises" were placed before us. In Murray's Oxford Dictionary the words "accrues" and "arises" are regarded as synonymous. In the Century Dictionary

the word accrue is defined to mean "to become a present or enforceable right to demand." Stroud defines "arising in the United Kingdom" as "coming into the person's hands in the United Kingdom" —To my mind, all these definitions contemplate actual receipt of income, and not an income which may at any future time pass into the hands of the person resident in British India. In a given year a particular sum of money may be remitted from the foreign parts; that income would be taxable. But if that is retained in the hands of the agent for adjustment in the foreign country or for further employment there, can it be said that the income has accrued to the principal in British India? The learned Advocate-General argued that the second part of the section 3(1) made it clear that the income in the hands of the agent is income in the hands of the principal and he referred to sections 31 and 33 for this proposition. It seems to me that these two sections are inconsistent with the contention advanced. I have already referred to the nature of these two sections. Now I shall examine section 33, on which so much stress was laid by the Advocate-General, once again. There are two parts of it. One relates to "profits or gains accruing or arising to such a person whether directly or indirectly through or from any business connection in British India;" (2) and the other to what "shall be deemed to be income accruing or arising within British India." The object of this section, as I understand it, is to observe the comity of nations, which directs that all nations in enacting fiscal laws should as far as possible put a territorial limit to the operation of the fiscal enactment. In other words they should only tax property *in situ*. It is with that object, this section enacts that the income which is transmittable to a person outside British India shall be deemed to be income arising in British India if the non-resident foreigner has business in British India and transacts that business in British India through an agent. The object is secured by taxing the income made in British India before it leaves British India. Whether this theory may not result in the imposition of double tax where the principal resides within the Empire, but outside British India, it is unnecessary for us to consider: also whether it would not conflict with the laws of other nations where the principal resides in a foreign territory. What is material is, that this section introduces a fiction of law as regards non-resident principal, in order that income due to him may be regarded as accruing or arising in British India. A significant omission by the Legislature is almost fatal to the contention of the learned Advocate-General. Whereas the income received by an agent in British India on behalf of a foreign principal has been notionally described as income accruing or arising in British India, the converse, namely, of income belonging to a resident principal which has been received out of British India by an agent is not similarly brought under a legal fiction. The obvious principle which guided the Legislature was that the tax should be imposed only on what is actually received or made in British India. I must, therefore, hold that the learned Advocate-General's contention that the second clause of section 3 (1) affects the receipt of income by the agent in Saigon is not sustainable.

Then it was attempted to argue that section 9 is comprehensive enough and it should not be fettered by reference to section 3. I do not think this contention is admissible at all. I shall say only a few words on the meaning to be attached to the words "in any business carried on" in section 9. But even supposing that we come to the conclusion that the principal residing in Kanadakathan was carrying on business in Saigon, it will still have to be established that the income accrued or arose in British India, if it is to be taxed.

Now I shall deal with the contention put forward that the business was carried on in British India. The facts mentioned in the order of reference do not justify us in holding that the business in Saigon was controlled by the principal residing in Kanadakathan. As has been said in some cases, there are not facts which would enable us to hold that the brain was in Kanadakathan which directed the operations in Saigon. Mr. Krishnaswamy Aiyar drew our attention to the difference between business being carried and profits being received, as observed in *San Paulo (Brazilian) Railway Co. Ltd.* v. *Carter* (10). The language employed by some of the noble Lords in that

case was very strongly relied on by the learned Advocate-General. The observations of Lord Davey, who subsequently explained the position in *Commissioners of Taxation* v. *Kirk* (16), do not support the view that by giving general instructions the business is carried on in the country from which these instructions issue. Moreover, the facts in *De Beers Consolidated Mines, Limited* v. *Howe* (13) and in *Cesena Sulphur Company* v. *Nicholson* (17) and in *Mitchell* v. *Egyptian Hotels Limited* (9) were different from the facts on which we have been asked to give our opinion. I do not, therefore, think any good will be served by discussing these cases. In my opinion the facts to which our attention has been drawn are not specific enough to enable us to say that the business was really carried on in British India. There is only one other remark that need be made. It was elicited in the course of the argument that until the year 1914 or 1915 no income-tax was levied in respect of foreign trades of principals residing in British India. The old Act of 1886 was repealed in 1918. So far about 30 years at least the executive Government in India did not levy income-tax upon business of this kind. Mr. Krishnaswamy Aiyar relied on this practice and quoted *Commissioners for Special Purposes of Income Tax* v. *Pemsel*(11) and *Yewens* v. *Noakes* (12) as enunciating that the practice under a repealed enactment can be looked into for construing the later enactment. Whatever may be the weight we may attach to it, it seems to me that Courts will not be acting wrongly in referring to the practice in construing the Act. However, I do not invoke the aid of this practice, as in my opinion there is nothing in the Act which on the face of it imposes a duty upon income of this kind. As I started by saying that unless the words are clear, a fiscal enactment should not be construed as imposing a tax by implication. For these reasons I am of opinion that the assessee is not taxable.

BY THE COURT.—We fix the assessee's Vakil's fee at Rs. 250; and his costs will be paid by Government within three months from this date.

M. C. P.

Answer accordingly.

(16) (1900) App. Cas. 588; 69 L. J. P. C. 87. 83 L. T. 4.

(17) (1876) 1 Ex. D. 428; 45 L. J. Ex. 811; 35 L. T. 275; 25 W. R. 71.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No. 52 OF 1917
IN SUIT No. 57 OF 1914.
February 10, 1919.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

RAMENDRA NATH ROY—PLAINTIFF—APPELLANT

versus

BRAJENDRA NATH DASS AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 99, 102—Sale of goods—Broker liable as principal, position of—Stoppage in transit, right of—Assignment by buyer, effect of.

A broker liable upon a principal contract both to the seller and the purchaser has a right to enforce the contract and is entitled to sue in respect thereof. His position by virtue of his personal liability to his sellers for the price is that of an unpaid vendor with a right of stoppage in transit conferred by section 99 of the Contract Act, but such right would be defeated if the buyer obtained the documents of title and delivered them to a second buyer who acted in good faith and gave valuable consideration for them, as such delivery would amount to an assignment under section 102 of the Contract Act [p. 987, col. 1; p. 988, col. 1.]

For Facts see 41 Ind. Cas. 944; 45 C. 111.

Mr. *S. R. Das* (with him Messrs. *K. P. Basu* and *N. Sen*), for the Appellant.

Mr. *N. Sircar* (with him Mr. *Langford James*), for Cartwright & Co.

Mr. *P. L. Buckland* (with him Mr. *Surita*), for the Lansdowne Jute Mills.

Mr. *C. C. Ghose* (with him Mr. *D. C. Ghose*), for the Brikmyre Bros.

JUDGMENT.

SANDERSON, C. J.—I have read the judgment of my learned brother with which I agree and I have little to add.

In my judgment the plaintiff was not a mere broker in the transaction in question.

The learned Judge who tried the case referred to a usage as being so well known that the Courts might almost take judicial notice of it; and further said it was admitted by both sides, but he did not find exactly what the usage is.

I think, however, that the real position of the plaintiff was that he was acting as a broker and paid by brokerage, but liable to both the seller and the purchaser as on a "principal" contract, and that, consequently, the plaintiff had a corresponding right to enforce the contract and was entitled to sue in respect thereof.

The learned Counsel for Messrs. Cartwright and Co. contended that this right to enforce the contract would not include the right of stoppage in transit, as that right belongs to an unpaid vendor only under section 99 of the Contract Act of 1872. In my judgment, having regard to the facts of this case, and especially the fact that the plaintiff was personally liable to his sellers for the price of the goods, he was really in the position of an unpaid vendor, and that he had the right of stoppage conferred by the above-mentioned section.

In my judgment, there is no doubt the plaintiff appropriated the goods, represented by the documents which he handed to B. N. Dass, to the contract. On the 29th December 1913, when the plaintiff handed the documents to B. N. Dass he did so with the intention that B. N. Dass should deal with the goods, and, judging from the letter of the 28th December 1913, it must have been obvious that B. N. Dass was going to deal with the goods immediately. B. N. Dass did in fact deal with the goods on the 30th December 1913.

B. N. Dass assented to the appropriation by accepting the documents and dealing with and handing them to Messrs. Cartwright and Co. The alteration by B. N. Dass of the words "for payment" into "for examination" in the two receipts, dated the 29th December 1913, handed to him by the plaintiff and his letter of the 29th December 1913 to the plaintiff as to certain jute being booked "at owner's risk" were, in my judgment, merely for the purpose of gaining some time.

The fact that the plaintiff was paid by B. N. Dass Rs. 25,000 on the 3rd January 1914, on account, which was nearly half the total sum due in respect of all the goods, is material on the question of appropriation and assent thereto, and in my judgment there is no doubt that there was appropriation to the contract of the goods in question on the part of the plaintiff and assent on the part of B. N. Dass.

As to the question whether the appropriation was conditional upon B. N. Dass' promise to pay the price of the goods, I need add nothing to what my learned brother has said. But even assuming for the moment that the appropriation was conditional and was voidable by reason of the unfulfilled promise to pay, as urged on behalf of the plaintiff, he would have to prove that the circumstances under which B. N. Dass obtained possession of the documents, amounted to an offence on his part: section 108, Exception (3).

The plaintiff must prove the offence and show that B.N. Dass had a criminal intent at the time he made the alleged promise of payment, and, in my judgment, the plaintiff has not discharged the onus which lies upon him in that respect.

I do not think it has been established that the plaintiff received the cheque for Rs. 25,000 on the 30th December 1913, and that it was post dated the 3rd January 1914. There is, however, no doubt that the cheque was cashed on the 5th January 1914 in due course, and the payment of this large sum is a material fact in considering whether B. N. Dass was actuated by a criminal intent when he received the documents from the plaintiff.

There is a further difficulty in the way of the plaintiff, inasmuch as he seems by his evidence to have accepted the position of the sale by Dass to Cartwright and by Cartwright to the Mills, and his Solicitor's letters of the 10th January 1914 to Messrs. Cartwright and Co. and to B. N. Dass seem to me to be inconsistent with the position that the plaintiff was exercising his alleged right to avoid the contract.

As regards the transactions between B. N. Dass and Cartwright, the learned Judge thought that H. C. Guha was probably acting in collusion with B. N. Dass but he was not satisfied that H. C. Guha was a party to any fraud by B. N. Dass upon the plaintiff.

If there was collusion between H. C. Guha and B. N. Dass, in my judgment, it was for the purpose of passing off the goods, represented by the documents, in performance of contracts with the Mills which had already been fulfilled, or for which the goods were not suitable, and thereby loss was caused to Messrs. Cartwright and Co., but I am by no means satisfied that H. C. Guha was in any way a party to the alleged fraud on the part of B. N. Dass upon the plaintiff.

In this Court the alleged right to stop in transit was insisted upon with respect

to the goods included in bills of lading 13, 20, 29, 32 and railway receipt No. 9 only.

As regards railway receipt No. 9. The consignees in the railway receipt were the Lansdowne Jute Mills Co., and the evidence of Mr. Robertson, who was in Bird and Co. and who was appointed Receiver by the Court, was to the effect that the Lansdowne Mills got delivery of the goods on the 2nd January 1914, and the notice of stoppage in transit was not given until the 10th January 1914, so that it appears that in the case of these goods the transit was at an end before the notice of stoppage was given.

As regards the four bills of lading, I have already held that the plaintiff's position was such as entitled him as unpaid vendor to stop the goods in transit, and I think that the evidence shows that on the 10th January 1914 B. N. Dass was insolvent. The question arises whether the right of stoppage ceased by reason of the buyer, B. N. Dass, having obtained the bills of lading and having assigned them to a second buyer who was acting in good faith and who gave valuable consideration for them under section 102 of the Contract Act.

The point which was strenuously argued on behalf of the plaintiff was that B. N. Dass, the buyer, had not "assigned" the bills of lading within the meaning of section 102. On this part of the case no point was raised as regards the facts relating to the disposal of the goods, as found in the learned Judge's judgment, except as to the use of the word "excess" which, it was said, was not a correct way of describing the delivery; but this does not affect the question now under consideration, and I agree with the finding that there was no want of good faith either on the part of Cartwrights or on the part of the Mills and that valuable consideration was given. Reference was made to section 101 and it was then contended that in order to come within section 102, the first buyer must be the consignee named in the bill of lading, and that as the bills of lading in this case were made out in the names of the Mills or their Manager or Agents, and as B. N. Dass merely handed the documents to Cartwrights to fulfil supposed running contracts with the Mills, there was no assignment within the meaning of the section.

It was contended that the only way in which the plaintiff's right to stop in transit could be defeated was by an "assignment," which meant an endorsement by the person in whose name the bills of lading were out and who was entitled to the control of the goods. It was urged that B. N. Dass was not entitled to the control of the goods, as the bills of lading were in the names of the ultimate buyers, *viz.*, the Mills; that B. N. Dass could not assign by merely handing the bills of lading to the Mills or to Cartwrights on behalf of the Mills. It was admitted that if the bills of lading had been made out in the name of B. N. Dass and he had endorsed them to the Mills or to Cartwrights on behalf of the Mills, the plaintiff's right to stop in transit would have been at an end; but it was urged that as the bills of lading in this case were made out in the name of the Mills the right of stoppage in transit was not defeated, even though the handing over of the bills of lading by B. N. Dass to Cartwrights on behalf of the Mills would pass the property and though the result as regards the passing of the property would be the same as if the bills had been in B. N. Dass' name and he had endorsed them.

The bills of lading were made out in the name of the Mills at the request of B. N. Dass and on the facts of the case it must be taken, in my judgment, that the plaintiff handed over the bills of lading to B. N. Dass with the intention that he should sell and deliver the goods to the Mills, and all that was necessary for completing the delivery would be the handing over of the bills of lading to the Mills.

In my judgment, if we were to adopt the plaintiff's contention, we should be putting too narrow a construction upon the section, and under the circumstances of this case, the delivery of the bills of lading to Messrs. Cartwrights and Co. amounted to an assignment of the bills of lading within the meaning of the section.

For the above reasons, I agree that the appeal should be dismissed with costs.

WOODROFFE, J.—The plaintiff is the son of a wealthy father, which seems to have been his misfortune, for it enabled him to start business as a broker before he had acquired

the necessary experience. He made one venture by way of the transaction in suit and we are told that, owing to its unhappy results, it will be the last He says he sold goods to a man named B. N. Dass. He then entrusted to the latter the documents of title before getting payment. Dass made them over to a third party (Messrs. Cartwright say they took them in good faith in supposed discharge of running contracts with the defendant Mills) and got the value of the goods. Fortunately for the plaintiff, the sum of Rs. 25,000, which represents nearly half the value of the goods, was paid by B. N. Dass. He then, however, went insolvent and the plaintiff now wants to remedy the position brought about by his imprudence in making over documents of title to goods without getting payment and in thus enabling the defendant B. N. Dass to deal, as regards the goods, with third parties. By this suit he is seeking to make up for the loss which he has suffered through his own act.

A large number of questions have been argued, but substantially the case turns upon the question whether the documents were procured from the plaintiff by the fraud of B. N. Dass and whether the plaintiff has successfully protected himself from his act in handing over the documents by the exercise of a right of stoppage in transit.

A preliminary question arises as to the title on which the plaintiff sues. His Counsel contends that he was a principal in the contract with B. N. Dass and this seems to be the basis on which the plaint is drawn. The respondents who appear (that is the defendants other than B. N. Dass, who seems to have disappeared) contend that the plaintiff was a mere broker. The learned Judge has found that the contract was a principal contract; that is according to an usage, which he holds was both admitted and proved, a broker in a contract for an undisclosed principal is liable upon and may sue on the contract. Though a broker, he has thus, it is said, the liabilities and rights of a principal. The documents and facts are not free from confusion. But on the issues and findings, I have no difficulty in arriving at a conclusion on this point. If the plaintiff was a mere broker he cannot sue or be sued and the suit should have been dismissed on that ground. But there is no issue which in my opinion directly and necessarily raises this point, as regards which something may have been said during the trial. The learned Judge has held that the usage mentioned was admitted by both sides. The assumption of such an usage is not relevant if the plaintiff was a mere broker. Upon these considerations and facts of the case, I hold that the plaintiff was neither a mere broker nor a principal as contended for by the respondents and appellant respectively, but was a broker liable upon what is called a principal contract. I should here say that Mr. S. R. Das, who argued the case for the appellant, did so on the alternative assumption that he was either principal or a broker liable on a principal contract, and claimed that he was entitled to a decree on either assumption. Whether, however, he was one or the other has a bearing upon two questions in this suit, namely, the time when, and the person by whom, appropriation of goods to the contract was made and the question whether a broker liable upon a principal contract is entitled to exercise the rights of a vendor against goods in transit.

Then as to the question of appropriation. Did the property in the goods pass? This depends on whether there was an appropriation by one party, assented to by the other, through which the agreement or contract became executed. In my opinion the plaintiff could and did appropriate. There is, it is to be observed, no question of any other goods. The only goods which the plaintiff at any time sold were these goods. These had been selected, shipped and railed and consigned to the Mills to which B. N. Dass asked that they might be sent. The plaintiff's case is that he had purchased these goods from the upcountry sellers for the express purpose of fulfilling the contract with B. N. Dass. The latter had asked that these goods should be consigned to the Mills. On the 29th December the documents of title were made over to the defendant B. N. Dass and were accepted and dealt with by him. There is no doubt that (apart from the question of a condition) the property in the goods passed at least on the 29th December. If the property in the goods passed, we are not concerned with the provisions of Exception (1) of section 108 of the Contract Act,

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The real question in this suit is, therefore, whether the appropriation by the plaintiff was conditional, namely, on a promise of payment as alleged in the plaint. If so and the condition was not fulfilled, there was no passing of the goods and the question of the applicability of Exception (1) above stated would have to be considered.

It is further contended that even if the property in the goods passed, it did so under a voidable contract procured by an offence and, therefore, the plaintiff is entitled to succeed under the provisions of Exception (3) of section 103 of the Contract Act. It is not alleged that the contract originally entered into was voidable, but that there was an agreement by way of conditional appropriation which was voidable and that the circumstances which rendered the contract voidable amounted to an offence. The question under this section is whether the alleged agreement was voidable as procured by an offence. It is denied that there was an offence ; and it is further said that the alleged voidable contract was upon the evidence (namely, the plaintiff's Attorney's entries and letters) treated as subsisting. It is not necessary to enquire into this, if in fact no fraud has been established. In fact this case principally turns on the question whether there was a fraudulent offence by B. N. Dass and whether the plaintiff was entitled to exercise, and did effectually exercise, a vendor's right of stoppage in transit. I will deal with the former first.

The offence charged is cheating, namely, that the defendant B. N. Dass made a false representation that he was in a position to pay and would pay, but he was not in such a position and never intended to pay. There was, it is said, a mere fraudulent pretence to get hold of the goods without paying for them Now, in the first place, it is to be noted, as affecting the whole of this part of the case, that the proof of what passed between the plaintiff and B. N. Dass on the 29th, when the alleged offence was committed, depends on the evidence of the plaintiff, and if this is not accepted, the case as to a fraudulent offence is not made out. But even if the account of what occurred on the 29th December is accepted, it becomes still necessary to enquire whether the facts proved show a criminal offence. It is, of course, possible that the defendant made a promise which was unfulfilled, and yet was not guilty of an offence. The learned Judge who tried the case has expressed himself as unable to accept the story which the plaintiff has told, considering it to be in several particulars at variance with contemporaneous documents. On the whole I see no sufficient reason to come to any other conclusion on grounds some of which I will mention. The evidence shows that the plaintiff was without the necessary business experience. After his return from England, where he was sent for a business training, without learning overmuch, he met the defendant B. N. Dass who, he said, had the general reputation of being honest and a gentleman. He says (and it is clear) that he trusted him. This venture in suit was his first and last. He says that his own sellers (who sold him goods to meet Dass' contract) gave him credit. In fact the bills of lading and railway receipts were made over to the plaintiff by his sellers without any payment whatever. Further, according to the plaintiff, there was an arrangement with his sellers on the evening of the 29th, according to which the plaintiff was to re-pay them gradually. This, it is contended, so far from supporting a case of promise of immediate payment, rather points to the conclusion that he was giving the same credit as he had asked for and obtained. At any rate it is argued that there was no special reason why the plaintiff should press for immediate payment. On the previous day B. N. Dass wrote to the plaintiff as follows:—

Calcutta, 28th December 1913.

" Dear Mr. Roy,

Herewith I am sending you three contract receipts. For God's sake kindly let me have the documents you have already got. You know fully that I want the documents not later than to morrow morning, but if I get them to day I might make out the Bill, etc, to-day or I shall be in terrible fix. If you so kindly send them to me to-morrow morning. Kindly treat this letter both urgent and important.

Yours sincerely

To

R. N. Roy. B. N. Dass."

This letter must have indicated to the

plaintiff that he wanted the documents to raise money from his buyer. On the evening of the 29th, the plaintiff took two receipts for the bills of lading there mentioned, in one of which the jute is treated as delivered. When these receipts were tendered no demand seems to have been made for the money which, it is said, was to have been paid at 10 A. M. According to the plaintiff's evidence, B. N. Dass had to "sign or pay." Nothing is done until the 3rd January when a sum of Rs. 25,000, which is nearly half the value of the goods, was paid. This is an important circumstance to be considered in adjudging the question whether the man, who paid this sum on the third January, had some five days previously a criminal intention not to pay, though professing his readiness to do so to get hold of the documents. The suggestion of learned Counsel for the appellant that this was a kind of "blind" does not easily establish itself. Although Exhibit N (letter by the plaintiff's Attorneys) does allege that the bills of lading were obtained by fraudulent misrepresentation, nothing is said in this letter nor in Exhibit 33-A (an entry of the Attorneys' dated the 9th January) as to the voidability of the contract. In fact in his evidence the plaintiff says "yes", in answer to the question: "Then you accepted the position of the sale by Dass to Cartwright and to the Mills?" The Attorney's entry of the 10th January notes that Dass and Co. were called upon for payment of the balance of the amount due on a contract now said to be voidable. Similarly, on the 10th January 1914 the Attorneys wrote to B. N. Dass and Co., calling upon them to make immediate payment of the balance due to the plaintiff. Though some statements in Mr. Edward's letters are incorrect, I see no sufficient grounds for upholding the learned Judge's comments as regards his evidence, nor have the respondents relied on these. On the whole I am of opinion that no sufficient ground has been made out for coming to a different conclusion from that at which the learned Judge has arrived, on the question whether the documents were made over to Dass, under the circumstances alleged by the plaintiff. It is not necessary to hold, and I do not hold, that the plaintiff has said what he knows to be untrue on this matter. It is sufficient to say that the evidence of the plaintiff only is under the circumstances not enough. But even if it were enough to establish that there was an appropriation and handing over of the documents on a promise of payment, it would still have to be shown for the purposes of Exception (3) of section 103, Contract Act, that the facts alleged amounted to an offence. No doubt there are some unfavourable circumstances, such as the general financial position of Dass, and the dishonouring of his cheques on the 9th January, and his insolvent condition from that date. But it is difficult to hold that it has been established that Dass had a criminal intent when he made the alleged promise of payment to the plaintiff, seeing that he paid shortly thereafter the large sum of Rs. 25,000, or nearly half the price of the goods which he is said to have swindled out of the plaintiff. I hold that the alleged offence has not been made out.

The last issue is as to the alleged right of stoppage in transit. As regards some goods, the right cannot admittedly be claimed. The claim is made as regards bills of lading Nos. 13, 20, 32, 29 and railway receipt No. 9. As regards this last Mr. Robertson says that although the Mills bought from him as Receiver on the 6th March, the Mills actually got delivery on the 2nd January and it is thus submitted that as regards these goods the transit was at an end. As the learned Judge has held, section 102 of the Contract Act applies. The argument of the respondent has been that the stoppage in transit section does not apply, for it is said that the plaintiff was not a seller, but at the most a broker personally liable and with personal right of suit under the usage relating to what are called "principal contracts." The cases, however, establish that a liberal meaning should be given to the term "vendor", which includes any person standing in the position of a vendor The plaintiff paid a portion of the money he owed his sellers before the notice of stoppage was given and was liable in respect of the whole. I am of opinion, therefore, that a broker liable on a principal contract has authority to stop goods in transit.

If this were not so, a broker might be

made liable and would yet be shorn of a right essential for his protection against a defaulting buyer Assuming this, however, in the appellant's favour, the question is whether the right of stoppage did not cease under the provisions of section 102 of the Contract Act. It is said that the buyer did not "assign" the bill of lading within the meaning of this section and that assignment does not mean merely "handing over." It is the fact that the documents were not endorsed. Neither, however, Dass nor Roy could endorse them. The documents, however, were such that the Mills, being consignees, were entitled to take delivery without further endorsement. The documents other than No. 9 were in fact made over to the Mills before the date of the notice of stoppage in transit and were handed over to them in pursuance of a supposed running contract. They were not at first accepted by Messrs. Birkmyre and Co., who, however, entered into a new contract, as regards the goods on a date also before the above-mentioned date. Unless we take a very narrow and technical view, all that was necessary in the present case was the transfer, in the sense of handing over these documents, though it is conceded that if the documents had been made over to some person other than the consignee on the bills, the case might have been otherwise. It was further contended for the respondent that the plaintiff was estopped from denying that Dass had no right to deal with the bills of lading. It is not necessary to discuss that as, in my opinion, the plaintiff has not established his right of stoppage in transit. The appeal, therefore, fails on all the grounds taken and should, in my opinion, be dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 13 B OF 1918.

January 13, 1919.

Present:—Mr. Mittra, A. J. C., and Mr. Prideaux, A. J. C.

KISANCHANDRA—APPELLANT

versus

RAMLAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Arbitration and award—Arbitration, private—Award, bad in part, whether can be split up—Amendment of award, when permissible—Parties signing award, effect of.

When an award goes beyond the powers of the arbitrator, it is permissible to separate such portion of the award, and to maintain the remainder, if good [p. 993, col 2]

Ordinarily, an arbitrator after he has delivered his award is *functus officio*; but if the parties after the delivery of the award again make a reference asking for the re-consideration of a part of the award, and the arbitrator thereupon re-considers that part of his award and amends it accordingly, the amendment so made is within his powers. [p. 994, col. 2 p. 995, col 1]

An award of arbitrators derives its binding force as against the parties entirely from their previous submission, and their subsequent signature in token of consent in no way affects the character of the award It is neither more binding upon the parties when signed by them nor less binding when they do not sign it. It is binding in the former case, because it is the judgment of a tribunal to which the parties had unconditionally submitted before adjudication and not because they have subsequently acknowledged the justice of the decision [p. 995, col. 1.]

Miscellaneous appeal against the decree of the 2nd Additional District Judge, East Berar, Amraoti, in Civil Suit No. 24 of 1907, decided on the 22nd of December 1917.

Mr. *M. V. Joshi*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—This is an appeal under section 104, (1) (*f*) of the Civil Procedure Code, 1908, from an order refusing to file an award in an arbitration without the intervention of the Court.

The application was made under section 525 of the Code of 1882 in 1907. It is a matter for regret that the case should have been pending for nearly twelve years.

It has been found, and it is no longer disputed before us, that all parties to the suit signed the agreement of reference, dated the 13th February 1907 (Exhibit P—2). The arbitrator made an award

(Exhibit P—1) on the 22nd April 1907. On the 14th May 1907 a further agreement (Exhibit P—3) was signed by the parties and certain amendments were made in the award itself.

The parties to the suit are descendants of Puranmal, who founded two temples at Hyderabad and one at Pushkar in Ajmere. Three *jagir* villages were granted by His Highness the Nizam's Government, two of these Balgaon and Akoli are situated in Berar, and the third Pangam in the Hyderabad State. The Berar *jagir* villages are recorded as coming under Rule IV of the Berar Inam Rules. This shows that the revenues of these two villages were given for a charitable or religious object. There were disputes between the parties regarding the management and enjoyment of the temples and the *jagir* villages, and, it would appear, also regarding their joint ancestral family property, moveable and immoveable. The arbitrator has dealt with each class of dispute separately. The management has hitherto been in the hands of the contesting defendant Ramlal. The arbitrator has decided that the management should be with three persons representing the three branches of Puranmal's family. So far as the management of the temples and *jagirs* is concerned, the arbitrator has recorded an opinion which has been translated by the lower Court thus:—

"I consider it proper that after four years ... ... the management of the Mandirs may be entrusted to a public committee and all the immoveable and moveable property of Mandirs should be made over to that committee. I also consider this proper that the members of the three branches of the family of Paranmalji will appoint such committee; if all the members ... ... do not do so ... ... then any two members out of them shall appoint a committee. But if no one out of these members will appoint such a committee then I think it proper that the public in general will exert itself to appoint such a committee."

The parties are agreed, and the lower Court holds, that this clause meant to secure the rights of the public is *ultra vires*, inasmuch as the object of the reference was to settle which members of the family should have the management, and, as the lower Court points out, the parties did not intend to surrender their rights to a public body. This is one ground given by the lower Court for rejecting the award. The other ground is that by reason of the agreement made on the 14th May, the award has been superseded and the amendments made by the arbitrator in the award on that day were beyond his powers.

The first point for consideration is whether the hope expressed by the arbitrator that the temples and the *jagirs* should be handed over to the public makes the whole award bad. It is not disputed that this clause can be separated from the rest. The argument on behalf of the contesting respondent is that in summary proceedings under section 525 of the old Civil Procedure Code, corresponding to Schedule II, paragraph 20 of the new Code, the Court has no option but to reject an award, bad in part, even if the part is separable. In support of this it is contended that the use of the expression "*the award*" in paragraph 21, Schedule II precludes the Court from filing only a portion of it. It is, however, fully conceded that when an arbitration takes place through the Court, such separation of the portion which is beyond the powers of the arbitrator is permissible. A number of rulings have been cited in support of the respondent's contention, of which the following are under the new Code: *Dinabandhu* v. *Chintamoni* (1), *Dhanpat Rai* v. *Kahn Devi* (2).

These need not be examined in view of the recent decision of their Lordships of the Privy Council in *Amir Begam* v. *Badr-ul-din Husain* (3). At page 342* their Lordships say: "It is well recognised law that when a separable portion of an award is bad, the remainder of the award, if good, can be maintained." This was a case under paragraph 20 of the Second Schedule of the Code of Civil Procedure,

(1) 26 Ind. Cas. 697; 19 C. W. N. 476.

(2) 23 Ind. Cas. 422; 30 P. R. 1914; 11 P. W. R. 1914; 31 P. L. R. 1914.

(3) 23 Ind. Cas. 625; 36 A. 336; 19 C. L. J. 494; 18 C. W. N. 755; 1 L. W. 1015; 16 Bom. L. R. 413; 12 A. L. J. 537; 17 O. C. 120; 16 M. L. T. 35; 27 M. L. J. 181; (1914) M. W. N. 472; 1 O. L. J. 249 (P. C.).

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1908. The first ground on which the lower Court has rejected the award is, therefore, untenable.

We next proceed to consider whether the award can be said to have been superseded by the agreement of the 14th May (Exhibit P—3). The only point on which the agreement may be said to supersede the award is in respect of the appointment of the public committee for the management of the temples and *jagirs*. If, as is the case of both parties, this part of the award was in excess of the powers of the arbitrator, an agreement superseding that part was a pure surplusage. In other respects the parties agree to act according to the decision of the arbitrator. The agreement further contains two clauses which are perfectly consistent with the award; namely, that each member of the family will be separately responsible for his separate debts and any decrees against him, and further that each member will be alone personally concerned with the profit and loss of his own separate business. We cannot see how this agreement can be said to supersede the award.

There is a substantial amendment made in a matter of detail in the award, for which the lower Court has rejected the award. We will return to this point after we have disposed of the respondent's arguments based upon, what he chooses to call, alterations in the award.

The arbitrator has been examined as a witness but his evidence given in Tamil has been very badly translated. It appears, however, from this evidence that Ramlal objected to a sentence in paragraph 14 of the award which he regarded as an imputation on his character. The arbitrator was willing to expunge the last sentence in that paragraph and proceeded to do so at the instance of Ramlal. The other parties then objected and hence the original sentence was allowed to remain and is to be found in the copy supplied to the parties. This sentence does not in any way affect the decision of the arbitrator. All that can be said is that there was an attempt to expunge a sentence which Ramlal considered objectionable but which the arbitrator eventually allowed to remain in view of the protest of the other parties.

In paragraphs 18 and 24 certain payments were directed to be made at Hyderabad. The words "At Hyderabad" were scored out. They were duly initialled in paragraph 24, but apparently through an oversight they were not initialled in paragraph 18. No question was put to the arbitrator regarding the erasure. We have not the slightest doubt that this was done before the award was signed. We wish to mention that we have inspected the original award and are perfectly satisfied that this is a frivolous objection.

In the penultimate sentence of paragraph 50 of the original award the word 'Sell' has been added and duly initialled. This must have been done before the award was delivered. Without the use of the word 'Sell' or some word indicating a transfer, the sentence becomes meaningless.

We now deal with the real alteration which has been made in the award. Originally Nathmal was to represent the junior branch of the family. At the request of the parties rotation amongst the members of the third branch was introduced by way of amendment. The lower Court on this point writes thus:—

"The authority of an arbitrator is at an end as soon as he has made the award. Any alteration which he may subsequently make will be nugatory and his act will be like a mere spoliation by a stranger: (Russell's Arbitration and Award, 9th Edition, page 114)."

The lower Court does not seem to have understood the circumstances under which the alterations came to be made. All parties to the reference desired that alteration to be made and the award was amended accordingly; each amendment being marginally signed by all the parties including Ramlal. Ordinarily, an arbitrator after he has delivered his award is *functus officio*. In the case of a private award neither the Hindu Law nor the Statute Law of British India requires a reference in writing. It is not suggested before us that the law is different in Hyderabad where the amendment took place. If parties after the delivery of the award again make a reference asking for the reconsideration of a part of the award and the arbitrator thereupon reconsiders

that part of his award and amends it accordingly, the amendment so made is within his powers. The signature of the parties, read with the oral evidence in the case, clearly proves what in law would amount to a fresh reference on a particular point of detail dealt with in the award. We, therefore, come to the conclusion that the amendment is no ground for rejecting the award.

Various objections were taken to the award by the respondent Ramlal, and in a memo. of objections filed he disputes every finding recorded against him. His Counsel, however, has argued only the points which we are dealing with in this judgment.

It is contended that an award ceases to be an award and becomes a partition deed or a deed of conveyance or compromise by reason of the signature of the parties in token of acceptance. It is, therefore, contended that the document required registration. We think there is no force in this argument. The document is not and is not sought to be used as a conveyance but only as an award. We agree with Stevens, Judicial Commissioner, who holds :—

"An award of arbitrators derives its binding force as against the parties entirely from their previous submission, and their subsequent signature in token of consent in no way affects the character of the award. It is neither more binding upon the parties when signed by them nor less binding when they do not sign it. It is binding in the former case because it is the judgment of a tribunal to which the parties had unconditionally submitted before adjudication, and not because they have subsequently acknowledged the justice of the decision:" *Jagannath* v. *Rambux* (4).

The lower Court has held that the sanction of the Commissioner of Berar, who exercises the functions of the Advocate-General, was not necessary for a suit asking for the reliefs granted by the award. It seems that the *jagirs* are trust property or property burdened with a trust created for public purposes of a charitable or religious nature. In paragraph 19 of its judgment the lower Court writes: "In such *jagirs*, the balance of income, after the expenses of maintenance of the religious institution are met from it, is the remuneration of the *wahivatdar* or manager." There is no evidence to this effect but it is probably the practice in most *jagirs*. Whether such practice is lawful or not can only be determined by a reference to the *sanads*. The *sanads* have not been produced, though they should be in the possession of the contesting defendant Ramlal. In our opinion, a suit to remedy a particular infringement of an individual private right in regard to such trust property does not come within the purview of section 92 of the Civil Procedure Code, 1908. The parties as descendants of Puranmal, the founder of the temples, claimed a right to manage them together with the appurtenant *jagirs*. They say that the defendant was hitherto the managing member of the family and as such managed the endowment. A suit for joint management by all the members of the family of the founder will lie without the sanction of the Commissioner of Berar: *Miya Vali Ulla* v. *Sayed Bava Santi Miya* (5), *Budree Das Mukim* v. *Ohooni Lal Johurry* (6), *Rama Das* v. *Hanumantha Row* (7); see also *Muhammad Abdul Majid Khan* v. *Ahmad Saeed Khan* (8).

No doubt, any decision come to in such a suit cannot bind the public. In a suit under section 92 the proposed scheme of management can be set aside if found necessary in the interests of the public.

It is contended that the award so far as the family property is concerned is bad, because there were no disputes about it. We think the terms of the reference (Exhibit P-2) are quite clear. We have had the original read out to us. The reference was also with regard to "moveable and immoveable property of the said joint family in Hyderabad Deccan, the Districts of Berar and Laxmangadh and other places." There is no property of the temple in Laxmangadh. It is perfectly clear that the reference was with regard to the family property as well as the endowed property.

(4) 6 C. P. L. R. 95.

(5) 22 B. 496.
(6) 33 C. 789; 10 C. W. N. 581.
(7) 12 Ind. Cas. 449; 36 M. 364; 21 M. L. J. 952; 10 M. L. T. 356; (1911) 2 M. W. N. 387.
(8) 20 Ind. Cas. 37; 35 A. 459; 11 A. L. J. 673.

It is contended on the authority of *Mohammad Ibrahim Khan* v. *Ahmad Said Khan* (9) that the right to management of property belonging to a public trust cannot be the subject-matter of a reference to arbitration. In our opinion section 92 would be no bar to a suit asking for joint management of endowed property by the descendants of the founder. It follows, therefore, that there could be a valid reference to arbitration in such a case.

It is contended that the arbitrator has created an anomalous estate and that he had no power to prevent a partition. The award merely expresses a hope that the parties should not divide their family property for the present. There is nothing to prevent any of the parties suing for partition. We can see nothing anomalous in the parties not dividing their family estate and at the same time members of the family carrying on a separate trade or business for their individual benefit.

The arbitrator has decided that the actual cost of funeral expenses in the family should be given by the managers but that the amount should not exceed the maximum fixed. We can find nothing illegal in this.

Objection is taken to that part of the award which says that Ramlal shall pay through the hands of Murlidhar Rs. 3,000 (three thousand) to members of the family in consideration of their rights over the land purchased by Murlidhar. As Murlidhar is not a party before us, we decline to go into the question whether he was sufficiently represented before the arbitrator by his father Ramlal.

It is contended that the real arbitrator appointed by the parties was one Baxi Raghunath Prashad, that his name was omitted from the agreement of reference, as he was in Government service, and that the Swamiji was only a *benami* arbitrator. Familiar as we are with the plea of *benami*, this is the first case in which it is seriously argued that a named arbitrator really represented another person. We agree with the lower Court that the respondent is not entitled to give evidence contradicting the terms of the written submission. In any case, the evidence only shows that Baxi Raghunath Prashad, a Judge in Hyderabad, advised the parties to sign the reference and that he promised to assist the Swamiji with his advice on points of law and that after his death the Swamiji was not at first willing to proceed with the arbitration. The understanding of the parties was no doubt that the arbitrator should receive assistance on points of law from this gentleman, but his presence and assistance were not conditions precedent to the arbitration. We may note that the Swamiji was the spiritual preceptor of the parties who had confidence in him. It is, therefore, natural that he should have been chosen to settle their disputes.

These are all the points argued before us. We have come to the conclusion that the award, with the exception of the portion which has been admitted to be *ultra vires*, should be filed. We, therefore, order the award to be filed and pronounce judgment according to it to the extent found valid. We fix Rs. 250 (two hundred and fifty) as Pleader's fee in this Court and order costs in both Courts to be paid by defendant Ramlal.

Order accordingly.

(9) 6 Ind. Cas. 219; 32 A. 503; 7 A. L. J. 761.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2547 OF 1917.

July 4, 1919.

Present :—Mr. Justice Chatterjea and Mr. Justice Duval.

RAM LAL DAS, COMMON MANAGER TO THE ESTATE OF SACHINDRA NATH ROY, AND OTHERS—DEFENDANTS —APPELLANTS

versus

BANDI RAM MOOKHAPADHAYA, AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES KALI SANKAR MOOKHERJEE AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 54, 67, 169 (c)—Rent, arrears of, what are—Interest payable on arrears, whether rent.

When rent falls due and is not paid, it becomes an arrear under section 54 of the Bengal Tenancy

Act, and carries interest under section 67, and the amount payable as interest is thus part of the rent, within the meaning of section 169 (*c*) of the Act. [p. 999, col. 1.]

Appeal against the decree of the District Judge, Birbhum, dated the 11th June 1917, affirming that of the Munsif, Suri, dated the 22nd July 1916.

FACTS appear from the judgment.

Babu *Anilendranath Rai Chowdhury*, for the Appellants.—Defendants Nos. 1 to 5 are the appellants. The appeal arises out of a suit for recovery of money. Defendants Nos. 1 to 6 obtained a rent decree against defendants Nos. 7 to 8, who are *dar patnidars* of the *taluk*. The *dar-patni taluk* was sold in execution thereof. The sale was confirmed in 1913. Rs. 2,506 remained in deposit as surplus sale-proceeds in the Court The present appellants then applied for the withdrawal of the amount in deposit under section 169 (*c*) of the Bengal Tenancy Act and the amount was allowed to be withdrawn in May 1914. Plaintiff brought this suit for recovery of money on the ground that defendant No. 8 had mortgaged his interest in the *dar patni taluk* in plaintiff's favour, that he obtained a decree on the mortgage and that the decree was partially satisfied from the sale of defendant No. 8's other properties, that by virtue of his mortgage his lien was transferred to the surplus sale-proceeds and that my clients were entitled to arrears up to the date of sale and not confirmation of sale. Both the Courts found that my clients would be entitled to the arrears up to the date of sale and that they would get no interest on the same. I would refer your Lordships to *Bejoy Chand* v. *Shashi Bhushan Bose* (1) The question at issue then is whether I would get interest or not. Although section 169 clearly says that my clients would be entitled to arrears up to the date of the confirmation of sale, yet the ruling of Jenkins, C. J., is against me when he held that the interest of the judgment-debtor would be subsisting only up to the date of sale. Now, my sole point is that the lower Court erred in not allowing me interest on the arrears of rent. I would draw your Lordships' attention to the Bengal Tenancy Act, section 3 (5) and section 54 (3). Section 67 also clearly entitles me to interest. See *Prafulla Nath Tagore* v. *Matabaddin Mandal* (2), *Moharajadhiraj Bejoy Chand Mohatab Bahadur* v. *S. C. Mookerjee* (3), *Maharaja Monindra Chandra Nandy Bahadur* v. *Asar Mahmud Mandal* (4). The last case was decided by Brett, J., and was dissented from by Fletcher, J., in *Prafulla Nath Tagore* v. *Matabaddin Mandal* (2).

Babu *Uma Charan Laha*, for the Respondents —The whole question is whether rent includes 'interest.' See section 3 (5). Interest is not paid for use and occupation of land. The tenant is liable for interest no doubt, but not as a part of rent. Rent does not include interest, otherwise it would have been clearly mentioned in the section. That such is the intention of the Legislature is obvious from the wording of section 63 of the Court of Wards Act IX of 1879. The mortgagee should have preference over the landlord in the matter of interest. I would rely on *Koylash Chandra De* v. *Tarak Nath Mandal* (5), *Maharaja Manindra Chandra Nandy Bahadur* v. *Asar Mahmud Mandal* (4) *Meharajadhiraj Bejoy Chand Mohatab Bahadur* v. *S. C. Mookerjee* (3); the case in *Prafulla Nath Tagore* v. *Mahtabaddin Mandal* (2) also followed *Koylash Chandra De* v. *Tarak Nath Mandal* (5).

Babu *Anilendranath Rai Chaudhury*, in reply.—Rent includes interest as there is the statutory obligation on the part of the tenant to pay interest after his default to pay the rent. The tenant is bound to pay rent and interest for the use and occupation of the land on default. Interest, like rent, is a charge on the holding. The provisions of section 169 of the Bengal Tenancy Act support my contention.

JUDGMENT.—This appeal arises out of a suit for recovery of Rs. 547-5 principal and Rs. 93 as interest thereon under the following circumstances.

The defendants Nos. 1 to 6 were *putnidars* who obtained a decree for rent of a *dar-patni* against defendants Nos. 7 and 8. The *taluk* was sold in execution of the decree on the 2nd July 1912 and the sale was confirmed on the 8th March 1913. After satisfying the rent decree, there re-

(1) 23 Ind. Cas. 101; 18 C. W. N. 136.

(2) 42 Ind. Cas. 881; 26 C. L. J. 322; 22 C. W. N. 823.

(3) 11 C. W. N. 1106.

(4) 12 C. W. N. CXLIV (144 *Notes*).

(5) 25 C. 571*n*; 1 C. W. N. 63*n*.

mained in deposit in Court Rs. 2,506 as surplus sale-proceeds. The *patnidars* applied for payment to them (out of the surplus sale-proceeds) of the rent which had fallen due in respect of the tenure between the institution of the suit and the date of the confirmation of sale, obtained an *ex parte* order and withdrew the sum of Rs. 547-5 for arrears up to the date of the confirmation of sale.

The present suit was instituted by the plaintiff on the allegation that the defendant No. 8, one of the *dar-patnidars*, had mortgaged his *dar-patni* interest to the plaintiff and the latter had obtained a mortgage decree which was partially satisfied by the sale of other properties, and that the mortgage lien over the property sold had been transferred to the surplus sale proceeds.

Two questions were in dispute in the Court below. The first is whether the defendants were entitled to arrears only up to the date of sale and not up to the date of confirmation of sale, and the second whether they were entitled to any interest on the rent which fell due between the date of the institution of the suit and the date of sale.

The Court below has held that the *patnidar* was entitled to rent only up to the date of sale and having regard to the decision of this Court in the case of *Bejoy Chand* v. *Shashi Bhushan Bose* (1) the learned Pleader for the appellants could not press his objection on this point.

The only question which has been argued before us is whether under the provisions of section 169, clause (*c*) of the Bengal Tenancy Act, the landlord is entitled to interest on the rent.

Now, the word 'rent' is defined in section 3 of the Act as "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant", and sub section (3) of section 54 of the Act lays down: "any instalment or part of an instalment of rent not duly paid at or before the time when it falls due shall be deemed an arrear." Section 67 provides that "an arrear of rent shall bear simple interest at the rate of $12\frac{1}{2}$ per cent. per annum from the expiration of that quarter of the agricultural year in which the instalment falls due to the date of payment or of the institution of the suit, whichever date is earlier."

The question whether the word 'rent' in section 169 includes interest has been considered in three cases in this Court. In the first case, *Maharajadhiraj Bejoy Chand Mohatab Bahadur* v. *S. C. Mookherjee* (3), decided by Ghose and Caspersz, JJ., the former observed: "Speaking for myself, I may say that the Legislature could never have intended when using the word 'rent' in section 169, clause (*c*), to exclude the interest accruing thereupon and to put the decree-holder under the necessity of bringing a fresh suit for the interest only."

In the next case, an unreported decision in Second Appeal No. 2260 of 1906 decided by Mr. Justice Brett on the 29th April 1908, the learned Judge held a contrary view.

In the third case of *Prafulla Nath Tagore* v. *Matabaddin Mandal* (2) Fletcher and Smither, J.J., following the case in *Maharajadhiraj Bejoy Chand Mohatab Bahadur* v. *S. C. Mookherjee* (3), held that rent would include interest. It is true that the learned Judges treated the observations of Ghose, J., in the case of *Maharajadhiraj Bejoy Chand Mohatab Bahadur* v. *S. C. Mookerjee* (3) as a decision of the Court and as clear authority in favour of the landlord. As a matter of fact, the case was decided upon an admission of the judgment-debtor that the claim of the landlord to the interest was a just one and Ghose, J., himself pointed out that upon the petition as presented by the judgment debtor admitting the justice of the plaintiff's demand, no question of the character that was raised by the Subordinate Judge should have been raised and discussed. Then he made the observation which we have quoted above; it was, therefore, an *obiter*: and Mr. Justice Brett in the unreported case, we have referred to, also pointed out that it was an *obiter* of Mr. Justice Ghose. But although that is so, we are inclined to accept the view taken by Ghose, J., in that case followed by Fletcher and Smither, JJ., in *Prafulla Nath Tagore's* case (2).

We have been referred to section 161, clause (*c*), which runs as follows: "The terms 'arrears' and 'arrears of rent' shall be deemed to include interest decreed under section 67 or damages awarded in lieu of interest under sub-section (1) of section 68." It is contended that had the word 'rent'

included interest thereupon, there would have been no necessity of adding clause (c) to section 161. But as soon as rent falls due and is not paid, it becomes an arrear under section 54 and carries interest under section 67. The money payable as interest, therefore, becomes part of the rent. Clause (c) was probably added to section 161 to make the point clear.

However that may be, we agree in the view taken by Ghose, J., that the Legislature could never have intended in section 169 to exclude the interest accruing upon the rent and to put the decree holder under the necessity of bringing a fresh suit for the interest only.

For these reasons, we think that the decision of the Court below is wrong. The appeal is allowed. The appellant will be entitled to full costs of this Court. There will be costs in proportion in the lower Court.

The cross-objection is not pressed and is dismissed.

Appeal allowed.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 87 OF 1919.

May 16, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

CHARU CHANDRA BANDOPADHAYA AND ANOTHER—DEFENDANTS—PETITIONERS

versus

MR. L. FAITHFUL—PLAINTIFF—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 128—Limitation Act (IX of 1908), Sch. I, Art. 115—Principal and surety—Liability of surety, whether co-extensive with that of principal—Limitation for suit against surety, commencement of.

The liabilities of a principal and his surety, though arising under the same transaction, are distinct, because the liability of a surety does not necessarily in all cases arise simultaneously with that of the principal, and it may happen that the remedy against the principal is barred when the liability of the surety arises. The question depends on the terms of the contract of guarantee by which the surety has bound himself. Section 128 of the Contract Act merely defines the measure of liability and has no reference to the extinction of the liability by the operation of the Statute of Limitation. [p. 1001, col. 1.]

Defendants Nos. 1 and 2 borrowed a certain sum from the plaintiff under a registered promissory note payable on demand. Defendants Nos. 3 and 4 by a letter addressed to the plaintiff stood sureties for the debt, stating that they made themselves liable for the debt. The suit on the promissory note was instituted more than three years from the date of the letter by the sureties:

Held, (1) that as against the sureties limitation began to run from the date of the sureties' own contract; [p. 1000, col. 2.]

(2) that the liability of the sureties having arisen simultaneously with that of the defendants Nos. 1 and 2 and with the making of the advance, the suit against the sureties was barred under Article 115, Schedule I to the Limitation Act. [p. 1000, col. 2.]

Rule against the order of the Sub-Judge, 3rd Court, 24-Pergannahs, in Small Cause Court Suit No. 286 of 1918.

FACTS appear from the judgment.

Dr. *Dwarkanath Mitter* (with him Babu *Kshitish Chandra Sen*), for the Petitioners:—The claim against the petitioners, who were sureties, is barred by limitation, as the suit was brought more than three years after date of the letter by which the petitioners proposed to be sureties for the debt. The present case is governed by Article 115 of the Limitation Act. The liability of the sureties will arise on their own contract and not on the contract of the defendants Nos. 1 and 2. I rely on *Sreenath Roy* v. *Peary Mohan* (1) and *Brojendro Kissore* v. *Hindustan Co-Operative Insurance Society* (2) in which it has been held that so far as the liability of the sureties is concerned, limitation would depend upon the sureties' own contract.

Babu *Manmatha Nath Mukherjee*, for the Opposite Party.—Article 115 of the Limitation Act does not govern this case. It appears that the promissory note executed by the debtors was registered, and the sureties rendered themselves liable for the due performance by the debtors of the contract made by the latter in the registered instrument. So the Article of the Limitation Act applicable is Article 116. The question of limitation of both the principal and the surety is to be considered with reference to the nature of the contract sued upon. The surety is a surety for the performance of

(1) 39 Ind. Cas. 205; 25 C. L. J. 91; 21 C. W. N. 479.

(2) 39 Ind. Cas. 705; 25 C. L. J. 238; 21 C. W. N. 432; 44 C. 978.

the contract in writing and registered and, therefore, a suit against the surety for the performance of the contract in writing registered and made by the principal, cannot but be governed by Article 116. I rely on the principle laid down in *Challaphroo* v. *Banga Behary Sen* (3), *Deb Narain Dutt* v. *Ram Sadhan Mandal* (4), *Panchanan Das* (*Girish Chandra Das*) v. *Kunja Behari Malo* (5), *Ambalavana Pandaram* v. *Vaguran* (6), *Sheshachala Naickar* v. *Varada Chariar* (7). The cases in *Sreenath Roy* v. *Peiry Mohan* (1) and *Khawja Muhammad Khan* v. *Husaini Begum* (8) also support my contention. The Court below has, therefore, rightly passed a decree in favour of the defendants-petitioners.

Dr. *Dwarkannath Mitter* briefly replied.

JUDGMENT.—In this case defendants Nos. 1 and 2 borrowed certain sum from the plaintiff on a registered promissory note payable on demand. Defendants Nos. 3 and 4 in a letter addressed to the plaintiff agreed as follows:—

"My brother Shib Chandra Bandopadhaya is, for his own necessities, borrowing from you Rs. 150. There is no objection to your paying him the money and we make ourselves fully liable for it. On that account you need have no anxiety. He will pay your interest month by month. As to that there will be no excuse or objection."

The suit was instituted more than three years from the date of this letter. The lower Court overruled the plea of limitation raised by defendants Nos. 3 and 4 and decreed that suit against all the defendants. The present Rule was issued under section 25 of the Small Cause Courts Act at the instance of defendants Nos. 3 and 4, and the only question for our consideration is whether the decision on the question of limitation is correct. I feel very little difficulty in holding that the suit against the sureties is barred. In the case of *Sreenath Roy* v. *Peary Mohan* (1) it was held that a promissory note payable on demand is a present debt payable without any demand and that the liability of the surety in such cases arises simultaneously with that of the debtor, *i. e.*, with the making of the advance. The liability of a surety does not necessarily in all cases arise simultaneously with that of the principal. It often happens that the remedy against the principal is barred when the liability of the surety arises. The question depends on the terms of the contract of guarantee by which the surety has bound himself. In this case, having regard to that, the liability of the sureties arose simultaneously with the making of the advance and as such the suit against them is barred under Article 115 of the Limitation Act.

It has, however, been argued that the contract between the debtor and the creditor being in writing registered and the sureties having rendered themselves responsible for the due performance of that contract, the Article of the Limitation Act applicable even against the sureties is Article 116.

In support of his contention the learned Vakil for the plaintiff who has appeared to show cause has relied on *Ambalavana Pandaram* v. *Vaguran* (6), *Sreenath Roy* v. *Peary Mohan* (1), *Sheshachala Naickar* v. *Varada Chariar* (7), *Panchanan Das* (*Girish Chandra Das*) v. *Kunja Behari Malo* (5), *Deb Narain Dutt* v. *Ramsadhan Mandal* (4) and *Challaphroo* v. *Banga Behary Sen* (3).

These are either cases in which it has been held that when a person has entered into a contract with another and that contract is reduced into writing and signed by one of the parties alone, the person who has not signed may sue on that contract or be sued on it, or cases in which, following the decision of their Lordships of the Judicial Committee in *Khwaja Muhammad Khan* v. *Husaini Begum* (8), it has been held that where there is a contract between two persons for the benefit of a third party, the person for whose benefit the contract is entered into, though no party to it, may proceed in equity to enforce it. In all such cases the question of limitation will no doubt depend on the nature of the contract sued upon. These cases to my mind do not touch the present question. Here there are two contracts by

(3) 31 Ind. Cas. 394; 22 C. L. J. 311; 20 C. W. N. 408.

(4) 20 Ind. Cas. 630; 17 C. W N. 1143; 41 C. 137; 18 C. L. J. 603.

(5) 1 Ind. Cas. 438; 35 C. 683; 12 C. W. N. 628; 9 C. J. L. 1.

(6) 19 M. 52; 5 M. L. J. 228.

(7) 25 M. 55.

(8) 7 Ind. Cas. 237; 32 A. 410; 14 C. W. N. 865; 7 A. L. J. 871; (1910) M. W. N. 313; 8 M. L. T. 147; 12 C. L. J. 205; 12 Bom. L. R. 638; 20 M. L. J. 614; 37 I. A. 152 (P. C.).

two different parties and the liability of each can only arise upon his own contract. I am not aware of any other principle that can be applied to such cases. In *Sreenath Roy* v. *Peary Mohan* (1) the question was whether the limitation to enforce the contract of guarantee in that case was governed by Article 65 or Article 115, and the Court held that the case was governed by latter article. That decision does not help the plaintiff and in so far as the decision on the question of limitation was based not on a consideration of the nature of the contract entered into by the plaintiff debtor but of the contract entered into by the surety, it is against the plaintiff. In De Colyar's Law of Guarantees, 3rd Edition, page 462, on the authority of reported English decisions, the law is thus: "In the case of a guarantee *not under seal* after six years have elapsed from the period at which the surety first became liable to make payment to the creditor, the right of the creditor to compel him to do so will be barred by 21 Jac. II c. 16, s. 3. If, however, the guarantee be under seal the creditor's rights against the surety will not be barred until the expiration of *twenty* years." This shows clearly that limitation in such cases depends on the sureties' own contract. The case of *Brojendro Kissore Roy* v. *Hindustan Co-Operative Insurance Society* (2) clearly lays down that the liabilities of the principal and the surety, though arising under the same transaction, are distinct and that section 128 of the Contract Act only defines the measure of liability and has no reference to the extinction of the liability by the operation of the Statute of Limitation. This is a direct authority in favour of the defendants, the petitioners before us.

I would, therefore, make the Rule absolute and set aside the decree of the learned Subordinate Judge in so far as the defendants Nos. 3 and 4 are concerned and dismiss the suit against them with costs.

The petitioners are entitled to their costs in this Rule. We assess the hearing-fee at one gold *mohur*.

Rule made absolute.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 290 OF 1916 AND Nos. 26, 27, 28, 29 AND 30 OF 1918.

June 4, 1919.

Present:—Mr. Justice Walmsley and Justice Sir Syed Shamsul Huda, KT.

TARAKANTA DAS CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALI PRASAD (KALI PRASUNNA) DAS GHORAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Interlocutory order, compliance with, whether destroys right of appeal—Forum, proper—Valuation of suit—Adjudication by Court—Appellate Court, how to be determined.

A plaintiff valued his suit in the Court of the Subordinate Judge at Rs. 5,100, but on the defendants' objection that the value was excessive, the Subordinate Judge went into the question and recorded a finding that the proper value of the suit was Rs. 1,385 and returned the plaint for presentation to the Court which had jurisdiction to try the suit. The plaintiff complied with the order but without giving up the right of appeal, and shortly afterwards preferred an appeal to the High Court against the Sub-Judge's order, when it was objected that having complied with the order he could not question it:

Held, (1) that the plaintiff was not deprived of his right of appeal: [p. 1002, col. 1.]

(2) that as the forum of appeal depended not upon the value as adjudged but upon the value as accepted by the plaintiff after adjudication, the appeal had been correctly presented to the High Court [p. 1002, col. 2.]

APPEAL No. 290 OF 1916.

Appeal against the order of the Subordinate Judge, Backergunge, dated the 20th July 1916.

APPEALS Nos. 26, 27, 28, 29 AND 30 OF 1918.

Miscellaneous appeals Nos. 204 to 208, preferred on the 23rd August 1916, in the Court of the District Judge, Backergunge, against the order of the Subordinate Judge, 2nd Court, of that district, dated the 20th July 1916, and transferred to the file of this Court by the order of Teunon and Newbould, JJ., dated the 4th July 1918.

Babus *Gunada Charn Sen* and *Bimla Chandra Das Gupta*, for the Appellants.

Babus *Bepin Behari Ghose II* and *Akshoy Kumar Banerjee*, for the Respondents.

JUDGMENT.

No 290 of 1916.

WALMSLEY, J.—This appeal is preferred by the plaintiffs and it arises in the following manner. The plaintiffs filed a suit (No. 298 of 1913) in the Court of the Subordinate Judge of Barisal for a declaration of their

Zemindari right to some land, and they valued the suit at Rs. 5,100. The defendants urged that the valuation was excessive, and that the true value was not more than Rs. 1,000. The learned Subordinate Judge went into this question and found that the value of the property in suit was Rs. 1,385 and as there was then at Barisal a Munsif empowered to try suits up to Rs. 2,000 in value, he returned the plaint to be presented in the Munsif's Court. The plaintiffs amended the valuation and presented the plaint in the Munsif's Court under protest, and shortly afterwards preferred this appeal against the Subordinate Judge's order.

A preliminary objection was raised to the effect that the plaintiffs, having complied with the order, could not be allowed to question it, and in support of the objection reference was made to the case of *Beni Madhub Das* v. *Jotindra Mohun Tagore* (1). The facts are similar, save that in the present instance the Pleader wrote on the plaint "Amended under Court's order but without giving up our right of appeal" and re-filed to-day, "without giving up the right of appeal." It appears to me that the fact that the plaintiffs pointedly declared that they were going to appeal, distinguishes the present case from the one quoted. We are now concerned only with the question whether their action took away their right of appeal, and I think we should hold that it did not.

Then the question arises, in what Court does the appeal lie? Is it to this Court on the ground that the valuation put on the suit by the plaintiffs exceeds Rs. 5,000, or to the District Judge's Court on the ground that the correct valuation as found by the learned Subordinate Judge is below Rs. 5,000? For the defendants reliance is placed on the case of *Boidya Nath Adya* v. *Makhan Lal Adya* (2). That was a converse case. The plaintiff valued his suit at Rs. 4,200 and appealed to the District Judge against an order refusing to appoint a Receiver. This Court held that the valuation was unquestionably more than Rs. 5,000, and that the District Judge was not competent to deal with the appeal. The principle may be the same, but here the valuation is itself questioned and is in fact the subject-matter of the appeal, although technically the appeal is against the order consequential on the finding as to valuation, whereas in the case cited the application for appointment of a Receiver was dealt with before there was any decision as to valuation. On the other hand, the plaintiffs rely upon the case of *Nilmony Singh* v. *Jagabandhu Roy* (3). That is practically on all fours with the present case, and the only difficulty that arises in applying the principle followed there lies in the remarks of the learned Judges about the valuation being *bona fide*: they said it might be wrong to determine the forum of appeal on the basis of plaintiff's valuation, if that valuation had been found to be excessive and intended to change the venue of the appeal. In the present case the defendants contend that the plaintiffs have deliberately over-valued the suit in order to avoid a plea of *res judicata*. The learned Judges, however, did not say that the valuation must be *bona fide*: they only expressed a doubt as to what would be the effect if the valuation were not *bona fide*. This question of the *bona fides* of plaintiff's valuation does not appear to have been raised again in any reported case. The difficulty of applying a rule that the valuations must be *bona fide* is considerable and the result might be embarrassing.

Reference was also made to the Full Bench decision in the case of *Ijjatulla Bhuyan* v. *Chandra Mohan Banerjee* (4). The question was different, but in Mookerjee, J.'s judgment some useful remarks are made, and I think we should act upon his view: "The forum of appeal depends not upon the value as adjudged, but upon the value as accepted by the plaintiff after adjudication." Here, save for the compliance with the Subordinate Judge's order, the plaintiffs still maintain that the valuation exceeds Rs. 5,000. I think we should hold that in consequence the appeal lies to this Court.

Now to come to the merits of the case. The questions to be determined are the annual value and the number of years' purchase to be allowed. The learned Judge finds the nett annual value to be Rs. 138-8-1. The plaintiffs contend that this is wrong, and that it should be about

(1) 11 C. W. N. 765; 5 C. L. J. 550.

(2) 17 C. 680.

(3) 23 C. 536.

(4) 34 C. 954; 6 C. L. J. 255; 11 C. W. N. 133 (F. B.).

Rs. 320. Their argument is based on the results of proceedings under section 105 of the Tenancy Act, but I fail to see how they can make those decisions a basis for the defendants were not the tenants set up by the plaintiffs. If the plaintiffs' facts are correct, those proceedings took place between parties who had no interest in the land, and the judgments are valueless. On the contrary, the figure taken by the learned Judge is the plaintiffs' own statement in the plaint, and on their allegations it is at least doubtful whether they could successfully maintain a suit for the variation of the rent.

Another objection to the plaintiffs' argument is that this ground is not set out in the grounds of appeal. There is a reference to the Record of Rights in the fifth ground, but there is no evidence that the plaintiffs, if successful in this suit, would be entitled to recover seven rupees per *kani* from their tenants, and further no formal evidence has been given as to the extent of a *kani*. I think that in regard to the nett annual income we must uphold the finding of the learned Subordinate Judge.

With regard to the number of years' purchase, the learned Subordinate Judge says that there are two *kabalas* showing sale of the Zemindari right at ten years' purchase, and two showing twenty-five years' purchase: He thinks the latter an unsafe criterion because there are valuable '*hats*' on the land sold, and numerous *jalkars*. I think this reasoning is unsound. In the first place, these four *kabalas* taken together only cover a two-annas share, and it is hardly wise to come to a conclusion on the transfer of such small shares. Secondly, the presence of '*hats* and *jalkars*' undoubtedly creates the possibility of an expanding income, but I doubt whether that possibility is enough to account for the difference between ten and twenty five. The question, however, is not to be determined by what has been paid for a share in this particular Zemindari, but on the basis of what is commonly regarded as a fair return for money laid out in landed property.

When land is acquired compulsorily, claimant demands as much as twenty five years' purchase, and I think the number given is generally from fifteen to twenty. In the present instance I think the plaintiffs should be allowed to value their suit at fifteen years' purchase of the nett annual value, that is to say, at Rs. 2,077-8-0.

Five other suits connected with the present one were filed by the plaintiffs, four in the Court of the Subordinate Judge and one in the Court of the Munsif: the last was transferred to the Court of the Subordinate Judge to be tried with the others. Similar orders were passed on them, and the appeals, preferred in the District Judge's Court, have been called up to this Court for the sake of convenience. They are as follows: —

				Plaintiffs' valuation.	Sub-Judge's valuation.
				Rs.	Rs.
Title Suit	3	Appeal	No. 26	...2,500	400
„	„ 4	„	„ 27	...2,100	260
„	„ 5	„	„ 28	...3,100	680
„	„ 11	„	„ 29	...3,500	950
„	„ 246	„	„ 30	...1,100	200

On the figure that we have adopted, the valuation in these suits will become Re. 600, 390, 1,020, 1,425, and 300 respectively. All are, therefore, triable by a Munsif, and three of them by a Munsif who is not vested with special powers.

A sixth suit mentioned in the judgment is not the subject of appeal, *viz.*, Title Suit No. 247.

On these findings the order of the Subordinate Judge was correct in regard to Title Suits Nos. 3, 4, 5, 11 and 246 and wrong in regard to Title Suit No. 298.

The result is that the Appeal No. 290 is decreed, and it is ordered that the plaint be returned to the Court of the Subordinate Judge, where the suit will proceed according to law; while the other appeals are dismissed. Each party will bear his own costs in this Court in all these appeals. In Appeal No. 290 the parties will bear their own costs in the lower Courts also.

SHAMSUL HUDA, J.—The facts of this case are fully stated in the judgment of my learned brother and it is not necessary to repeat them.

If the question were *res integra*, I would have felt considerable difficulty in holding that when a question of valuation is put in issue and is determined upon evidence, adduced by the parties, by a Court competent to

decide such a question, that the value of the suit for purposes of section 21 of the Civil Courts Act is not the value so determined but the value which the plaintiff has thought it fit to put on his own suit. In this case even according to our own valuation the appeal lay to the Court of the District Judge and not to this Court. However, having regard to the decision of this Court in *Nilmony Singh* v. *Jagabandhu Roy* (3), I feel constrained to hold that an appeal lies to this Court.

On the question of valuation I agree with the decision arrived at by my learned brother.

Appeal No. 290 *allowed*;
Appeals Nos 26 *to* 30 *dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 180 OF 1918.

May 27, 1919.

Present :—Mr. Justice Newbould.

ANANDA CHANDRA MUKHERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

Srimati KIRANSASHI DEBI AND OTHERS —PLAINTIFFS—RESPONDENTS.

Chowkidari Chakran *lands—Resumption by Government—Settlement with* Zemindar, *effect of*—Putnidar, *rights of.*

Where *chowkidari chakran* lands are resumed by Government and are settled with the *zemindar*, a clause in the lease giving the *zemindar* full power to appoint or dismiss the *chowkidars* has not the effect of reserving to the *zemindar* and excluding from the *putni* the *chowkidari chakran* lands. [p. 1005, col 1.]

Nafar Chandra v. *Bejoy Chand*, 44 Ind. Cas. 526; 22 C. W. N. 487, followed.

Appeal against the decree of the Subordinate Judge, 1st Court, Hooghly, dated the 8th September 1917, reversing that of the Munsif, 1st Court at that place, dated the 30th June 1915.

FACTS appear from the judgment.

Dr. *D. N. Mitter* (with him Babu *Narain Chandra Kar*), for the Appellants:—After the Privy Council decision in *Ranjit Singh* v. *Kali Dasi Deli* (1) it can no longer be maintained that Chowkidari Chakran lands, situated within the ambit of a Putni, should go to the Zemindar after resumption and resettlement by Government, unless there be an express reservation in respect of these lands in the Putni lease itself. No such express reservation was made in the present case. It has been held in *Nafar Chandra* v. *Bejoy Chand* (2) that even if the Putni lease reserves in favour of the Zemindar the right to appoint and dismiss Chowkidars, that is not sufficient to show that these lands were excepted from the Putni lease. See also *Girish Chandra Roy* v. *Hem Chandra Roy* (3). The contrary view taken in *Nitya Nund Hazra* v. *Maharajadhiraj Bejoy Chand Mohatab* (4) cannot be regarded as good law. The presence of such a claim in the lease is, therefore, immaterial. The present suit is also barred by limitation as it was not brought within 12 years of re-settlement with the Zemindar. See *Raj Krishna Rudra* v. *Fakir Dome* (5).

Babu *Kishori Lall Chatterji*), for the Respondents :—The Privy Council case in *Ranjit Singh* v. *Kali Dasi Debi* (1) does not say that nothing but an express reservation can keep the Zemindar's rights. It is sufficient if an implied reservation can be made out. In this case there are strong grounds for holding that there was an implied reservation, because in addition to the fact that the right to appoint and dismiss Chowkidars was retained by the Zemindar, there is the additional point that the services of the Chowkidar were rendered to the Zemindar and not to the Putnidar. This latter point distinguishes this case from the case in *Nafar Chandra* v. *Bejoy Chand* (2).

On the question of limitation, it is clear that the case cannot come under Article 142 of the Limitation Act, because it has been found that the Zemindar or the plaintiff was never in possession of the land in suit. Even if Article 142 applied, this suit cannot be time barred, as it has been found that the possession of the defendants and their vendors could not have begun earlier than

(1) 40 Ind. Cas. 981; 25 C. L. J. 499; 44 C. 841; 2 P. L. W. 1; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 19 Bom. L. R. 462; (1917) M. W. N. 459; 6 L. W. 101; 22 M. L. T. 489; 44 I. A. 117 (P. C.).

(2) 44 Ind. Cas. 526; 22 C. W. N. 457.
(3) 5 C. L. J. 28.
(4) 7 C. L. J. 593.
(5) 21 Ind. Cas. 197; 19 C. W. N. 478.

1310 B. S. while the suit was instituted in 1321 B. S.

Dr. *D. N. Mitter* briefly replied.

JUDGMENT.—This appeal arises out of a suit for ejectment from certain lands known as Chowkidari Chakran lands. The plaintiff based his claim on a lease from the Maharajah of Burdwan, who is the proprietor of the estate within the ambit of which these lands lie. The defendants are the tenants of the Putnidars, who held under a Putni lease granted in 1213 B. S. corresponding to 1806-7 A. D. The learned Subordinate Judge on appeal decided in favour of the plaintiff, on the ground that the clause in the lease giving the Zamindar full power to appoint or dismiss the Chowkidar shows that these lands could not have been transferred to the Putnidars. The point that arises in this appeal is the same which arose in the case of *Nofar Chandra* v. *Bejoy Chand* (2). That case was decided by my learned brother Teunon, J., and myself and we held that such a clause in the Putni lease had not the effect of reserving to the Zamindar and excluding from the Putni the Chowkidari Chakran land. When we delivered the judgment, our attention was not drawn to the decision of the Judicial Committee of the Privy Council in the case of *Ranjit Singh* v. *Kali Dasi Debi* (1). That decision lays down that ordinarily the Zemindar's interest to Chowkidari Chakran lands resumed by Government and transferred to the Zemindar under Bengal Act VI of 1870 passed by virtue of such a transfer to the holder of the Putni lease in the village within which such lands are situated. This authority confirms our previous decision and the essential conditions of the lease being similar, I have no hesitation in holding that in the present case the right in the land passed to the Putnidar on resumption and that the plaintiff has no title which will enable him to succeed against the tenants, the Putnidars.

It was also contended that the suit is barred by limitation. But on the view I have taken, it is unnecessary to determine this point.

The appeal is decreed. The judgment and decree of the lower Appellate Court are set aside and the original judgment and decree of the Munsif are restored and the plaintiff's suit dismissed.

The appellants are entitled to their costs in this Court and in the lower Appellate Court.

Appeal decreed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 62 OF 1919.

June 23, 1919.

Present:—Mr. Kanhaiya Lal, J. C.

PARMESHWAR DIN AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Art. 120—Declaratory suit—Limitation, commencement of—Denial of title, when furnishes cause of action—Revenue Court, refusal of, to effect partition, effect of—Possession not disturbed.

Where a person is in possession of property, it is not obligatory upon him to file a suit for a declaration of his title, unless the denial of his title by the opposite party has the effect of disturbing his possession or doing him other injury not capable of being remedied otherwise than by a suit for declaration. [p. 1006, col. 2.]

The refusal of a Revenue Court to effect partition of a joint *khewat* till the shares of the contending parties are determined by the Civil Court, does not necessarily vest the opposite party with an adverse title, if the possession of the person, against whom the order is passed, remains undisturbed. [p. 1006, col. 2; p. 1007, col. 1.]

Appeal against the decree of the District Judge, Fyzabad, dated the 16th December 1918, upholding that of the Subordinate Judge, Sultanpur, dated the 24th February 1917.

The Hon'ble Mr. *Wasir Hasan* and Mr. *Niamatullah*, for the Appellants.

Mr. *Bisheshar Nath Srivastava*, for Respondents Nos. 3 and 8.

JUDGMENT.—The parties to this appeal are co-sharers in Patti Bhawani Singh, which comprises an 8-annas share of an under-proprietary right in the village

PARMESHWAR DIN *v.* RAM NATH.

Nandaur. Their predecessors, Sheodat and Nandan Dube, obtained a *sankalpnama* in respect of the said share from Hanoman Singh, Bisheshar Singh and Gajadhar Singh, the superior proprietors, in lieu of Rs 600 on the th January 1892 The *sankalpnama* did not specify the share granted to each Sheodat and Nandan Dube did not get mutation of names effected in respect of the said share in the *khewat* but their names were entered in the *jamabandi*. Sheodat was succeeded by his widow, *Musammat* Dilasa, and by his brothers, Debidin and Shankar. The village had two Pattis, Patti Amir Singh and Patti Bhawanidin. The land comprised in the *sankalpnama* appertains to the latter Patti.

In 1890 Balbhaddar applied for a partition of his share in the village, making Nandan, *Musammat* Dilasa, Debidin and Shankar, who were also co sharers in Patti Amir Singh, parties to the proceeding (Exhibit A1). There was some land which belonged to the co sharers of both the Pattis. At the time of the partition, the partition officer wanted to ascertain shares of each of the co-sharers of Patti Bhawanidin but found difficulty in determining it. The assertion of the heirs of Sheodat was that the share of Sheodat was one-third. The partition officer eventually allowed an imperfect partition of Patti Amir Singh but refused to allow a partition of Patti Bhawanidin, because the names of Nandan, Debidin, Shankar and *Musammat* Dilasa were not borne on the under-proprietary register and there was a dispute as to the extent of the share which Nandan and other persons had therein (Exhibit 34).

In 1894 an application was made by Shankar, *Musammat* Dilasa and Debidin for the entry of their names in the revenue papers in respect of a half share of Patti Bhawanidin, but the application was opposed by Nandan who asserted that their share was one-third. The Revenue Court ordered the names of the applicants to be entered with that of Nandan without any specification of shares and directed the applicants to get their share determined by the Civil Court (Exhibit 36).

In 1916 another attempt was made by the present plaintiffs for a partition of their share, but they were directed to go to the Civil Court to get their share determined. The present suit was thereupon filed by the plaintiffs for a declaration that they were the owners of an 8 annas share in the said Patti. The Courts below decreed the claim.

The only point urged for consideration in this appeal is that the suit for a declaratory decree was barred by time. Section 42 of the Specific Relief Act (I of 1877) permits a party entitled to any right as to any property to seek a declaration against any person, denying or interested in denying his title to such property, but it is not obligatory upon him to file a suit unless such denial has the effect of disturbing his possession or doing him other injury not capable of being remedied otherwise than by a suit for declaration of his title. Article 120 of the Indian Limitation Act (IX of 1908) allows a period of six years for such a suit from the date when the right to sue accrues. But though such a suit for the declaration of such a title may be barred by time, the right of the person, whose title is denied, to hold the property is not lost so long as his title to the property subsists. If he is not in possession, he cannot sue for a declaration of title. If he is in possession, he can sue for a declaration of his title, but is not bound to do so, unless anything has been done, which has the effect of prejudicing his right to continue in possession. In *Jevanand* v. *Beni Madho* (1) it was accordingly held that where a plaintiff has got a right, every invasion of that right gives him a fresh cause of action. As pointed out in *Muhammad Taqi* v. *Muhammad Baqar* (2), if a person who has title to immoveable property allows another to retain possession under an openly avowed claim that he is holding in his own right and fails for a period of 12 years to vindicate his title by recovering possession, his right to the property becomes extinguished. The refusal of the Revenue Court to make a partition till the shares of the contending parties were determined by the Civil Court does not necessarily vest the opposite party with an adverse title, if

(1) 4 Ind. Cas. 159; 12 O. C. 320.
(2) 20 Ind. Cas. 580; 16 O. C. 163.

the possession of the person, against whom the order was passed, remains undisturbed.

The learned Counsel for the defendants-appellants has relied on the decisions in *Francis Legge* v. *Rambaran Singh* (3) and *Akbar Khan* v. *Turaban* (4), but a different view was taken in *Allah Jilai* v. *Umrao Hussain* (5). The effect of the entry of the name of the opposite party may in some instances operate to throw a cloud upon the title of the person whose name is removed and disturb his right to hold possession thereof. Such a disturbance, if effected, may provide a starting point for limitation, which may in course of time extinguish the title of the former. But in this case there has been no such disturbance. The Revenue Court directed the names of both the parties to be entered in the revenue papers and the finding of the Courts below is that they continued in joint possession, though their specific shares were left undetermined.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(3) 20 A. 35: A. W. N. (1897) 193.
(4) 1 Ind. Cas. 557; 5 A. L. J. 657; A. W. N. (1908) 252; 4 M. L. T. 444; 31 A. 9.
(5) 24 Ind. Cas. 535; 36 A. 492; 12 A. L. J. 810.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 936 OF 1918.

May 12, 1919.

Present :—Justice Sir Asutosh Chaudhuri, Kt., and Mr. Justice Cuming.

HARI PADA MUKHERJEE AND OTHERS —DEFENDANTS—APPELLANTS

versus

RADHA BULLAV PAL—PLAINTIFF—RESPONDENT.

Hindu Law—Reversioner, suit to establish title as —Burden of proof—Appeal - Appellate Court, duty of, to come to clear findings of fact.

In a suit to establish title as a reversionary heir the plaintiff must show that he is the nearest reversionary heir. It is no part of the duty of the defendant to set up any nearer heirs. The whole of the onus is on the plaintiff. [p. 1008, col. 1.]

In trying an appeal it is the duty of the first Appellate Court to come to clear findings of fact, as they are final and the High Court in second appeal cannot go behind them. [p. 1008, col. 1.]

Appeal against the decree of the Subordinate Judge, 1st Court, Burdwan, dated the 20th of April 1918, reversing that of the Munsif, 1st Court at that place, dated the 18th of April 1917.

FACTS appear from the judgment.

Babu *Sarat Chandra Roy Choudhury* (with him Babu *Sajani Kanta Sinha*), for the Appellants.—The judgment in this case of the learned Subordinate Judge is not satisfactory and cannot be sustained, inasmuch as he does not come to clear and definite findings on the facts in dispute, which he should have primarily done as the final Court of facts. The plaintiff's case was that he was reversionary heir of one Asananda and it was for him to establish his position as such before the defendants could be called upon to rebut the position. The onus clearly lies upon the plaintiff and the learned Subordinate Judge was clearly wrong in thinking that it was the duty of the defendants to set up a nearer heir to demolish the position of the plaintiff.

Then also as regards the properties to which the plaintiff laid claim the learned Subordinate Judge went on wrong premises. He did not carefully go into the written statement of the defendant. Had he done so, he would not have committed the grave error that he has committed in his judgment. The learned Judge failed to take note of the real and substantial contentions of the parties. So my prayer for a remand, I submit, cannot be resisted.

Babu *Bipin Behari Ghosh* (Junr.) (with him Babu *Samarendra Kumar Dutt*), for the Respondent.—I submit that no case for a remand has been made out by the other side. Inasmuch as the defendants could not put up a nearer heir and the plaintiff's case was quite consistent with all the surrounding facts, the lower Court could not but give him a decree. The learned Subordinate Judge did his best to come to findings of fact, which cannot be reversed by your Lordships in second appeal.

Babu *Sarat Chandra Roy Choudhury* not called upon to reply.

HARI PADA MUKHERJEE v. RADHA BULLAV PAL.

JUDGMENT.—We regret that we have to remand this appeal. The judgment of the learned Subordinate Judge is very unsatisfactory. It is confused, ill-expressed and the learned Subordinate Judge does not seem to have applied his mind to the points for decision. He ought to remember that in trying an appeal it is his duty to come to clear findings, as they are final and this Court cannot go behind them.

In dealing with the question whether the plaintiff is the reversionary heir of Asananda, he says: "the learned Munsif has found that the plaintiff and Asananda and Parmananda are of the same family. Therefore, the appeal must succeed." Then he says, "the defendants could not set up a nearer heir." It is no part of the duty of the defendants to set up any nearer heir. The whole of the onus is on the plaintiffs to show that they are the reversioners. The Subordinate Judge then says, "so the evidence adduced by the plaintiff must be accepted as sufficient." Probably what he intended to say was that inasmuch as there was no evidence on the other side, although the evidence given on behalf of the plaintiff is that of interested persons, having regard to the other facts of the case such evidence ought to be accepted. If he had said that one could have understood his point of view, but the way in which he has treated the matter throwing the onus on the defendants is responsible for a confused and indefinite finding. We think he ought to arrive at a clear finding with regard to this matter.

Then as regards the properties the plaintiff based his claim upon the fact that Asananda and Permananda were brothers in joint possession, that Permananda died first, leaving a widow named Taramoni, that Taramoni survived her husband for a considerable number of years, that after Taramoni's death Adharmoni, the widow of Asananda, became possessed of this property and held adversely for 12 years and after her death her daughter Sarnamoyee obtained possession of this property. The defendants' case was that after Permananda's death, Taramoni his widow succeeded to the property, that Adharmoni died before her and that on the death of Taramoni "while she was the owner of the property left by her husband, there was no one alive in the family of her husband. So Sarnamoyee got the property by inheritance and was all along in possession." The portion of the judgment in which the learned Subordinate Judge deals with this matter is very confused. He says that "the defendants stated in their defence that the widow of Permananda died after Adharmoni and so Sarnamoyee got his properties not as an heir of Adharmoni but adversely as against others. This contention is not tenable as the disputed properties had belonged to Asananda even according to the defendants." This is exactly what the defendants had not said. The defendants in two portions of the written statement, namely, in paragraph 10 and in paragraph 12, deal with the shares of the two brothers, paragraph 10 dealing with Asananda's share and paragraph 12 with Permananda's share. We regret to have to say that the learned Subordinate Judge in dealing with those matters ought to have carefully dealt with the real contentions between the parties.

The whole appeal, therefore, is remanded. He will have to come to a clear finding as to whether the plaintiff is the reversioner and, secondly, as regards the properties which he may be entitled to.

Costs will abide the final result of the case.

Case remanded.

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Adverse possession—*Acquiescence—Estoppel, equitable—Land lying unoccupied—Encroachment by erecting buildings—No mistaken belief as to ownership—Demolition of buildings.*

No question of adverse possession or limitation can arise in respect of land practically lying unoccupied.

A question of acquiescence or equitable estoppel may arise where the owner of land sees another person erecting buildings upon it and, knowing that such person is under the mistaken belief that the land is his own property, purposely abstains from interference with the view of claiming a demolition of the buildings when erected. Where, however, the person encroaching on the land of another cannot be said to have been acting under any mistaken belief as to the ownership of the land, no question of acquiescence or equitable estoppel can arise. O PADDU v. MAHABIR PRASAD, 6 O. L. J. 455 683

Adverse possession—contd.

——— *Gift by joint owners—Petition to Collector for mutation of names, whether evidence of gift—Possession of donee, nature of—Evidence Act (1 of 1872), s. 91—Hindu Law—Will, construction of—Widow, estate taken by.*

P, who died in 1867, executed a Will, clause 3 of which was in the following terms: "I have given my half share in Kariamangalam *mitta* to my wife, Nayar Alangarammal, *alias* Thayarammal, on account of her maintenance and other absolute use. She is at liberty to enjoy the same with powers of alienation by sale, etc." and by clause 4 he gave his property, in general terms, to the two infant sons of his eldest brother. The plaintiffs, the sons of the two foregoing, brought the present suit to establish their title to a moiety of the *mitta* or estate, and claimed, in the alternative, as persons entitled to succeed on the death of the testator's widow *A.*, which occurred in 1912, to her property not disposed of during her lifetime or by her Will, that the moiety in question was undisposed of at her death and vested in them as her heirs.

The whole *mitta* originally belonged to the testator and his brother, and on the latter's death in 1879 his share became vested in his widow *R. A.* and *R.*, the owners of the *mitta*, joined in a petition to the Collector in 189· reciting that they had given away the *mitta* to *D.*, the daughter of *R*, and prayed that the *mitta* be transferred accordingly, and this was done. The defendant, the daughter of *D.*, contended that in consequence of this, the moiety passed to *D.* and through her to the defendant and that the estate having been in the possession of *D*, and herself after *D*'s death for upwards of 2 years, the plaintiffs' suit was barred by the rule of adverse possession:

Held, (1) that clause 3 of the Will gave an absolute interest in the moiety to the testator's wife, and that the 4th clause operated upon the remaining property only, and that on the death of *P.* his moiety of the *mitta* vested in his widow *A.* absolutely;

(2) that during the lifetime of *R.* the possession of *D.* was adverse as against both *A.* and *R.*, that when on the death of *R* in 190· *D.* became entitled to a moiety of the property, the character of her possession of the other moiety as against *A.* was not changed, and as there had been an ouster of *A.* before the death of *R* which continued after her death, the possession of *D.* was adverse to *A.* throughout, and that consequently the suit must fail;

(3) that having regard to section 91 of the Evidence Act, although the petition of 1895 to the Collector and the change of names in the register were not admissible to prove a gift, they could be referred to as explaining the nature and character of the possession thenceforth held by *D*, as leading to the inference that the receipt of the rents by *D.* was a receipt in the character of donee and owner of the land and, therefore, in her own right and not as a trustee or manager for her mother and aunt. **P C** N. VARADA PILLAI *v.* JEEVARATHNAMMAL, (1919) M. W. N. 724; 10 L. W. 679 **901**

——— by tenant. *See* LANDLORD AND TENANT **184**

———, title by, not set up in plaint—Plaintiff, whether can succeed on plea of. *See* PLEADINGS **639**

Agra Tenancy Act (II of 1901), s. 11 (a)—*"Lease for a term of not less than seven years," meaning of—Lease reserving right of re-entry, whether covered by section Occupancy rights, accrual of.*

The intention and meaning of "lease for a term of not less than 7 years" in section 11 (*a*) of the Agra Tenancy Act is that from the commencement of the period the tenant shall have a certainty of freedom of disturbance for 7 years with a *quid pro quo* to the landlord in the provision that the tenant shall not count the period towards accrual of occupancy rights. A condition in the lease giving a power of re-entry to the landlord within the 7 years cuts at the very root of the principle which the law is intended to cover.

Where under a lease purporting to be for seven years, the landlord retains the power of re-entry on the whole or any unspecified part of a holding within the seven years, the lease cannot be regarded as one "for a term of not less than seven years" under proviso (*a*) to section of the Agra Tenancy Act so as to preclude the tenant from counting the seven years towards accrual of occupancy rights. **U P B R** ABDUL JALIL KHAN *v* MAN SINGH, 1 U. P. L. R. (B. R) 25 **48**

——— **s. 22 (c)**—*N. W. P. Rent Act (XII of 1881), s. 9, proviso—Occupancy tenant, death of—Brother, right of succession of.*

The brother of an occupancy tenant succeeds on the death of the latter's widow, irrespective of whether or not he shared in the cultivation of his brother who died while the Rent Act of 1881 was in force, the succession being determined by the law in force at the time the right vests. **U P B R** BUDHOO *v.* SATDEO TEWARI, 1 U. P. L. R. (B. R.) 30 **85**

——— **ss. 34, 156, 177 (e)**—*Suit under s. 156—Proprietary title, plea of—Revenue Court, whether can take cognisance of plea—Jurisdiction of Civil and Revenue Courts.*

Where in a suit under section 156 of the Agra Tenancy Act, read with section 34 thereof, the defendant pleads a proprietary title, the Revenue Courts have no jurisdiction to entertain and examine the plea under section 177 (*e*) of the Act; this function rests with the Civil Court **U P B R** LACHMI NARAIN *v.* SARDAR KUAR, 1 U. P. L. R. (B R.) 16 **190**

——— **ss. 95 (a), (b), 202**—*Civil Procedure Code (Act V of 1908), O. II, rr. 1, 2—Landlord and tenant—Ejectment, suit for—Plea of agricultural holding—Suit under s. 95 (b)—Refusal to have class determined, effect of—Procedure.*

Where in a suit for ejectment in a Civil Court the respondents plead that they hold the land as an agricultural holding, and are referred to the Revenue Court under section 202 of the Agra Tenancy Act, and in their suit under section 95 (*b*) of that Act they apply that they do not want their class determined, this action, though not quite in accordance with the principle of rules 1 and 2 of Order II of the Civil Procedure Code, does not bar the Revenue Court from deciding their claim to be tenants under section 95 (*a*). **U P B R** RAJA MISRA KALI CHARAN SAHEB *v.* SITAL, 1 U. P. L. R. (B. R.) 32 **82**

——— **ss. 131, 194 (1), (3)**—*Partition—Co-sharer, whether can sue to eject tenants before confirmation of partition.*

Where a holding is allotted to a co-sharer in a joint *mahal* on partition, he cannot, as sole proprietor

Agra Tenancy Act—concld.

sue to eject the tenants of the holding until the partition is confirmed by the Commissioner under section 131 of the Agra Tenancy Act, and his status as sole proprietor is thereby established. **U P B R** NIADAR SINGH *v.* GHASI, 1 U. P. L. R. (B. R.) 31 **76**

——— **s. 156,** suit under—Proprietary title, plea of—Revenue Court, whether can take cognizance of plea. *See* ANTE, s. 34 **190**

——— **ss 177, 185**—*Civil Procedure Code (Act V of 908), O IX r. 8—Order appealable to District Judge—Revision by Board of Revenue, whether competent—Suit dismissed for default—Restoration, order of, interference with.*

Where, under section 177 of the Agra Tenancy Act, an order in certain suits is appealable to the District Judge, such suits are, by the terms of section 185 of the Act, outside the revisional jurisdiction of the Board of Revenue, and it is not within the competence of the Board to interfere with an order under rule 9, Order IX, Civil Procedure Code, restoring such a suit dismissed for default. **U P B R** SALAMATULLAH *v.* SAHU MAKHANLAL, 1 U. P. L. R. (B. R.) 29 **69**

——— **s. 177 (e)**—Revenue Court, whether can take cognizance of plea of proprietary title. *See* ANTE, s. 34 **190**

——— **s. 185**—Revisional Jurisdiction of Board of Revenue. *See* ANTE. s. 177 **69**

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——— **s. 202,** parties referred to Revenue Court under—Refusal to have class determined, effect of. *See* ANTE, s. 95 (*a*) **82**

Aliyasantana Law—Ejaman, *removal of, suit for—Jurisdiction of Court—Declaration of unfitness of next senior member and appointment of one lower down, validity of—Grounds for removal.*

In a suit for the removal of the *ejaman* of an *Aliyasantana* family the Court has jurisdiction not only to remove him for good reasons but also to declare the next man to be unfit and pass on the succession to his junior.

The jurisdiction to remove the *ejaman* is founded on his forfeiture of his office on gross misconduct rendering him unfit for it.

Moral unfitness is an equally good reason for exclusion as mental or physical deficiency. **M** NEMANNAKUDRE *v.* ACHMU HENGASU, 37 M. L. J. 539; 11 L. W. 49; (1920) M. W. N. 117 **855**

Amanji lands, meaning of. *See* CIVIL PROCEDURE CODE, s. 11 **33**

Amendment of application for execution, when permissible. *See* CIVIL PROCEDURE CODE, O. XXI, R. 15 **803**

Appeal (Civil)—*Appellate Court, whether can set aside decree which has not been appealed against—Civil Procedure Code (Act V of 1908), O. XLI, r. 33.*

A Court cannot in the course of the decision of an appeal from one decree set aside a decree which dismisses a separate suit and has not been appealed against

P. sued *G.* to recover possession of certain land previously sold by her to the defendant, alleging fraud and undue influence. With regard to the same sale three other suits were also brought, one by a collateral of the last male holder for a declaration to protect her reversionary rights and two by rival pre-emptors. The first Court gave *P.* a decree and dismissed the other three suits *G* appealed, while the plaintiffs in the other suits did not prefer any appeal. In the course of the appeal *P.* and *G* put in a compromise, according to which *G* was to obtain half the land on payment of a certain sum of money. Thereupon the District Judge added the plaintiffs in the other three suits and ordered that those suits be re-opened and re-tried. *G.* preferred a second appeal:

Held, that the order of the District Judge was incorrect and that the suits could not be re-opened. **P** GOBIND RAM *v.* PALI, 116 P. R. 1919 **883**

——— *Interlocutory order, compliance with, whether destroys right of appeal—Forum, proper—Valuation of suit—Adjudication by Court—Appellate Court, how to be determined.*

A plaintiff valued his suit in the Court of the Subordinate Judge at Rs 5,100, but on the defendants' objection that the value was excessive, the Subordinate Judge went into the question and recorded a finding that the proper value of the suit was Rs 1,385 and returned the plaint for presentation to the Court which had jurisdiction to try the suit. The plaintiff complied with the order but without giving up the right of appeal, and shortly afterwards preferred an appeal to the High Court against the Sub-Judge's order, when it was objected that having complied with the order he could not question it:

Held, (1) that the plaintiff was not deprived of his right of appeal:

(2) that as the forum of appeal depended not upon the value as adjudged but upon the value as accepted by the plaintiff after adjudication, the appeal had been correctly presented to the High Court. **C** TARA KANTA DAS *v.* KALI PRASAD DAS, 23 C. W. N. 942 **1001**

——— *Mortgage suit—Mortgage executed by husband under power-of-attorney from wife—Power-of-attorney not proved—Remand, whether can be ordered.*

Where in a suit upon a mortgage purporting to have been executed by the husband of a lady on her behalf under a power-of-attorney from her, the plaintiff does not take any step for the production of the power or to prove it, or to give secondary evidence of its contents, the case ought not to be remanded to give him the opportunity of producing and proving the power. **C** RAM CHANDRA *v.* ABEDA KHATUN **562**

——— Order on application to set aside sale on ground of omission to give notice of settlement of sale proclamation, open to, and second appeal. *See* CIVIL PROCEDURE CODE, s. 47 **809**

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Appeal (second)—concld.

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Appellate Court, refusal by, to admit additional evidence—High Court, whether can interfere in second appeal. *See* CIVIL PROCEDURE CODE, s. 100 **274**

Arbitration and award—*Error of law patent on face of award—Award, whether liable to be set aside—Contravention of rule binding on parties, whether error of law—Vendor and purchaser—Contract, breach of, by vendor—Purchaser, whether can be made to pay damages—Common Law.*

A Court will set aside an award if there is an error of law patent on the face of it.

Where a rule binding on the parties to an arbitration lays down that in no case is a particular party liable to pay a sum of money as damages or compensation, then an award directing that party to pay a sum of money is bad on the face of it in point of law.

Under rule 52 of the Rules of the Bombay Cotton Trade Association where a buyer refuses the cotton on account of non-approval of tender, he may exercise either of two options, *viz*, he may buy in the market at a reasonable rate on the account, risk and expense of the seller or he may invoice the cotton back to the seller at the market rate of the day, upon which the final award is made; but he is not bound to exercise either of these options, and the failure to exercise either of these options does not render him liable to pay damages to the seller.

Where an award imposes a liability on a party which cannot possibly be said to have been provided for by the contract between the parties on a proper construction of its terms, there is an error of law patent upon the face of the award which entitles the Court to set it aside

It is entirely opposed to the general provisions of the Contract Act and to the Common Law that a buyer who has rightly rejected goods tendered under a contract of purchase and sale should be in any way liable to the seller.

Per *Heaton, J.*—Where an award imports by reference the contract rules and correspondence between the parties and then contravenes one of the rules, it can properly be said that there is an error of law patent on the face of the award. **B** JIVRAJ BALOO SPINNING AND WEAVING CO., LTD. *v.* CHAMPSEY BHARA AND CO., 21 BOM. L. R. 1037 **799**

——— *Reference, effect of—Award, whether extinguishes original cause of action—Agreement authorising arbitrators to arrive at decision in whatever way they like, effect of—Objection to award—Burden of proof—Award not set aside—Decree on ground inconsistent with plaint, whether can be given—Award not stamped, validity of.*

The fact that an award duly signed by the arbitrators is not stamped, does not affect its original validity.

A valid award ordinarily operates to merge and extinguish all claims raised in the submission, and after the award has been made, the submission and the award are the only basis by which the rights of the parties are governed and constitute a bar to any action on the original cause of action.

Arbitration and award—contd.

Where a party contests the validity of an award, the onus is on him to prove that the award is bad.

An agreement to recognise any award the arbitrators might make, even though it is beyond the scope of the disputes mentioned in the reference, is binding on the parties to the reference.

The ordinary rule that, as the submission only refers to the arbitrator the question between the parties, the moment he touches the interests of a stranger his authority and his award are void, can have no application to cases of partition of joint family property.

Where the parties by their conduct and by the terms of the reference show that the arbitrators are at liberty to get information from one or all of them without there being necessarily a formal meeting with all the three parties present, it is not open to a party to object to the award that it was passed *ex parte* and without just cause.

Where arbitrators are expressly authorised to proceed with or without making inquiries, and to arrive at a decision in whatever way they like, it is open to them to take into consideration a document purporting to be the draft of a Will unsigned by the testator and to regard it as a genuine and valid document.

A party who seeks to upset an award, and who fails to do so, cannot claim a decree on a ground which is quite inconsistent with his plaint. **S** RAMCHAND GURDASMAL *v.* GOBINDRAM GURDASMAL, 13 S. L. R. 75 **337**

——— *Settlement by agreement of parties, whether award—Persons not parties to settlement, whether bound—Contract for sale or exchange of land—Possession, suit for, maintainability of—Specific performance, decree for, whether necessary—Contract, whether can be enforced as against some of several vendees—Specific Relief Act (I of 877), s. 16—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Possession, suit for—Specific performance, prayer for, whether can be added.*

Where a person is asked to act as mediator in the settlement of a dispute, and records a settlement agreed on by the parties, his act is not that of an arbitrator, and the record made by him is not an award, and if that record is at all operative, it is so only as a contract as between those who have signed it. It can have no operation whatever against a person who never joined in it

Where there is a contract for sale or exchange of land, no decree for possession can be given unless the title is completed by specific performance of the contract

A plaint in a suit for possession can be amended by the addition of a prayer for specific performance of the contract by the execution of a conveyance by the defendant.

The amendment can be allowed even by a Court of Appeal if the evidence on which a decree can be passed on the plaint as amended, is before the Court or can be easily obtained and the defendant can be compensated by costs for any prejudice he may have sustained or may sustain.

Where a number of persons combine to sell property, parts of which are owned by some of them

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with other persons individually, a claim by the vendee for enforcement of the contract as against some portions only of the property will be sustained if the portions claimed can reasonably be enjoyed independently of the remainder. **M** SUBRAMANIA IYER *v.* KALYANASUNDARAM IYER 283

Assam Land Revenue Regulation (I of 1886), ss 23, 154—*Deputy Commissioner, whether has power to settle boundary dispute coming to his knowledge otherwiser than in course of settlement proceeding—Civil Court, whether can entertain suit regarding boundary dispute in respect of which Deputy Commissioner has passed order—Jurisdiction of Civil Court, when ousted*

In order to give a Settlement Officer jurisdiction under section 3 of the Assam Land Revenue Regulation there must be a report by a Survey Officer concerning a boundary dispute that has come to his knowledge in the course of his survey. The Regulation gives a Deputy Commissioner no power to settle a dispute which arises long after the settlement proceedings and which comes to his knowledge on an application from one of the parties concerned.

Where the order of a Deputy Commissioner deciding a boundary dispute on the application of one of the parties concerned does not appear to be one which is final by reason of its having been passed under section 23 of the Assam Land Revenue Regulation, nor does the order show under what section the Deputy Commissioner purported to act, the Civil Court has jurisdiction to entertain a suit regarding the dispute.

The question whether the Civil Court has jurisdiction or not depends on whether the order of the Deputy Commissioner was or was not passed under section 23 of the Regulation. **C** RAM KUMAR *v.* CHANDRA KANTA 529

——— **s. 154** 529

Award, filing of, what amounts to—Application to set aside—Limitation. *See* LIMITATION ACT, 1908, s. 12 46

Batwara papers, evidentiary value of. *See* BENGAL TENANCY ACT (VIII B. C. OF 1885), s. 153 19

Benami transaction—*Burden of proof—Court, duty of.*

In matters of *benami* transactions, it is essential for Courts of law to take care that their decisions rest not upon suspicion, but upon legal grounds established by legal testimony At the same time, the Courts ought not to approach such transactions with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest possible evidence that the *ex facie* owner of property is a trustee for or holds the same for the interest of another. Even a silght quantity of evidence will suffice for the purpose of showing that the transaction was a sham The person who impugns the apparent character of a transfer must, however, show something or other to establish that it is a *benami* or sham transaction.

W. hypothecated among other properties, a share in a certain *mauza.* The mortgagee obtained a decree on the bond against *W.* and some of the mortgaged properties were sold, including the share in the *mauza,* which was purchased by *B*, the wife of *W.* who obtained possession and continued to receive the rents and the profits up to the time of her death. Shortly before her death she bequeathed this property to *M.*, the appellant, and he obtained possession of it. After the deaths of *B* and the mortgagee, the present suit was brought for a declaration that the share in the *mauza* never belonged to *B.*, but remained *W.'s*, *B.'s* purchase being a simulate transaction, and that the property was held in her name *benami* for *W* The High Court decreed the claim and *M*, the devisee of *B.*, appealed to the Privy Council:

Held, that plaintiff had entirely failed to prove that *B.'s.* ownership was *benami* for *W.* and that the fact of the action having been brought after years of possession and when the principal parties to the transaction challenged and also the mortgagee were dead was a circumstance not without weight in such cases and involved a certain addition to that duty or onus of proof which in *benami* cases undoubtedly rested upon the assertor. **P C** MUHAMMAD MAHBUB ALI KHAN *v.* BHARAT INDU, (1919) M. W. N 507; 23 C. W. N. 321 54

Bengal Cess Act (IX B. C. of 1880), s. 20—*Road cess return, statement in, value of—Rent, rate of, determination of.*

A statement made by a landlord in a road cess return is not merely an admission, it is a statutory bar under section 20 of the Bengal Cess Act to recovering rent at a rate higher than that shown in the cess return. **C** PRASANNO KUMAR *v.* SIB KRISHNA SINGHA SARMA 202

Bengal Estates Partition Act (V B. C. of 1897), s. 44—Partition—Collector whether can assess rent. *See* BENGAL TENANCY ACT (VIII OF B. C. 1885), s. 153 19

Bengal Landlord and Tenant Procedure Act (VIII B. C. of 1869), ss. 14, 29—*Notice of enhancement of rent, period of operation of—Suit to recover rent at enhanced rate, when maintainable.*

What section 14 of the Bengal Landlord and Tenant Procedure Act of 1869 requires is that not less than three months' notice should be given if the landlord intends to enhance the rent of an under-tenant or a *raiyat.* It cannot be held that a notice which gives over nine months is a notice which fails to comply with the provisions of that section.

The object of section 29 of the Bengal Landlord and Tenant Procedure Act of 1869 is that a suit for enhancement should not be brought without previous due notice But it does not follow that when a notice under that section is once given, the suit for enhancement of rent cannot be brought two or three years afterwards. **C** ABHOYESWARI DEBI *v.* BANGSHIRAM RAJBANSHI 52

——— **s. 29**—Suit to recover enhanced rent, when maintainable *See* ANTE, s. 4 52

Bengal Land Registration Act (VII B. C. of 1876), s. 78, scope of. *See* CIVIL PROCEDURE CODE, s. 115 49

Bengal Land Revenue Sales Act (XI of 1859)—Mokarari lease. *See* TRANSFER OF PROPERTY ACT, s. 111 (*d*) 16

Bengal Municipal Act (III B. C. of 1884), ss. 15, 69, *rules framed under—R.* 17, *infringement of, effect of—Election, whether void—Burden of proof—Costs, by whom to be borne.*

Rule 17 of the rules framed by the Local Government under the Bengal Municipal Act to regulate Municipal elections is not a mandatory rule, and an election is not necessarily void because of an infringement of that rule. But the burden rests upon those who maintain the validity of an election, notwithstanding an infraction of the rule, to show that the result was not affected by the infringement.

Where owing to a transgression of the rule more than one-half of the constituency did not vote at an election and it was not shown that the result of the election had not in fact been affected, the election was set aside as contrary to law.

The ordinary rule is that costs are borne by the unsuccessful party, but when an election suit is caused by the conduct of the returning officer, each party may, in the discretion of the Court, be ordered to pay his own costs. **C** SHYAM CHAND *v.* CHAIRMAN OF THE DACCA MUNICIPALITY, 30 C. L. J. 270; 24 C. W. N. 189 **741**

——— s. 69 **741**

Bengal Patni Regulation (VIII of 1819), s. 11 (3) proviso—*Bengal Tenancy Act (VIII B. C. of* 1885), *ss* 105, 195 (*e*)—Patni *tenure—Resident hereditary cultivators—Enhancement of rent, whether permissible—Lease fixing rent in perpetuity, effect of—*Bona fide *engagement with* patnidar, *effect of—Occupancy rights, entry of, effect of.*

Resident hereditary cultivators, to whom the proviso to section 11 of the Bengal Patni Regulation of 1819 is applicable, are not liable to pay higher rent on proof of the condition on which their rent is liable to enhancement under the Bengal Tenancy Act. Such tenants are not liable to pay any rent in excess of their engagements with the previous *patnidar*, unless such engagements are cancelled on the ground that they were not made in good faith.

The acceptance of a lease by a resident hereditary cultivator fixing the rent payable by him in perpetuity does not take away the status which he had as resident hereditary cultivator so as to make the rent payable by him enhanceable under the provisions of the Bengal Tenancy Act.

In the absence of a lease proving a *bona fide* engagement made with the tenant by the previous *patnidar* fixing the former's rent, the tenant as a resident and hereditary cultivator gets no protection from the proviso to section 11 of the Bengal Patni Regulation.

Where a *putnidar* can only enhance the rent of his tenants by special procedure under the Patni Regulation, he cannot do so by an entirely different procedure under the Bengal Tenancy Act.

Where tenants hold land under a lease fixing the rent payable by them in perpetuity, the fact that they have allowed themselves to be entered in the Record of Rights as occupancy tenants does not put an end to their rights under their leases nor does their action amount to estoppel. **C** RAKHAL CHANDRA CHATTERJEE *v.* BHABADEB CHATTERJI **271**

Bengal Public Gambling Act (II of 1867), ss. 3, 4—Same transaction—Joint trial, legality of. *See* CRIMINAL PROCEDURE CODE, s. 239 **496**

Bengal Tenancy Act (VIII B. C. of 1885). *See* TRANSFER OF PROPERTY ACT. **16**

——— s. 5—*Landlord and tenant—Lease, construction of—Lessee, whether tenure-holder or* raiyat *—Appeal, second—Occupancy rights, acquisition of—Question, whether can be raised for first time in second appeal.*

Where a lease was granted on condition that if a tenant settled on any portion of the land leased out, the lessee would surrender to the lessor that portion and would get in exchange for the same lands of similar description, and that the lessee would not cut down any tree, nor would he have any right to sell, to make a gift of, or to transfer any portion of the land in any way:

Held, that the land was not settled with the lessee for the purpose of settling tenants thereon, and that the interest created by the lease was that of a *raiyat*.

Where a question as regards the acquisition of a right of occupancy by an under *raiyat*, or regarding the rights of a tenant holding over, is not raised in the lower Courts, the High Court in second appeal will not allow the point to be urged for the first time. **C** GAZIRADDIN *v.* GANGARAM **12**

——— ss. 6, 7, 8, 9—*Landlord and tenant—Rent, enhancement of—Reclamation lease—Provision for future enhancement of rent—Presumption that maximum rent provided for is to be fixed rent.*

When land is let in Bengal upon a lease for the purpose of clearing jungle or other reclamation, and provision is made for a gradual enhancement of the rent up to a prescribed maximum, a presumption arises that the maximum so prescribed is to be the full rent as long as the tenure subsists The general provisions for enhancement of rent contained in the Bengal Tenancy Act do not apply to such a case. **P C** PORT CANNING AND LAND IMPROVEMENT CO., LTD *v.* KATYANI DEBI, 37 M. L. J. 578; 17 A. L. J. 1061; 1 U. P. L. R. (P. C.) 91 **522**

——— s. 21—Occupancy rights, firm, whether can acquire. *See* HINDU LAW—ENDOWMENT **106**

——— s. 22 (2)—"*Third person*", *who is—Co-sharer proprietor, whether can be third person.*

A person inducted on to land as a tenant and not as a proprietor, and as a person intending to cultivate the land with his own ploughs, is a "third person" within the meaning of section 22 (2) of the Bengal Tenancy Act, even though he may be a co-sharer proprietor. **Pat** EMAMUDDIN *v.* MOHAMMAD RASHIDUL HUQ, 4 P. L. J. 540 **110**

——— ss. 40, 69 (1) (b)—*Civil Procedure Code (Act V of* 1908), *s.* 94 (*c*), (*e*)—*Jurisdiction of Revenue Court to determine shares of produce to which landlord and tenant are entitled—Proceeding under s.* 40, *Bengal Tenancy Act—Injunction restraining party from proceeding with application, legality of.*

A Revenue Court is competent, under section 69 (1 (*b*) of the Bengal Tenancy Act, to decide a dispute between a landlord and a tenant as to the proper shares of the produce to which each is entitled.

A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under section 40 of the Bengal Tenancy Act restraining him from

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further proceeding with an application made by him under that section to a Revenue Court. **Pat** BHAJAN AHIR *v.* GANGESHWAR KUAR, (1919) PAT. 46 **37**

——— **ss. 49, 85 (1), 167**—*Landlord and tenant—Sub-lease by* raiyat, *validity of—Sale for arrears of rent Sub-tenancy whether incumbrance—Annulment of sub-tenancy, whether necessary—Notice to quit, sub-tenant, whether entitled to.*

A sub-lease granted by a *raiyat* without a registered instrument and without the consent of the landlord is void as against the landlord under section 85, clause (1), of the Bengal Tenancy Act.

The provisions of section 67 of the Bengal Tenancy Act for annulment of sub-tenancies and the provisions of section 49 of the Act, which require notice to quit to be served on the under-*raiyat*, have reference to cases where there is a subsisting tenancy, which stands good against the landlord unless it is put an end to in the manner provided in those two sections. Where the sub-lease is invalid from the beginning as against the landlord, it is not necessary for him to annul that which has never been operative against him. **C** BHUBAN MOHAN GUHA *v.* SHEIKH BADAN, 46 C. 766; 30 C. L. J. 701 **334**

——— **ss. 54, 67, 169 (c)**—*Rent, arrears of, what are—Interest payable on arrears, whether rent.*

When rent falls due and is not paid, it becomes an arrear under section 54 of the Bengal Tenancy Act, and carries interest under section 67, and the amount payable as interest is thus part of the rent, within the meaning of section 69 (c) of the Act. **C** RAM LAL DAS *v.* BANDI RAM MOOKHAPADHYA **996**

——— **s. 67** **996**

——— **s. 69 (1) (b)** **37**

——— **s. 85 (1)** **334**

——— **s. 95**—*Civil Procedure Code (Act V of 1908), ss. 2 (17) (d), 80—Common manager, whether public officer—Suit against common manager—Sanction of Court, whether necessary—Notice to common manager, whether necessary—Officer* de facto, *acts of, validity of.*

A common manager appointed under section 95 of the Bengal Tenancy Act is a public officer within the meaning of section 2 (17) (d) of the Civil Procedure Code and a suit against him for accounts cannot be maintained without service of the notice contemplated by section 80 of the Code, and without leave obtained from the Court which appointed him.

Acts of officers *de facto* performed by them within the scope of their assume official authority, in the interests of the public or third persons and not for their own benefit, are generally as valid and binding as if they were acts of officers *de jure* and cannot be collaterally impeached. **C** BENI MADHAB *v.* UPENDRA CHANDRA SINGHA, 30 C. L. J. 279; 24 C. W. N. 138 **747**

——— **s. 95**—*Common manager, whether can be appointed to share of estate.*

Under section 95 of the Bengal Tenancy Act the appointment of a common manager to a share of an estate, and not to the whole estate, is illegal. **C** MOHINI LAL PAKRASI *v.* NOGENDA NATH PAKRASI, 30 C. L. J 261 **672**

——— **ss. 95, 98, 100**—*Rules framed by Calcutta High Court under s. 100, r. 4—Suit by common manager against ex-manager for account and recovery of balance due, whether maintainable—Sanction of District Judge, whether necessary—Failure to obtain sanction, effect of.*

A suit by the common manager of an estate against an ex-manager for account and for recovery of such sums of money as may upon account being taken be found due by the latter, is for the purposes of management of the estate as contemplated by clause 3 of section 98 of the Bengal Tenancy Act and is maintainable

Per *Ghose, J.*—But such a suit is not maintainable without the sanction of the District Judge as required by rule 4 of the rules framed by the High Court under section 100 of the Bengal Tenancy Act.

Where the District Judge is cognizant of the steps being taken by a common manager for the purpose of recovering what he considers to be due to the estate, and passes orders practically allowing the common manager to go on with a suit he has instituted, this is a sufficient compliance with the requirements of section 95 of the Bengal Tenancy Act and of the rules of the High Court under section 100.

Geidt, J.—Rule 4 of the rules framed by the High Court under section 100 of the Bengal Tenancy Act does not lay down that a suit which requires the sanction of the District Judge must be dismissed if instituted without such sanction.

This rule is a check on expenditure and the only necessary consequence of the infringement of the rule is to make the manager liable for all expenses improperly incurred. The check contemplated by the rule is fully met by imposing this penalty on the manager and the penalty is applicable to all breaches of it. **C** MAHAMMAD FAIZ *v.* SANDYS, 30 C. L. J. 263 **737**

——— **ss. 98, 100** **737**

——— **s. 104, sub-s. (2),** order under, whether can be reviewed. *See* CIVIL PROCEDURE CODE, O. XLVII, R. 1 **39**

——— **s. 104J**—*Record of Rights, entry in, as to rent—Evidence contradicting entry, admissibility of—Rent decree,* ex parte, *effect of—Court, whether bound by rate awarded in* ex parte *decree.*

Section 104J of the Bengal Tenancy Act precludes the giving of any evidence to contradict the statement as to rent recorded in a Record of Rights where a settlement roll has been prepared under section 104A to 104F of the Act, and no evidence can be given to contradict matters which fall within section 104J.

A party who has obtained an *ex parte* decree for rent by keeping back the record ought not to be entitled for all time to get rent at a rate other than that which is provided for by the Bengal Tenancy Act. **C** PARAFULLA NARAIN *v.* PALKU MAHAMMAD, 23 C. W. N. 860 **122**

——— **s. 105** **271**

Bengal Tenancy Act—contd.

——— s. 105—*Civil Procedure Code (Act V of 1908), s. 115—Order assessing fair and equitable rent—Jurisdiction—Revision—High Court, interference by.*

Where a Court has jurisdiction under section 105 of the Bengal Tenancy Act to assess fair and equitable rent, the High Court will not interfere in revision with an order made by the Court fixing a fair and equitable rent on the ground that the rent fixed is not fair or equitable. **C** RAM LAL GOTHI *v.* ROY CHOWDHURY SATISH CHANDRA **411**

——— s. 106—*Record of Rights, entry in, suit for correction of—Presumption—Burden of proof—Landlord and tenant—Tenant attorning to third person, effect of—Adverse possession*

In a suit for correction of the Record of Rights under section 106 of the Bengal Tenancy Act there is primarily a presumption in the defendant's favour, and the burden of proof rests on the plaintiff to show that the entry is wrong.

Where during the subsistence of a tenancy the tenant attorns to a third person, he becomes liable to eviction at the option of the landlord; but until the landlord indicates his intention to put an end to the tenancy, the mere act of attornment to a third person does not transfer possession from the landlord to the third person. **C** HARI KANTA DAS BARMAN *v.* BIBI NURANNESSA **625**

——— s. 148A—*Co-sharer, suit by, for arrears of rent—Form of suit.*

The essential principles underlying section 148 A of the Bengal Tenancy Act are (1) that the suit should, in form, be for the whole rent and in substance for the separate share of rent in arrears, (2), that the whole body of landlords are impleaded with the allegation that the plaintiff has not been able to ascertain what, if any, rents are due to the former. In such cases the whole rent *due* must, in the nature of things, be always a matter of speculation for the plaintiff and he is entitled to assert that he believes that his share of the rent due is the entire rent due and ask the Court to decide on the accuracy of that belief, if and when the impleaded co-sharers appear and claim any arrears as due to themselves If his belief is accurate, the Court will give him a decree for his share of the rent only as being the entire rent due, if inaccurate, the Court will investigate and decree the arrears due to the impleaded co-sharers as well. **Pat** RAM DHYAN SINGH *v.* PARDIP SINGH, 4 P. L. J. 50) **91**

——— s. 153, *applicability of—Suit for rent with alternative prayer for assessment of fair and equitable rent—Appeal, second, whether lies—Bengal Estates Partition Act (V B C. of 1897), s. 44—Partition—Collector, whether can assess rent—Batwara papers, evidentiary, value of.*

Section 153 of the Bengal Tenancy Act does not apply to a suit for recovery of rent, with an alternative prayer for assessment of fair and equitable rent.

Under section 44 of the Bengal Estates Partition Act the Partition Deputy Collector has authority to assess rent.

In a suit for rent the entries in *batwara* papers prepared under the Bengal Estates Partition Act are some evidence of the existence of the relationship of landlord and tenant between the parties and also some evidence as to the rents payable by the defendant. **C** JOTINDRA NATH ROY *v.* ISOF GOLDER **19**

Bengal Tenancy Act—contd.

——— s. 153—*Rent suit—Adverse possession of third parties, finding on—Question of title, whether decided—Appeal, second, whether lies—Finding on question not in issue, effect of.*

The finding of a Court in a rent suit on a question of adverse possession which does not arise at all, is not a decision on a question of title and is consequently not open to second appeal under section 153 of the Bengal Tenancy Act.

Where a Court records a finding on a question which is not in issue in the suit, such finding is inoperative. **C** KALI PROSUNNA *v.* ASGAR **576**

——— s. 153—*Rent suit valued at less than Rs. 00—Appeal, second, whether lies.*

No second appeal lies against a decree passed in a suit for rent in which the amount claimed does not exceed a hundred rupees, and in which no question of title has been decided. **C** KRISTO DAS LAW *v.* BYOMKESH CHUCKERBUTTY **64**

——— s. 158B (2)—*Sale of holding for arrears of rent—Notice to co-sharer landlords, failure to give, effect of—Sale, validity of.*

The provision of sub-section (2) of section 158B of the Bengal Tenancy Act as to the giving of notice to the co-sharer landlords before the sale of a holding is mandatory and not directory and the provision must be complied with before a co-sharer landlord can bring a tenure or holding to sale in execution of a rent decree, and the failure of the Court to serve such notice would render the sale invalid. **C** AHAMAD BISWAS *v.* BEJOY BHUSAN GUPTA 23 C. W. N. 931; 30 C. L. J. 135 **515**

——— ss. 159, 160 (c)—*Landlord and tenant—Lease for term of years—Betel plantation, whether protected interest—Sale in execution of rent decree—Purchaser, whether takes land subject to protected interest.*

The interest of a tenant in land on which a *boraj* or betel plantation has been made is a protected interest within the meaning of section 160 of the Bengal Tenancy Act, although the tenant does not hold the land under a permanent lease

A purchaser of a tenure at a sale in execution of a decree for rent due in respect of land on which there is a *boraj* or betel plantation, made by a tenant who originally held under a lease for a term of years but afterwards held over on payment of rent, takes subject to the protected interest of the tenant and the rights of such a purchaser are controlled by the provisions of section 169 of the Bengal Tenancy Act. **C** ABHOYA CHARN LATABAIDYA *v.* KAMINI PROBHA NAG **188**

——— s. 160 (c)—Betel plantation, whether protected interest. *See* ANTE S. 159 **188**

——— s. 167 **334**

——— s. 167—*Notice to annul incumbrance—Service of notice, mode of—Personal service, whether necessary—Appeal, second—Finding as to service of notice, whether finding of fact.*

A notice annulling an incumbrance under section 167 of the Bengal Tenancy Act must, wherever practicable, be served personally. Other methods of service can only be adopted where personal service cannot reasonably be effected.

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A finding of the lower Appellate Court that a notice annulling an incumbrance under section 167 of the Bengal Tenancy Act was properly served, is not a finding of fact and can be questioned in second appeal **C** RAM GOBINDA *v.* RAJANI KANTA DAS **570**

——— **s. 163 (c)** **996**

——— **ss. 171, 174**—*Contract Act (IX of 1872), s. 72, applicability of*—Taluk, *sale of*—*Rent-decree, execution of*—*Payment made by purchaser of portion of* taluk *to save* taluk *from sale*—*Suit for refund of payment, maintainability of.*

One *B* purchased a *taluk* at an auction. Plaintiffs purchased a share of it from *B*. and *D* purchased the rest from the heirs of *B*. The superior landlord obtained a decree for rent against the heirs of *B*. and threatened to bring the whole *taluk* to sale To stop the sale the plaintiffs deposited the decretal amount in Court. In a suit by the plaintiffs for a refund by the landlord of the sum deposited by them as well as for a declaration of their title to the land:

Held, (1 that the plaintiffs were entitled to a declaration of their title but were not entitled to get back from the landlord the decretal amount deposited by them, as they were jointly liable for the rent payable for the whole *taluk*;

(2 that the deposit was obviously made under section 74 of the Bengal Tenancy Act;

(3) that as the deposit was not made by mistake or under coercion or under stress of legal process, section 72 of the Contract Act did not apply. **C** KAMAL KRISHNA *v.* PEARY MOHON **553**

——— **s. 174** **553**

——— **s. 195 (e)** **271**

——— **Ch. X, ss. 103A, 106**—*Record of Rights, entry in*—*Presumption of correctness*—*Suit for declaration that entry is wrong*—*Limitation*

The period of limitation applicable to a suit for the correction of an entry in a Record of Rights is contained in Article 120 of Schedule I to the Limitation Act, and must be computed from the date the cause of action arises, that is to say, the date of the final publication of the Record, and not the date on which the certificate of final publication is signed by the Revenue Officer.

A certificate signed by the Revenue Officer is conclusive evidence of the publication of the Record, but the presumption as to the correctness of the entry arises from the publication which is provided for by section 103A of the Bengal Tenancy Act. **C** RAJANI NATH PRAMANIK *v.* MANARAM MANDAL, 24 C. W. N. 833 **968**

——— **Sch. III, Art. 1 (a)**—Ejectment, suit for—Limitation. *See* HINDU LAW—ENDOWMENT **106**

——— ——— **Art. 3**—*Licensee refusing to vacate on expiry of license, effect of*—*Possession, suit for*—*Limitation*

Where the licensees of a tenant refuse to vacate on the expiry of the period of their license, such refusal amounts to a dispossession of the licensor within the meaning of Article 3, Schedule III of the Bengal Tenancy Act, and unless a suit to recover possession is brought within the period prescribed by that Article, it must be dismissed as barred by limitation. **C** PANCHU KAPALI *v.* JAJNESWAR MAJHI **959**

Berar Land Revenue Code, s. 79—*Landlord and tenant*—*Notice to quit*—*Mode of service*—*Refusal of past card, whether sufficient service*—*Evidence Act (I of 1872), s. 114, Ill.* (f — *Presumption of fact*—*Appeal, second*—*Interference, whether permissible.*

Section 79 of the Berar Land Revenue Code does not lay down any specific mode for the service upon a tenant of a notice to quit. A notice, therefore, sent to a tenant by means of a registered post card the acceptance of which, upon being tendered by the Postal authorities, is refused by him, constitutes a proper service.

Where, upon the evidence, a presumption of fact under section 114, illustration (*f*), of the Evidence Act is drawn by an Appellate Court, such presumption is binding upon a Court of Second Appeal. **N** RAMCHANDRA KANIRAM *v* LAXMAN **62**

Buddhist Law, Burmese—*Pre-emption*—*Co-heirs, right of pre-emption of, extent of*—*Procedure.*

A Burmese Buddhist co-heir has a right of pre-emption in respect of the unseparated interest of any particular co-heir in undivided inherited property, and the whole body of co-heirs, excepting those in respect of whose interest the exercise of the right is claimed, are entitled to settle among themselves which of them shall exercise it in any particular case, but in case there are conflicting claims among the co-heirs and they fail to come to any agreement, any of them may institute a suit to establish his claim as against the others and also against any purchaser who may have bought or be proposing to buy the property in disregard of their rights **U B** MAUNG PU ZA *v.* MA NGE MA, 3 U. B. R. (1919 154 **468**

Burgadar, *whether tenant*—Kabuliyat, *construction of.*

Where a *burgadar* executes a *kabuliyat* as a mere contract for service, he is not a tenant, but where the document creates a tenancy, *i e*, where the contract is one of letting out the land for cultivation and is not a mere contract for service, the *burgadar* becomes a tenant. **C** SHEIKH MANSUR *v* BRAHMAMAYEE **541**

Calcutta Port Act, (III B. C. of 1890), s. 84, complaint under, Presidency Magistrate, Calcutta, jurisdiction to entertain. *See* CRIMINAL PROCEDURE CODE, s. 20 **622**

C. P. Tenancy Act (XI of 1898), s. 60—*Limitation Act (IX of 1908, Sch. I, Art. 139*—*Transfer of Property Act (IV of 1882), s. 116*—*Occupancy tenant*—*Sub-lease, perpetual, grant of*—*Sub-lessee, position of*—*Prescription, acquisition of title through*—*Ejectment, suit for*—*Renewal of lease*—*Limitation.*

Plaintiff, an occupancy and ordinary tenant of certain fields, sued to eject the defendants, who pleaded a perpetual lease in their favour by the plaintiff, but it was found that as that lease had been granted after the Central Provinces Tenancy Act was passed, it was valid only for one year and the plaintiff's suit was decreed. The defendants

C. P. Tenancy Act—concld.

appealed and contended that their possession having become wrongful after the expiry of one year when the tenancy was determined, the suit was barred by limitation under Article 139 of Schedule I to the Limitation Act and that they had acquired by prescription the status of perpetual sub-lessees:

Held, applying the principle of section 116 of the Transfer of Property Act, that the payment of rent by the defendants and the acceptance of the same by the plaintiff resulted in the renewal of the lease every year until disputes arose and as the suit was instituted within two years of such disputes, it was not barred under Article 139 of Schedule I to the Limitation Act.

As section 60 of the Central Provinces Tenancy Act 1898, precludes an occupancy and ordinary tenant from granting a perpetual lease, a sub-tenant of such a tenant cannot acquire title by prescription, as no such title is recognized by law. **N** NATHU *v.* GANGADHAR **212**

——— **s. 69**—*Landlord and tenant*—Bhogra *land*—*Permanent lease granted by landlord*—*Ejectment.*

There is nothing in the terms of section 69 of the Central Provinces Tenancy Act from which it may be inferred that every tenant holding *sir* lands is on that account liable to be ejected, nor is there anything in the section which would bar the defendant, in a suit in ejectment from *bhogra* land, from setting up a permanent lease granted by the proprietor himself. The granting of such permanent leases by proprietors of *bhogra* land is not forbidden by either the Tenancy or the Land Revenue Act. **Pat** ADITYA PRASAD *v* PARMANANDA PATEL, 4 P. L. J 505 **96**

Cess Return, entry in, value of. *See* LANDLORD AND TENANT **925**

Cessat ratio cessat lex, applicability of. *See* HINDU LAW—INHERITANCE **630**

Cesses, legal and illegal, tests for determining. *See* CIVIL PROCEDURE CODE, ss. 11 **33**

Chota Nagpur Encumbered Estates Act (VI B. C. of 1876), ss. 3, 9, 17, 19—Estate under control of manager—Holder of estate, whether can grant permanent lease. *See* TRANSFER OF PROPERTY ACT, s 52 **33**

Chowkidari Chakran lands—*Resumption by Government—Settlement with* Zemindar, *effect of*—Putnidar, *rights of.*

Where *chowkidari chakran* lands are resumed by Government and are settled with the *zemindar*, a clause in the lease giving the *zemindar* full power to appoint or dismiss the *chowkidars* has not the effect of reserving to the *zemindar* and excluding from the *putni* the *chowkidari chakran* lands. **C** ANANDA CHANDRA *v* KIRANSASHI DEBI **004**

Civil Procedure Code (Act XIV of 1882), s. 462—*Civil Procedure Code (Act V of 1908), O XXXII, r. 7—Compromise, petition for, on behalf of minor—Application for sanction of Court, statement in, that compromise was for minor's benefit—Endorsement of Court on petition—Order not expressly stating that compromise is for minor's benefit, effect of—Petition stipulating for sale of minor's properties not subject of* razinama—*Guardian* ad litem, *power of, to sell property of minor—Father*

Civil Procedure Code—1882—concld

of minor joining in sale with guardian ad litem, *effect of.*

An order of Court sanctioning a compromise on behalf of a minor party need not on the face of it state in so many words that the Court has considered the terms of the settlement and has come to the conclusion that the settlement is in the interests of the minor.

An endorsement of Court on the petition to sanction the compromise, which sets forth that the compromise is in the minor's interests, to the effect that the petition is granted is a sufficient compliance with the provisions of section 462 of the Civil Procedure Code of 1882

If a compromise is binding, it operates as a bar to the trial of any question forming the subject-matter of the compromise.

If a Court sanctions an arrangement but some of its provisions cannot be embodied in the decree because they do not relate to the suit, those provisions can be enforced against the minors though not by way of execution of the compromise decree.

Where in pursuance of a compromise a sale of the minor's properties is effected by the father and also the guardian *ad litem* of the minor, the sale is good, though the guardian *ad litem* may not have the power to act on behalf of the minor

Per *Abdur Rahim, J.*—Where an arrangement is sanctioned by the Court involving the sale of a minor's properties, it is within the competence of the guardian *ad litem* to effect the sale **M** RAJAGOPALAN *v* SUBHARAMA IYER, 9 M. L. J. M. W. N. 36 **354**

Civil Procedure Code (Act V of 1908), s. 2 (17) (d)—Common manager under Bengal Tenancy Act, whether public officer. *See* BENGAL TENANCY ACT, s 9) **747**

——— **ss. 7, 94, 95, O. XXXVIII, r. 5, O. L**—*Provincial Small Cause Court, power of, to attach moveables before judgment—Orders excluded from jurisdiction of Small Cause Court.*

A Provincial Small Cause Court or a Court exercising the powers of a Small Cause Court has power to attach moveables before judgment.

The orders excluded from the jurisdiction of a Small Cause Court are those specifically mentioned in section 94 of the Civil Procedure Code as injunctions or interlocutory orders, that is to say, orders under clause (*c* or clause *e* of the section **C** KUMUD BEHARI PAL *v.* HARI CHARAN SARDAR, 16 C. L. J. 717; 3 C. L. J. 79 **814**

——— **s. 10,** *applicability of—Stay of suit, when can be ordered—Injunction—High Court, power of, to restrain a party before it from prosecuting suit in Mofussil Court.*

Before an order staying a suit can be made under section 10 of the Civil Procedure Code there must be substantial identity between the matter in dispute in the second suit and the matter or some of the matter in dispute in the first suit and there must be a similar substantial identity in the matter of parties.

A Judge sitting on the Original Side of the Bombay High Court has jurisdiction to issue an injunction restraining the defendant in a suit before the High Court from proceeding with a suit instituted by him in a Mofussil Court in such a way as to delay

Civil Procedure Code—1908—contd.

or embarrass the trial of the suit in the High Court **B** MULCHAND RAICHAND *v* GILL AND Co, 21 BOM. L. R. 963 **518**

——— S. 10—*Stay of suit, when can be ordered—Concurrent jurisdiction, what is.*

Before an order under section 10 of the Civil Procedure Code can be made the Courts in which the two suits are pending must be shown to be of concurrent jurisdiction, in the sense that the suit to be stayed could be tried by the Court in which the first suit was instituted. **P** PAIRA MAL AND SONS *v.* RAJ NARAIN AND Co., 114 P. R. 1919 **467**

——— ss. 11, 48 (2)—*Execution of decree, application for, after 12 years from date of decree—Limitation, saving of—Force or fraud long anterior to application, whether saves limitation—Plea of fraud or force, absence of, in last execution application, effect of* Res judicata.

A decree-holder, availing himself of the plea of force or fraud under section 48 (2), Civil Procedure Code, as saving limitation in respect of an execution application made after 12 years after date of decree, is not restricted to proving that the fraud or force occurred within 3 years of the application. He is entitled to the benefit of the proviso even if the fraud or force was long anterior in date.

The failure to plead the saving of the limitation bar in an application for execution will not operate as *res judicata* for a subsequent application **M** MYDEEN ROWTHER *v.* MUHAMMAD ABDUL ABDUL GAFFUR, 10 L. W. 566 **862**

——— s. 11, O. XLI, r. 27—*Rent suit*—Res judicata *as against* pro forma *defendants—Matter not in dispute—Appeal—Appellate Court, power of, to admit fresh evidence, when to be exercised.*

In a suit for rent by the plaintiffs, who were co-sharer landlords, the defendants sought to use a judgment in a previous rent suit between other co-sharer landlords and themselves in which the plaintiffs in this suit were *pro forma* defendants:

Held, that the decision in the previous suit for rent could neither be binding on the present plaintiffs nor operate as *res judicata* against them on matters which were not or could not be in issue in that suit between them as *pro forma* defendants and the principal defendants.

Evidence not tendered before the primary Court ought not to be admitted by the Appellate Court, unless on examining the evidence as it stands some *lacuna* or inherent defect becomes apparent, and not merely because a discovery is made, outside the Court, of fresh evidence and the application is made to import it. **C** APARNA CHARAN CHABRI *v.* GOPI NATH SAMANTA **567**

——— S. 11—Res judicata—*Contrary decisions between parties in respect of similar questions—'Court of jurisdiction competent to try such subsequent suit,' meaning of—Court deprived of jurisdiction before judgment, effect of Landlord and tenant—Water taken with landlord's consent*—Sarasari, *levy of, legality of—Legal and illegal cesses, tests for determining*—Easwaran Koil Mahamai, Kanganam, Tayermutti, Pakkilai, Amanji, Varapattu *and* Varisaipattu *lands, meanings of.*

Questions that have been once settled between the parties are not the less *res judicata* on the ground that similar questions between the same parties have been decided otherwise in other litigation

A Court which had jurisdiction at the time of the institution of the first suit to try the subsequent suit but was deprived of such jurisdiction by legislative enactment before judgment was pronounced in the first suit is a Court competent to try such subsequent suit within the meaning of section 11, Civil Procedure Code

A charge in excess of the prior dry rent for water taken by the tenant is not an enhancement of rent.

Where water is taken by the tenant with the permission of the landlord to irrigate his dry lands, it is only reasonable to infer a contract between the parties that the landlord shall be entitled to a reasonable compensation for the water.

Where the tenant utilises the water for less remunerative crops as cotton, chillies, etc., and *sarasari* has usually been levied in the past, the levy is not illegal.

While mere length of payment will not make a cess, which is purely voluntary or which, on its face, is illegal, acquire a binding character, payment during a long course of years will be presumptive evidence that the payment of a cess had a legal origin, if the cess is of such a nature that a contract to pay it may be reasonably inferred.

Cesses in connection with temples are purely voluntary and the landlord is not entitled to the levy of *eiswaran koil mahamai*

Meaning of *varapattu* and *varisaipattu* lands explained.

The levy of *kanganam, tayermutti, pakkilai* and *amanji* disallowed as regards *varisaipattu* lands. **M** VENKATACHELAM CHETTY *v.* AYYAMPERUMAL TEVAN, 37 M. L. J. 248: 42 M. 702; (1919) M. W. N. 768 **33**

——— S. 11—*Res judicata*, decree against minor whether *See* HINDU LAW—MINOR **412**

——— ss. 11, 144, O. 11, r. 2—*Restitution, application for, when can be made—Declaration that decree is null and void—Omission to ask for restitution—Application, subsequent, for restitution, maintainability of—Estoppel.*

No restriction is contained in section 144 of the Civil Procedure Code as to the manner in which a decree should be varied or reversed, and none can be read into it, except it be "in accordance with law."

The omission to ask for restitution in a suit for a declaration that a decree is null and void, does not amount to a representation that the right to restitution is relinquished. Even if it does amount to such a representation, it would not operate as an estoppel, being a mere statement of intention or promise *de futuro*. **S** GHULAM MAHOMED *v.* LAL CHAND, 13 S. L. R. 153 **552**

——— S. 11, Expl. VI—*Suit on behalf of community in respect of a public right—Parties interested, subsequent suit by—Matter directly and substantially in issue*—Res judicata.

Plaintiff sued on behalf of himself and the Muhammadan community for a declaration to the effect that the land sold by defendant No. 1 to defendant No 2 was *waqf* and that the sale-deed was null and void. It appeared that in 1883 plaintiff on behalf of himself and the Muhammadan community

Civil Procedure Code—1908—contd.

had brought a similar suit against defendant No. 1 and one *I.*:

Held, (1) that Explanation VI to section 11 of the Civil Procedure Code was applicable to the case and it could not be contended that the parties to the two suits were not the same;

(2) that the question whether the area in dispute was *waqf* or not was directly and substantially in issue in the earlier suits, and having been adjudicated upon could not be re-opened **L** KALLAN *v.* MOHAMMAD MIR **886**

——— ss. 18, 21, 39 (b)—*Jurisdiction of Courts, territorial changes in—Sale by Court which ceased to exercise jurisdiction, validity of—Acquiescence by judgment-debtor, whether binds purchaser at sale by Court to which jurisdiction, is transferred —Estoppel—Evidence Act (I of 1872), s. 115—Transfer of Property Act (IV of 1882), s. 41, applicability of.*

A notification declaring that certain property or the area wherein it is situate is transferred from the jurisdiction of one Court to that of another, must be read as speaking retrospectively and as declaring that from and after its date, the former Court ceased to have jurisdiction over the subject-matter.

Where a Court which issued an order of attachment of certain property had been deprived of jurisdiction over the property but it ordered the sale of the property notwithstanding, the judgment-debtor not objecting:

Held, ( ) that the purchaser at the sale acquired no title to the property and that a purchaser at a sale ordered subsequently by the Court to which the jurisdiction over the property was transferred was entitled to possession.

(2) that the fact that the judgment-debtor did not object to the purchase by the plaintiff, however, it might bind the former, did not create any estoppel against an auction-purchaser at a sale held by the right Court.

Section 41 of the Transfer of Property Act only provides that a transfer from an ostensible owner confers title on the transferee. Where title is ostensibly in a person and the real owner further acknowledges the title as true, persons who seek to prove that the title is illusory will not be permitted to do so. What is denied is the right to adduce evidence that the *prima facie* title is not the real title. The principle does not apply to execution creditors, who are not, under all circumstances, estopped by considerations affecting the judgment-debtor.

It is not a general rule of law that an order for sale by a Judge who has no jurisdiction to direct it can be upheld on the ground that the judgment-debtor did not oppose it. The justification for such a rule of estoppel is the legislative provision in that behalf. That provision must be regarded as an exception to the general rule that orders passed without jurisdiction are nullities This exceptional rule of estoppel should not be extended further than is warranted by its language

Sections 18 and 21 of the Civil Procedure Code do not bind in terms persons like execution creditors. **M** VEERAPA CHETTI *v.* RAMASWAMI CHETTI, 26 M. L. T. 271; 37 M. L. J. 442; 43 M. 135; 11 L. W. 232 **579**

Civil Procedure Code—1908—contd.

——— s. 20, O. VII, r. 10—*Contract entered into by telegram—Cause of action, where arises—Jurisdiction Court, whether can consider question suo motu—Order directing return of plaint to proper Court, when can be made*

Plaintiffs, carrying on business at Khanna in the Ludhiana District, sent an order by telegram to defendants, residing and carrying on business at Khamgaun in the United Provinces, to purchase cotton seeds on their behalf. Defendants wired back informing the plaintiffs that the cotton seeds would be purchased and sent, but they sent only a part, withholding the remainder as the price had gone up Thereupon the plaintiffs filed a suit at Ludhiana for the recovery of the balance of the amount paid by them as well as damages for non-delivery:

Held, (1 that the Court was competent to consider the question of jurisdiction *suo motu* and to return the plaint at any stage of the suit for presentation to a Court in which the suit should have been instituted;

(2) that the contract must be taken to have been made at Khamgaun where the defendants carried on their business and where they received the plaintiffs' telegram and that the Ludhiana Court did not have jurisdiction to entertain the suit **L** FIRM OF ASA RAM-KALU RAM *v.* FIRM OF BAKHSHI RAM KANAHYIA RAM **331 579**

——— s. 21

——— s. 21, *applicability of—Jurisdiction, submission to—Summons, receipt of—Failure to object to jurisdiction, effect of—*Ex parte *decree, suit to declare invalidity of, maintainability of.*

A party residing outside the territorial limits of the jurisdiction of a Court, who receives a summons from that Court and raises no objection to its jurisdiction, must be deemed to have submitted to jurisdiction and once a party so submits, he cannot subesquently raise the question again in another Court An *ex parte* decree passed against such a person cannot be vacated on the ground of want of jurisdiction **M** ANNAMMAL *v.* SAMBASIVA AIYAR, 26 M. L. T. 286; 10 L. W. 293; 37 M. L. J. 349; (1919) M W N. 636 **463**

——— s. 35—*Costs—Discretion of Court, exercise of, interference with, when permissible.*

The discretion of a Court as to the award of costs, so long as it is judicially exercised, should not be bound down by any artificial rules, and, where a suit is based on a state of law which has since been overruled either by Statute or by the decision of a superior Tribunal, it would be a sound exercise of discretion to disallow costs. Much, however, depends upon the facts of each case, and upon its presentation by the party and upon the authorities existing at the time the suit was launched. **M** RAMASWAMI NAICKEN *v.* VENKATASWAMI NAICKEN, 37 M. L J 271; 26 M L. T 219; 0 L. W. 326; (191[illegible]) M. W. N 792; 43 M 6[illegible] **7**

——— ss. 37, 38, 39, 150—*Limitation Act (IX of 1908), Sch. I, Art. 182—Jurisdiction, territorial, change in—Mortgage decree—Assignment, after decree, of jurisdiction over mortgaged property to another Court—Execution, application for, to Court which passed decree, maintainability of, 'include' in s. 37, Civil Procedure Code, meaning of—Interpretation of Statutes—American decisions, citation of.*

Held, by the Full Bench (Sadasiva Aiyar, J., dubitante)—A Court which passes a mortgage decree is the proper Court for execution within the meaning of clause (4) of Article 182 of Schedule I of the Limitation Act even though the property over which it had jurisdiction at the time of the decree is taken away from its jurisdiction and assigned to another Court at the time of the presentation of the application for execution.

(Authorities reviewed).

Per *Wallis, C. J.*—The re-drafting and re-arrangements of the sections of a Statute leave the substance of the law unaltered, and such a serious change as the abolition of the decree-holder's right to apply in all cases to the Court which passed the decree in the first instance cannot be raised by implication, but should plainly and clearly appear on the language of the sections. The words "shall be deemed to include" is a phrase of extensive and not of restrictive jurisdiction, and it does not take away the right of Courts to execute decrees passed by them. The case of direct application to the Court to which the area has been transferred is met by the enactment of the new section 150 in the Civil Procedure Code, which is in terms wide enough to authorise that Court to entertain in the first instance any application which might have been made to the Court which passed the decree.

The tendency of Indian Courts to resort unnecessarily to American decisions deprecated.

Per *Ayling, J.*—Section 150, Civil Procedure Code, covers the case of the transfer of all the litigations arising out of a tract of country from one Court to another, and section 37 of the Code whatever it means by ceasing to have jurisdiction to execute, does not operate to exclude the Court which actually passed the decree and to substitute for it another Court and it is still open to the decree-holder to apply to the former for execution by way of transmission of the decree to the Court which has territorial jurisdiction.

Per *Sadasiva Aiyar, J.*—There seems to be no distinction in principle between jurisdiction to entertain an application for sale of property outside the jurisdiction and jurisdiction to execute the decree by sale of such property. Section 150 of the Civil Procedure Code would appear to have been enacted so as to take away both rights from the Court which ceased to have territorial jurisdiction.

Where questions of International Law or Commercial Law or Constitutional Law are involved, it is indispensable owing to paucity of Indian decisions) to refer to foreign decisions Where the Statute Law of India is silent and rules of justice, equity and good conscience have to be applied by Indian Courts and such rules have been clearly set out in famous decisions of foreign Courts, references to such authorities cannot conveniently be avoided. **M** SERNI NADAN *v.* MUTHUSWAMY PILLAI, 37 M. L. J. 284; 26 M. L. T. 227; (1919) M. W. N. 640; 42 M. 821; 11 L. W. 68 **213**

——— **s. 39 (b)** **579**

——— **ss. 42, 102**—*Execution of decree—Decree of Small Cause Court transferred to ordinary Court, effect of—Order in execution, whether appealable—Appeal, second, whether lies.*

Where a decree made by a Court exercising Small Cause Court jurisdiction is transferred for execution to a Court exercising ordinary original jurisdiction, the decree by force of its transmission acquires, for the purposes of execution, all the rights which a decree passed by a Court of ordinary original jurisdiction would have. An order made in execution of such a decree is appealable, but there is no second appeal. **M** DATTADA BHIMARAJU *v.* KASIBOTLA SREERAMA SASTRULU, 37 M. L. J. 303; 26 M. L. T. 256 **408**

——— **s. 47.** *See* PLEADER AND CLIENT **20**

——— **ss. 47, 104 (h), O. XXI, r. 40**—*Execution of decree—Order dismissing application for judgment-debtor's arrest, nature of—Appeal, whether lies.*

An order under Order XXI, rule 40, of the Civil Procedure Code dismissing the application of a decree-holder for the arrest and imprisonment of the judgment-debtor relates to the execution of a decree and as such comes under section 47 of the Code and is appealable

The concluding words of section 104, clause (*h*), of the Civil Procedure Code indicate that where an order directing the arrest or detention of the judgment-debtor is made in execution of a decree, it is to be treated as an order coming under section 47. **L** RAJ KARNI *v.* KARAM ELAHI **68**

——— **s. 47, O. XXI, r. 2 (3)**—*Execution of decree—Payment out of Court - Executing Court, whether can investigate, fact of payment*

It is not open to an executing Court to investigate in execution proceedings the fact of receipt of the decretal amount or of an adjustment of the decree out of Court. By reason of the special provision of the law contained in Order XXI, rule 2 (3) of the Civil Procedure Code, the determination of this question has been taken out of the purview of section 47 of the Code of Civil Procedure. **P** PARMA RAM *v.* LEHNA SINGH, 125 P. R. 1919 **443**

——— **s. 47, O. XXI, rr. 66, 90**—*Execution of decree Sale—Application to set aside sale on ground of omission to give notice of settlement of sale proclamation—Appeal, whether lies—Appeal, second, whether competent—Limitation applicable—Limitation Act (IX of 1908), Sch. I, Arts. 166, 181.*

An application to set aside an execution sale on the ground of absence of notice of the settlement of the sale proclamation, as required by rule 66, Order XXI of the Civil Procedure Code, can only be considered under section 47 of the Code, and any order passed thereon is open to appeal and second appeal.

Such an application is governed by Article 166 and not by Article 181 of Schedule I to the Limitation Act

The failure to give notice to the judgment-debtor before setting a proclamation of sale would not of itself invalidate the sale. **M** THEKKEDATH NEELU NEITHIAR *v.* SUBRAMANIA MOOTHAN, 1919) M. W. N. 597; 11 L. W. 59 **809**

——— **s. 47**—*Execution of decree—Sale, confirmation of—Possession, dispute as to delivery of, whether relates to execution of decree—Judgment-debtor, remedy of.*

Where, after an auction sale is confirmed and a sale certificate is granted to the auction-purchaser,

Civil Procedure Code—1908—contd.

the judgment-debtor or his legal representative objects to the delivery of possession of the property sold, the dispute cannot be said to relate to the execution, discharge or satisfaction of the decree within the meaning of section 47 of the Civil Procedure Code, inasmuch as the decree has already been satisfied, and, therefore, the executing Court cannot entertain the objection. **P** NUSRAT ALI *v.* SAKINA BEGAM, 121 P. R. 1919 **460**

——— **s. 47, O. XXI r. 2**—*Execution of decree—Satisfaction of decree, allegation of, whether can be investigated—Certification, absence of, effect of.*

Where in execution of a decree the judgment-debtor alleges that the decree has been satisfied and that the decree-holder has failed fraudulently to certify the satisfaction to the Court, the Court has power under section 47 of the Civil Procedure Code to investigate the allegation. **C** KAMINI KUMAR SAHA *v.* ABDUL RAHIM, 30 C. L. J. 248 **67**

——— **s. 48 (2)**—Force or fraud, plea of, when saves limitation. *See* ANTE s. 11 **862**

——— **ss. 58, 145**—*Execution of decree—Arrest of judgment-debtor—Surety bond for release of judgment-debtor, whether can be enforced in execution proceedings.*

A security bond executed in favour of a decree-holder to obtain the release of a judgment-debtor from imprisonment in execution, and filed in Court, whereupon the release of the judgment-debtor is ordered under the proviso to section 58 of the Civil Procedure Code, must be regarded as a matter of record in the Court as much as if it had been executed to the Court itself, and is consequently enforceable against the surety in proceedings in execution. **M** NANJUNDA ROW *v.* MARWADI DHAMMAJI, 10 L. W. 172 **673**

——— **s. 64, O. XXI, r. 54**—*Attachment, order for, when takes effect.*

An attachment operates as a valid prohibition against alienation of the attached property, only from the date on which the necessary proclamation is made, *i. e.*, a copy of the order is affixed as required by Order XXI, rule 54, Civil Procedure Code. **M** SINNAPPAN *v.* ARUNACHALAM PILLAI, 37 M. L. J. 375; (1919) M. W. N 678; 10 L. W. 391; 26 M. L T. 281; 42 M. 844 **207**

——— **s. 73, O. XXI, r. 55**—*Execuiton of decree—Money paid to remove attachment, whether liable to rateable distribution.*

Money paid under rule 55 of Order XXI of the Civil Procedure Code to remove an attachment is not subject to rateable distribution, and is payable only to the attaching creditor.

Section 73 of the Civil Procedure Code is restricted in its application to assets held by the Court which were realised or obtained by process of execution **B** NATHMAL GHAMIRMAL *v.* MANIRAM RADHAKISSON, 21 BOM. L R 975 **599**

——— **s. 80**—Injunction against public officer—Notice, failure to give, effect of. *See* PRESIDENCY TOWNS INSOLVENCY ACT, s. 38 (*b*) **627**

——— **s. 92**—*Religious Endowments Act (XX of 1863), s. 14—Temple—Appointment of trustee by temple committee—Suit for declaration that appointment is invalid and for injunction restraining interference with temple affairs—Sanction under s. 92, whether necessary—Jurisdiction of Civil Court.*

Civil Procedure Code—1908—contd.

A suit for a declaration that the appointment of a trustee by a temple committee is invalid and for an injunction restraining him from entering on his duties or interfering with the affairs of the temple and its properties is a suit virtually for the removal of a trustee and is not maintainable without the requisite sanction under section 92, Civil Procedure Code. The suit may also be treated as one in which direction of the Court is necessary for the administration of a public trust and falls under the section, at least under clause (*h*), sub-section (1).

Such a suit does not come within the scope of section 14 of the Religious Endowments Act.

A Civil Court can question the appointment of a trustee by a Devasthanam Committee, if the appointment is not made reasonably and in good faith **M** SUBRAMANIA PILLAI *v.* KRISHNASWAMI SOMAYAJIAR, 26 M. L. T. 143; (1919) M. W. N. 522; 42 M. 668 **605**

——— **s. 94** **814**

——— **s. 94 (c) (e)**—Injunction restraining party from proceeding with application, validity of *See* BENGAL TENANCY ACT (VIII B. C. OF 1885), s. 40 **37**

——— **s. 95** **814**

——— **s. 100, O. XLI, r. 27**—*Additional evidence, refusal of Appellate Court to admit—Appeal, second—High Court, interference by.*

Per *Wallis, C J.* and *Ayling, J.* (*Sadasiva Aiyar, J.*, dissenting.—The High Court cannot, in second appeal, interfere with an order of a lower Appellate Court rejecting an application made to it by a party to the appeal before the hearing of the appeal to admit certain material evidence discovered since the date of the decree appealed against which was not available to the said party with the exercise of due diligence during the trial of the suit.

Per *Sadasiva Aiyar, J.*—The High Court has power, in second appeal, to consider the propriety of the exercise of its discretion by a lower Appellate Court as regards the admission of additional evidence, though that discretion would not be interfered with lightly any more than the discretion of a Court rejecting a review petition would be lightly interfered with in revision. The question whether the Appellate Court exercised its discretion properly is a question of law as it is now settled that good grounds for review are also good grounds for the Appellate Court to allow further evidence to be adduced. **M** VAITHINATHA PILLAI *v.* KUPPA THEVAR, 10 L. W. 122; 37 M. L. J 125; (1919) M. W. N. 525; 26 M. L T. 246. 42 M. 737 **274**

——— **s. 102** **408**

——— **s. 104 (b)**—Order dismissing application for judgment-debtor's arrest, whether appealable. *See* ANTE s. 47 **68**

——— **s. 105**—*Interlocutory order, right to attack, in appeal against final decree, nature of—Compliance with order, whether debars appellant from contesting it.*

The right conferred by section 105 of the Civil Procedure Code is unqualified and by complying with the directions or findings of an intermediate order a plaintiff is not deprived of the right to raise in appeal the question of the propriety of such order and to attack its correctness.

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Plaintiff sued for possession by partition of definitely marked portions of certain premises, but was ordered to amend his plaint so as to include the whole of the premises under the penalty of having his suit dismissed. He amended his plaint accordingly. The first Court held that certain parts were not liable to be partitioned. In appeal the plaintiff attacked the order directing amendment of the plaint. The District Judge held that by complying with the order the plaintiff had divested himself of the right to dispute any part of the premises being included in the property to be partitioned. The plaintiff thereupon filed a second appeal to the High Court:

Held, that the plaintiff's compliance not being a voluntary one, he could go behind the order directing amendment of the plaint and that the lower Appellate Court erred in not considering and deciding whether this order was correct. L SHAH JAHAN *v.* INAYAT SHAH 644

——— **s. 115, O. XXXIII, r. 5 (d)**—*Application for leave to sue* in forma pauperis *Court, power of, to decide question of limitation---Revision—High Court, power of, interference of.*

Where an application is made for leave to sue *in forma pauperis*, the Court making an enquiry into the alleged pauperism of the applicant has power to decide the question of limitation and decide whether the plaintiff has or has not a subsisting cause of action.

The High Court has no power to interfere in revision with the decision of a Court which had jurisdiction to deal with the matter P HAUR KAUR *v.* MUNI LAL, 134 P R. 1919 441

——— **s. 115, O. XXI, r. 89**—*Limitation Act (IX of 1908), Sch I, Art. 166—Execution of decree—Sale—Deposit of decretal amount, whether application to set aside sale—Application to set aside sale made more than three years after confirmation of sale, dismissal of—Revision, maintainability of.*

Where property is sold in execution of a decree, the mere deposit by the judgment-debtor of the amount of the decree within thirty days of the ale cannot be regarded as an application under Order XXI, rule 89, of the Civil Procedure Code to set aside the sale.

Where an application by a judgment-debtor to set aside a sale of his property in execution of the decree against him made more than three years after the confirmation of the sale was dismissed as time-barred:

Held, that there was no ground for the exercise of the powers vested in the High Court under section 115 of the Civil Procedure Code.

The policy of the Legislature in providing short periods within which applications should be made to set aside sales, is that titles arising from judicial sales should be settled as soon as possible. B RAOJI BABURAO *v.* [illegible] 43 B. 835; 43 B 735 135

——— **s. 115**—High Court, whether can interfere with order assessing fair and equitable rent. *See* BENGAL TENANCY ACT, s. 105 411

——— **s. 115**—*Objection abandoned by Pleader—Subsequent objection by successor of Pleader, whether can be entertained—Irregularity—Revision—Bengal Land Registration Act (VII B. C. of 1876), s. 78, scope of—Tenant, whether can waive provisions of section—Suit for arrears of rent assigned to plaintiff—Registration, whether necessary.*

Where an objection, taken by the Pleader for the defendant, is abandoned, the Court acts with material irregularity in the exercise of its jurisdiction in entertaining such objection raised at a subsequent stage of the proceedings by the successor of the Pleader who originally abandoned it.

The provisions of section 78 of the Bengal Land Registration Act were framed for the protection of the tenant, and he is free to waive that benefit. If he does waive it, he cannot be permitted at his choice to resile from the position deliberately adopted by him.

Where the purchaser of the interest of a landlord as well as the back rents, sues to recover these rents as well as the rent due since his purchase, it is sufficient for him to prove during the trial that his name was registered subsequent to the institution of the suit. C NAJABAT ALI *v.* BIBI KADIRAN, 30 C. L. J. 48 49

——— **s. 115, O, VII, r. 11 (b)**—*Court Fees Act (VII of 1870), s. 12—Order requiring plaintiff to make up deficient Court-fee on plaint—Revision, whether maintainable—Procedure.*

Where a Court calls on a plaintiff to make up the Court-fee on his plaint and the plaintiff contends that the fee already paid is sufficient, the High Court will not interfere with the order in revision. It is for the plaintiff to make up his mind whether he will comply with the Court's order or not If he does not comply, his plaint will be rejected. Then unless the trial Court's order is final under section 12 of the Court Fees Act, the plaintiff will have a right of appeal. If the order is final, neither an appeal nor revision will be competent. P CHUNI LAL *v.* ROSHAN LAL, 120 P. R. 1919 427

——— **s. 115, O. IX, rr. 2, 8**—*Plaintiff, failure of, to pay process-fee—Defendant, application by, for time to file written statement, whether amounts to appearance—Suit, dismissal of, for default—Conditions of order, non-compliance with—Revision—High Court, power of interference of.*

Where a plaintiff has made default in paying the fee for service of a summons on the defendant, but notwithstanding this defendant applies to the Court for time to file written statements, the filing of such application amounts to an appearance by the defendant under rule 8 of Order IX of the Civil Procedure Code, and the Court would not be justified in dismissing the suit under rule 2 of that Order.

As rules 2 and 8 of Order IX of the Code require certain conditions to be satisfied in order to vest jurisdiction in a Court to pass an order thereunder, an order made by a Court, where these conditions are not fulfilled, is open to revision by the High Court under section 115 of the Civil Procedure Code. Pat GOLAB KUER *v.* BIBI SAIRA 41

——— **s. 129**—*Bombay High Court Rules (Original Side), r. 228—Originating summons, procedure by way of, when can be adopted—Suit for partnership accounts and damages, whether can be instituted by originating summons—Procedure.*

An originating summons is not the proper pro-

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cedure where the disputed facts are of such complexity as to involve a considerable amount of oral evidence. The action should be confined to matters which are capable of decision in a summary way.

An action was instituted by an originating summons in which the plaintiff sought a declaration that a partnership between himself and the defendants had been dissolved, and asked for an account of the partnership, damages for breach of the partnership agreement and an indemnity for certain liabilities incurred:

Held, that as considerable evidence would have to be taken in order to determine the matters in dispute, the procedure by way of originating summons was not the appropriate procedure for the action. **B** VITHALDAS CURSONDAS *v* DULSUKHBHAI VADILAL, 21 BOM. L R 972 **650**

——— **s. 135, O. XXXVIII, rr. 1, 3**—*Surety bond, construction of—Undertaking to produce defendant at time and place ordered and to be liable for decree amount in default—Appearance of defendant in Court to conduct case—Release of surety on application for discharge, validity of—Privilege of party while in Court on Court business—Liability of surety where decree passed on compromise—Contract Act (IX of 1872), s.* 135.

A person executed a security bond undertaking to produce the defendant in a suit at the time and place ordered by the Court, and that on his failure to do so, he and his property would be liable for the amount payable to the plaintiff. While the defendant was in Court conducting his case, the surety asked to be relieved from his obligation, but as the defendant was unwilling to surrender, the application was disallowed. Thereafter the plaintiff and defendant agreed to a consent decree which was put into execution against the surety. On appeal the District Judge discharged the surety from his obligation. On second appeal to the High Court:

Held, that in order to discharge the surety from his obligation it was necessary for the defendant to appear in pursuance of a summons or warrant, or to voluntarily surrender to the Court, and to submit himself to be dealt with by the Court as directed by Order XXXVIII of the Civil Procedure Code and that as the defendant was not before the Court in the manner above indicated and did not surrender, the surety could not be discharged.

Where a person becomes surety for the production of the defendant in a suit, the fact that the parties effect a compromise, instead of going to trial, would not relieve the surety of his obligation to the Court

A party who is before the Court to conduct his own case or to give evidence should not be arrested while he is before the Court or when leaving the Court house.

The provisions of the Civil Procedure Code should be strictly complied with in taking surety bonds. **M** ODAYAMANGALATH APPANNI NAIR *v.* ISAAK MACKADAM, 37 M. L. J 435; 10 L W 533 **367**

——— **s. 141**—Review, power of. *See* RELIGIOUS ENDOWMENTS ACT, s. 10 **156**

——— **s. 144** **552**

——— **s. 144**—*Restitution—Mesne profits—Decree reversed on appeal—Successful party, right of, to restitution.*

If a decree is reversed in appeal, the party against whom the decree had been given is entitled to have restitution of all that he has been deprived of under it, including the profits accruing from property of the possession of which he had been deprived by the other party. **L** ABDUL RAHMAN *v.* ALLAH BAKHSH **119**

——— **s. 145** **673**

——— **s. 145**—*Limitation Act (IX of 1908, Sch. I, Art. 182 (2)—Surety Execution of decree against surety—Appeal by defendant—Limitation, commencement of.*

A decree-holder has, under section 145, Civil Procedure Code, a right to execute his decree against a surety to the extent to which he has rendered himself personally liable in the manner provided for the execution of decrees. The fact that the defendant appealed, and that the sureties were not parties to the appeal, would make no difference. **B** CHOLAPPA GATTINNA SANNA *v.* RAMCHANDRA ANNA PAI, 21 BOM. L R 861; 44 B. 34 **187**

——— **s. 149**—*Appeal—Insufficient Court-fee on memorandum to appeal—Permission to make up deficiency, when to granted—Discretion of Court.*

Where insufficient Court-fee has been paid on a memorandum of appeal, the Court will not in its discretion under section 49, Civil Procedure Code, allow the deficiency to be made up on the day of the hearing, unless it is satisfied that some grounds exist for the exercise of its discretion

Where, therefore, a memorandum of appeal had been insufficiently stamped and it appeared that in the lower Court also the plaint was insufficiently stamped but upon objection being taken Court-fees were realized *ad valorem* upon the market-value of the land in suit:

Held, that under the circumstances the mistake was not a *bona fide* one and did not deserve the exercise of the discretion vested in the Court under section 49, Civil Procedure Code. **L** SATTO *v.* AMAR SINGH, 62 P. L. R. 1919 **256**

——— **s. 150** **213**

——— **s. 151**—Review—Inherent power of Court to *See* RELIGIOUS ENDOWMENTS ACT, s 10 **56**

——— **s. 151, O. IX, rr. 8, 9**—*Dismissal of suit for default—Restoration, application for—Sufficient cause, failure to establish—Inherent power of Court, exercise of—Precedents, value of—Question of fact—Discretion of Court.*

Order IX, rule 9, of the Civil Procedure Code makes it compulsory on a Court to set aside a dismissal under Order IX, rule 8 of the Code, where the plaintiff satisfies it that there was sufficient cause for his non-appearance. This rule, however, does not take away the Court's power to restore the case for any other valid reason The Court can exercise its inherent jurisdiction for the ends of justice, provided the defendant is amply protected in the matter of costs.

The decision of one Judge on the facts before him, that sufficient cause has not been shown for the restoration of a suit, cannot provide a precedent for other Judges on similar applications.

On questions of fact or matters of discretion there can be no precedent. Each Judge is entitled to come to the conclusions he thinks right on questions of fact and in matters of discretion. **B** BILASIRAI LAXMINARAYAN *v.* CURSONDAS DAMODARDAS, 21 BOM. L. R 952 **252**

——— s. 151, O. IX, r. 13—*Application to set aside* ex parte *decree—Jurisdiction to vacate decree apart from provisions of rule—Inherent power of Court, scope of, extent of.*

A Court has no power apart from the provisions of rule 13, Order I, of the Civil Procedure Code to set aside an *ex parte* decree made by itself.

Per *Abdur Rahim, Offg. C. J.*—Most of the cases where the Court exercises its inherent power relate to cases of an incidental or ancillary character, though it is not to be understood that the inherent power of the Court is limited to such cases, for that would be unduly limiting the scope of section 15 of the Civil Procedure Code. But there is no inherent power in a Court to set aside an *ex parte* decree by summary procedure and the power of the Court in that connection is limited to the circumstances mentioned in Order I, rule 13, Civil Procedure Code The inherent power of the Court should be exercised not capriciously or arbitrarily, but *ex debito justitiæ* on sound general principles and not in conflict with the intentions of the Legislature.

Per *Oldfield, J.*—Although statutory enactments, expressed in affirmative language, may sometimes be construed as having a negative implication, such implication must be a necessary and reasonable one. It is impossible to presume that the provisions of Order I, rule 13, of the Civil Procedure Code contain an imperfect statement of the law on the very definite topic with which the rule deals, *viz.*, the provision of a summary procedure for the re-opening of *ex parte* proceedings.

Per *Seshagiri Aiyar, J.*—Section 151, Civil Procedure Code, must be construed, not as empowering a Court to exercise powers which it never possessed, but as preserving to it those powers which it has been in the habit of exercising and which, by oversight or failure to specify, have not been particularised in the Statute. The section has been introduced for the simple reason that no Code can exhaustively deal with the procedure for exercising every power which a Court of justice is competent to exercise, and the language of the section shows that it should be availed of only where a power which has been exercised has not been provided in the Code. **M** GADI NEELAVENI *v.* MARAPPAREDDI GARI NARAYANA REDDI, 37 M. L. J. 599; 26 M L. T. 377; 10 L. W. 606 (1920) M. W. N. 19; 43 M. 94 **847**

——— s. 151, O. XXI, rr. 11, 17—*Execution of decree—Application for execution proving infructuous—Decree-holder not wishing to proceed, effect of—Application to amend previous application, nature of—Proceedings interrupted owing to erroneous order of Court—Inherent power of Court, exercise of.*

Where an application for execution of a decree proves infructuous, and the decree-holder states that he no longer intends to proceed with it, the proceeding arising out of the application *ipso facto* comes to an end, and there is no necessity for a formal order striking off the application to terminate the proceeding.

An application to amend a previous application, though not in the form prescribed by rule 11 of Order XXI of the Civil Procedure Code, but which, when read with the previous application, supplies all the information required by that rule, should be treated as a fresh application, and execution should be directed to proceed.

The fact that a decree-holder has, by an erroneous order of the Court, been prevented from proceeding with the execution of his decree in accordance with law, would justify the bringing into operation of section 151 of the Civil Procedure Code So, too, where it is found that a plea advanced by a judgment-debtor of payment is dishonest, and was made with the intention of delaying the execution until the decree was time-barred **C** HARIDAS BASAK *v.* RAJ KUMAR DEY **111**

——— s. 151, O. XLI, r. 23—*Inherent power, nature and scope of—Appeal—Appellate Court, powers of—Remand, when can be ordered—"Preliminary point," meaning of.*

Section 151 of the Civil Procedure Code contemplates the exercise of powers *ex debito justitiæ* which are not conferred by the rules of the Code. But where a power is given expressly, the inherent power of the Court ought to be very cautiously indented upon.

An Appellate Court has inherent power to make a remand under conditions other than those mentioned in Order XLI, rule 23, of the Civil Procedure Code.

The words "preliminary point" in Order XLI, rule 23, of the Civil Procedure Code, connote a determination not affecting the merits of the case.

The reversal of a judgment with a direction to admit evidence improperly excluded, is not a disposal on a preliminary point. **M** ATHAPPA CHETTY *v.* RAMANATHAN CHETTY, 10 L. W. 359; 37 M. L. J. 636 **417**

——— ss. 248, 311 **257**

——— O. I, r. 3—*Joinder of causes of action, when permissible—Test for determining whether joinder is permissible.*

The test whether a suit is bad for misjoinder of causes of action is, not whether the decree awarded to the plaintiffs is joint, but whether it is alleged in the plaint that there is against the defendants any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions Where the plaintiffs allege that the defendants had jointly become their partners, and as partners had jointly signed an acknowledgment, in respect of personal and partnership accounts upon which the plaintiffs rely, there is no misjoinder of causes of action **S** KHEMOMAL *v.* FIRM OF PESSUMAL, 13 S. L. R 133 **32**

——— O. II, r. 1. *See* AGRA TENANCY ACT, s. 95 (*a*) **82**

——— O. II, r. 2, O. XXXIV, r. 1—*Mortgages, two, in favour of same person—Suit on prior mortgage without disclosing subsequent mortgage—Suit on subsequent mortgage, whether maintainable.*

A person holding two mortgages on the same property and suing on the first mortgage alone is, in respect of the second mortgage, a party to the suit under Order XXXIV, rule 1, Civil Procedure Code and if he omits to mention his second mortgage in that suit and obtains a decree on the basis of his first mortgage, he cannot afterwards sue to enforce

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his second mortgage against such property. **O**
GUR PRASAD v CHHUTKU LAL, 6 O L J 482 **753**
——— **O. II, r. 3**—Joinder of claims. *See* OUDH RENT ACT, s. 105 **456**
——— **O. VI, r. 17**—Plaint, amendment of—Suit for possession—Specific performance, prayer for, whether can be added. *See* ARBITRATION **283**
——— **O. VII, r. 10** **331**
——— **O. VII, r. 10,** direction in, mandatory. *See* MADRAS ESTATES LAND ACT, s. 6 **308**
——— **O. VII, r. 11 (b)**—Order requiring plaintiff to make up deficient Court-fee on plaint. *See* CIVIL PROCEDURE CODE, s. 115 **427**
——— **O. VIII, r. 6, O. XX, r. 19**—*Set-off, nature of—"Debt" in O. VIII, r. 6, meaning of—Plaintiff, whether can set up limitation as answer to set-off—Principal and agent—Suit on agency transactions—Set-off, whether can be claimed.*

The right to claim a set-off is one of attack as well as of defence, and in a suit for the recovery ot the balance upon the taking of accounts in which the defendant claims a set-off, he occupies the position of a plaintiff in respect of any balance claimed by him, and the plaintiff is not precluded from setting up the defence of limitation as well as any other defence to the attack of the defendant.

The term "debt" in rule 6 of Order VIII of the Civil Procedure Code means a present obligation to pay a liquidated sum of money, and, in order to constitute a debt, it is not sufficient that a sum of money may be ultimately recoverable.

Where, therefore, in a suit for the balance to be found due on taking an account of an agency transaction, the defendant in his written statement claimed that a balance was due to him on the accounts:

Held, that Order VIII, rule 6, of the Code did not apply, inasmuch as there was no ascertained sum of money claimed, the amount being made to depend upon the examination of the accounts, and the written statement contained no particulars of the debt sought to be set off

In a suit upon agency transactions where the defendant alleges claims against the plaintiff which he could have sued to enforce independently of the plaintiff's suit, but which claims were, at the date of the plaintiff's suit, barred by limitation, he cannot be permitted to plead these claims as a set-off against the claim of the plaintiff. **M** PANUGANTI NARASIMHA RAO v SRINIVASA JAGANNATHA RAO, 37 M. L J. 193; 10 L. W. 183; (1919) M. W. N. 628; 26 M. L. T. 276; 42 M 873 **234**
——— **O. IX, r. 2** **41**
——— **O. IX, rr. 3, 8, O. XVII, rr. 2 to 4**—*One of several defendants not served—Adjournment for ascertaining whereabouts—Default of appearance—Dismissal of suit for default, legality of "Hearing," meaning of—Procedure.*

Several adjournments were granted in a case to enable the plaintiff to discover the whereabouts of one of the defendants who had not been served with notice. On the last date of hearing neither the plaintiff nor his Pleader appeared, while the Pleader for the defendants, except the one who had not been served, was present The Court dismissed the suit for default, and subsequently refused an application to set aside the dismissal. The plaintiff applied in revision:

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Held, (1) that Order XVII, rule 2, Civil Procedure Code, applied to the case, and that the original order of dismissal was a legal order.

(2) that the negligence of the plaintiff's Pleader resulting in the non-appearance of the plaintiff was not "sufficient cause" under Order XVII, rule 4 of the Code for setting aside an order of dismissal for default.

Per *Pratt, J. C.*—Where the conditions laid down in rules 2 and 3 of Order XVII of the Civil Procedure Code coincide, the procedure laid down in rule 2 of the Order must be followed inasmuch as the consequences of non-appearance have a natural precedence over the merits.

Per *Fawcett, A. J. C.*—The word "hearing" in rules 3, 6 and 8, Order IX, of the Civil Procedure Code is not necessarily equivalent to a "hearing of evidence," and the words "the defendant" in rule 8 of that Order must be construed as "the defendants who have been served." **S** GHULAM HYDER KHAN *v.* TEKCHAND, 13 S. L. R. 149 **560**
——— **O. IX, r. 8** **252**
——— **O. IX, r. 8**—Application by defendant for time to file written statement, whether amounts to appearance. *See* CIVIL PROCEDURE CODE, s. 115 **41**
——— **O. IX, r. 8**—Suit dismissed for default—Restoration, order of, interference with. *See* AGRA TENANCY ACT, s. 177 **69**
——— **O. IX, r. 9**—Dismissal of suit for default—Restoration, application for. *See* ANTE, s. 151 **252**
——— **O. IX, r. 13**—Court, power of, to set aside *ex parte* decree. *See* ANTE, s. 151 **847**
——— **O. IX, r. 13, O. XXXII, rr. 3, 4**—*Minor—Guardian* ad litem, *whether can be appointed without consent—Guardian not properly appointed—Minor, whether bound by decree*—Ex parte *decree against minor not properly represented—Application to set aside decree, whether maintainable.*

The appointment of a person as the guardian *ad litem* of a minor without that person's consent is not a valid appointment.

Where a minor is not properly represented on the record, he cannot be regarded as a party to the proceedings, and the result of such proceedings, therefore, cannot bind him: consequently there can be no question of his having been prevented by sufficient cause from conducting them. If in such a case an *ex parte* decree is passed against a minor, he cannot apply to set it aside under Order IX, rule 13, of the Civil Procedure Code

In order to attract the provisions of Order IX rule 13 of the Civil Procedure Code, relating to the setting aside of *ex parte* decrees, the person seeking the aid of the Court must be a party to the suit. It is of the essence of the rule that the complaint must come from one whose rights could validly be dealt with by the trial Court.

If in consequence of the failure to have a guardian appointed a minor defendant is not properly before the Court, any decree passed against him and any proceedings intended to affect him would be nullities The minor has in such a case, his remedy against the invalid act of the Court in quite a different proceeding, and not in a proceeding instituted to set aside the decree treating him as if

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he were properly before the Court. **M** EDA PUNNAYYA *v.* JANGALA KAMA KOTAYYA, 37 M. L. J. 399; 26 M. L. T. 327; 10 L. W. 471; (1920) M. W. N. 1 **84**

——— **O. XX, r. 19** **234**

——— **O. XXI, r. 2** **67**

——— **O. XXI, r. 2**—*Execution of decree—Consent decree—Application by judgment-debtor intimating to Court that the terms of the decree have been performed, nature of—Decree-holder, remedy of.*

A consent decree provided that the defendant-judgment-debtor should deliver to the plaintiff a parcel of land and should raise a wall within a time specified in the decree. The decree further provided that the defendant, as soon as he had carried out the terms of the decree, should notify that fact to the Court. Within the specified time the defendant made an application intimating to the Court that he had complied with the terms of the decree. The application was received but no action was taken upon it:

Held, (1) that the application of the defendant did not fall under Order XXI, rule 2, of the Civil Procedure Code;

(2) that if the defendant had not faithfully carried out the terms of the decree, the proper course for the plaintiff was to apply for execution of the decree and the Court would then consider whether the terms of the decree had been carried out. **C** LIGRAJ PATJOSI *v.* MAHADEB RAM, 30 C. L. J. 118 **882**

——— **O. XXI, r. 2 (3)**—Executing Court, whether can investigate fact of payment out of Court. *See* ANTE, S. 47 **443**

——— **O. XXI, r. 11**—Application to amend previous application, nature of. *See* ANTE, S. 151 **111**

——— **O. XXI, rr. 15, 17**—*Execution of decree—Joint decree—One of several joint decree-holders, whether can apply for execution—Procedure—Amendment of application for execution, when permissible.*

A joint decree cannot be executed by one of the several joint decree-holders in respect of what the applicant considers his share in the decree. Much less can it be executed by one of the decree-holders in respect of the entire decree, unless it is on behalf of the decree-holders for the benefit of them all. Even if the application for execution of the decree by one of the decree-holders be on behalf of or for the benefit of them all, it is for the Court to allow, for sufficient cause, the execution of the decree on such application, and in case the Court does allow the application and the decree to be so executed, the Court is required to make such order "as it deems necessary for protecting the interests of the persons who have not joined in the application."

The requirements of rule 15 of Order XXI of the Civil Procedure Code go to the root of the execution of the decree itself, and, therefore, while rule 7 of the Order empowers an executing Court to allow a defect in the requirements of rules 1 to 4 of the Order to be amended, it does not include rule 15 of the Order, so that an application for execution of a decree which does not comply with the requirements of rule 15 cannot be allowed to be amended. **Pat** MEIK *v.* MIDNAPUR ZAMINDARY COMPANY, LD., (1919) PAT. 849; 4 P. L. J. 575 **803**

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——— **O. XXI, r. 17.** *See* ANTE S. 151 **111**

——— **O. XXI, r. 17** Amendment of application for execution, when permissible. *See* ANTE, R 15 **803**

——— **O. XXI, rr. 22 (a), 90**—*Civil Procedure Code (Act XIV of 1882), ss. 248, 311—Execution of decree—Attachment, order for Execution petition, dismissal of, for default—Attachment, whether subsists—Sale, application for—Notice to judgment-debtor, failure to issue, effect of—Irregularity.*

The dismissal of an application for the sale of property attached in execution of a decree does not in any way affect the continuance of the attachment.

Where there is a subsisting attachment and a Court proceeds to sell the property in pursuance of that attachment, it would not be acting without jurisdiction if no notice is given of the application for an order for sale. The absence of notice is a mere irregularity and does not render the sale null and void. **M** VUPPU SITARAMAYYA *v.* MINCHULA GOPALAKRISHNAMMA, 10 L. W. 190; 37 M. L. J. 216; (1919) M. W. N. 568; 43 M. 57 **257**

——— **O. XXI, r. 40**—Order dismissing application for judgment-debtor's arrest, nature of. *See* ANTE, S. 47 **68**

——— **O. XXI, r. 54** **207**

——— **O. XXI, r. 54**—*Attachment of immoveable property belonging to Hindu co-parcener—Attachment of share in each item, validity of.*

An attachment of the share of an undivided Hindu co-parcener in joint family property must take the form of an attachment of his undivided share in the family property as a whole, and not of his undivided share in each item of it. **M** JANGANTHAR SUBBIAH *v.* KAMISETTI CHINNA VENKATASUBBIAH, 10 L. W. 449 **336**

——— **O. XXI, r. 55**—Money paid to remove attachment, whether liable to rateable distribution. *See* ANTE, S 73 **599**

——— **O. XXI, r. 58**—Claim, dismissal of—Order, whether affects persons not parties to proceedings. *See* LIMITATION ACT, SCH. I, ART. 11 **260**

——— **O. XXI, rr. 61, 63** **260**

——— **O. XXI, rr. 67 (2), 90**—*Execution of decree Sale, application to set aside—Advertisement in Gazette, whether necessary—Irregularity—Prejudice, proof of—Objection not stated in application, whether can be taken—Appellate Court, whether can entertain new objection.*

Order XXI, rule 67 (2), of the Civil Procedure Code merely provides that an executing Court may, in its discretion, direct an advertisement of a sale to be published in the Gazette, but there is no obligation on its part to do so, and the failure to give such a direction does not amount to material irregularity in the conduct of the sale within the meaning of rule [illegible] of the Order

A judgment-debtor applying under Order XXI, rule 90, of the Civil Procedure Code to set aside an execution sale must show not only that there has been material irregularity in the conduct of the sale but also that such irregularity has resulted in substantial injury to him.

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An execution Court should not consider objections other than those expressly stated in the application presented to it under Order XXI, rule 90, of the Civil Procedure Code. *A fortiori*, objections not so taken cannot be considered by an Appellate Court, when hearing an appeal from the order of the Court rejecting an application to set aside a sale. **L** GOPI CHAND *v.* BENARSI DAS **794**

——— **O. XXI, r. 89**—Deposit of decretal amount, whether amounts to application to set aside sale. *See* ANTE, s. 11 **135**

——— **O. XXI, r. 89, O. XLIII, r. 1 (j), O. L, r. 1 (a)**—*Scope of O XXI, r. 89—Execution of decree—Sale subject to mortgage—Mortgagee, right of, to apply to set aside sale—Small Cause decree—Execution by ordinary Court—Order setting aside or refusing to set aside sale of immovable property—Appeal, maintainability of—Revision to High Court, whether lies.*

The words "where immoveable property has been sold" in Order XXI, rule 89, Civil Procedure Code, are not restricted to the actual interest that passes by the sale.

It is open to the holder of a mortgage on property sold in execution of a decree to apply under Order XXI, rule 89, Civil Procedure Code, to set aside the sale, even though his mortgage is admitted in the sale and the sale is subject to his right.

Where the decree of a Small Cause Court is being executed by an ordinary Court, an order made by the latter under rule 89, Order XXI of the Civil Procedure Code, is appealable to the District Judge, and the High Court can entertain an application under section 115 of the Code from the order of the District Judge. The Provincial Small Cause Court Act would have no application to such a case. **M** KANDASWAMI ASARI *v.* SWARNAVELU STAPATHI, 10 L. W. 556; (1920) M. W. N. 151 **958**

——— **O. XXI, r. 90** **257**

——— **O. XXI, r. 90**—Application to set aside sale on ground of omission to give notice of settlement of sale proclamation. *See* ANTE, s. 47 **809**

——— **O. XXI, r. 90**—Sale, application to set aside, contents of. *See* ANTE, 67 (2) **794**

——— **O. XXI, r. 90**—Sale, proclamation of, omission in, whether ground for setting aside sale. *See* DECREE **143**

——— **O. XXI, rr. 96, 97, 98, 99, 103**—*Execution of decree—Sale—Auction-purchaser, application by, for recovery of possession, dismissal of—Appeal, whether lies—Remedy of auction-purchaser.*

While proceedings for the sale of certain mortgaged property were pending, the mortgagor executed leases of certain land included in the mortgaged property for 40 years. The mortgagee purchased the property in auction sale and applied under Order XXI, rule 97, of the Civil Procedure Code for possession of the same. The lower Court held that the leases were collusive, but declined to interfere with the possession of the lessees and passed an order under Order XXI, rule 96, of the Code that it should be proclaimed that the interest of the mortgagor had been transferred to the auction-purchaser:

Held, (1) that the order of the lower Court amounted to an order dismissing the application of the decree-holder under Order XXI, rule 99, of the Civil Procedure Code;

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(2) that the auction-purchaser, who was a party other than the judgment-debtor against whom an order had been made under Order XXI, rule 99, of the Civil Procedure Code, had no right of appeal and that his remedy was to institute a suit against the occupiers for their ejectment. **O** BIBI SAIDUNNISSA *v.* FAIYAZ HASAN **923**

——— **O. XXII, r. 3, O. XLI, r. 4**—*Appeal—Death of joint plaintiff before hearing of appeal, effect of—Abatement of appeal—Decree passed in ignorance of fact of death, validity of—Appeal by one of several plaintiffs—Other plaintiffs, whether necessary parties.*

Where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, rule 4 of Order XLI of the Civil Procedure Code does not authorise him to proceed with the appeal without making the other plaintiffs parties thereto.

The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity. **C** BALARAM PAL *v.* KANYSHA MAJHI **548**

——— **O. XXII, r. 4**—*Appeal—Death of party—Legal representatives not brought on record—Appeal, second—Substitution, whether can be effected.*

Where in an appeal pending in an Appellate Court one of the parties dies and the appeal is proceeded with without bringing his representatives on to the record, the High Court in second appeal cannot order the substitution, because the question of substitution can only arise where there is a death pending a suit or appeal. **C** PROMADA NATH ROY *v.* ABDUL MAJID **480**

——— **O. XXII, r. 9**—*Appeal—Death of appellant—Representatives not brought on record—Abatement of appeal, setting aside of—Fraud of agent, whether sufficient cause.*

Where an appeal abates owing to the failure to bring the legal representatives of the deceased appellant on record, the fact that the agent of the representatives of the deceased appellant colluded with the other side and did not apply within the statutory period for substitution, is sufficient cause under rule 9 of Order XXII of the Civil Procedure Code for setting aside the order directing the appeal to abate. **C** SHIBA PROSAD JANA *v.* HATI MAITY **585**

——— **O. XXII, rr. 10 & 11**—Alienee, joinder of, as party. *See* TRANSFER OF PROPERTY ACT, s. 52 **428**

——— **O. XXIII, r. 1**—*Withdrawal of suit without leave to bring fresh suit—Suit, subsequent, based on different allegations, maintainability of.*

Plaintiff brought a suit against *C.* and *T.* to recover possession of a house, on the allegation that it had been let to *C.* who had abandoned it and that *T.* was in possession of it as a trespasser. The defendants pleaded that they were the owners of the house The plaintiff obtained permission to withdraw the suit but he was not given leave to bring a fresh suit Subsequently he brought another suit for possession of the same house against *T.* and *K*, on the ground that after the withdrawal of the first suit he had let the house to *T.* who had abandoned it and had sold it to *K*:

Held, that the previous suit having been withdrawn

without leave to bring a fresh suit, the plaintiff was debarred under the provisions of Order XXIII, rule 1, of the Civil Procedure Code from alleging that *T.* was not the owner of the house, and that, therefore, the present suit was not maintainable. **P** KANSHI RAM *v.* RAO BALDEO SINGH, 136 P. R 1919 **478**

——— **O. XXIII, r. 3** **423**

——— **O. XXIII, r. 3**—Compromise, Court whether bound to record. *See* TRANSFER OF PROPERTY ACT, s 52 **833**

——— **O. XXXI, rr. 1, 2**—*Administrator, one of several, suit by, to recover rent, maintainability of—Consent of other administrators.*

A suit by one of several administrators of an estate with the consent of the other administrators, who are impleaded as *pro forma* defendants, to recover rent is maintainable. **C** NAZIR AHAMAD *v.* RAGBAT ALI **478**

——— **O. XXXI. r. 2** **478**

——— **O. XXXII, rr. 3, 4** **1?4**

——— **O. XXXII, r. 7** **354**

——— **O. XXXIII,** *scope of—Petition for leave to sue* in forma pauperis—*Court, jurisdiction of, to enquire into merits.*

The primary object of an inquiry under Order XXXIII, of the Civil Procedure Code, is to determine the pauperism of the petitioner, and a Court is not justified in determining complicated questions of law in the course of such inquiry. If in the course of the inquiry it appears to be clear from the facts brought out in the evidence or from the facts alleged in the petition that the petitioner has no good subsisting cause of action, the Court can dismiss the petition, but it cannot treat the petition as calling for an adjudication of various questions which ought to be the subject of specific issues after all the pleadings have been filed. **M** KALLIANI AMMA *v.* MATATHIL VEETIL ACHUTHAN NAIR, 10 L. W. 174; (1919) M. W. N. 573; 37 M. L. J. 309 **239**

——— **O. XXXIII, r. 5 (d)** **441**

——— **O. XXXIV, r. 1**—Mortgage by father—Son, whether has interest in redemption *See* CUSTOM—MORTGAGE **411**

——— **O. XXXIV, r. 6**—*Mortgage, suit on—Preliminary decree, declaring that if sale-proceeds prove insufficient mortgagor shall be liable for balance, nature of—Final decree, whether necessary.*

A preliminary decree in a mortgage suit, which provides for sale of the mortgaged property and directs that if the whole amount of the debt is not realised by the sale, the defendant shall be liable for the rest of the claim if legally realisable, is not a composite decree which would enable the holder thereof to proceed against the other properties of the judgment-debtor without a fresh decree obtained under rule 6 of Order XXXIV of the Civil Procedure Code and, therefore, the decree-holder is entitled to apply for a personal decree for the amount of the balance. **C** SITANATH SHAH *v.* MADAN MOHAN DAS, 23 C. W. N. 924 **904**

——— **O. XXXV, r. 4**—*Interpleader suit—Claimants, failure of, to appear—Procedure.*

Where in an interpleader suit both the claimants fail to appear, the proper course for the Court is to follow the procedure laid down in the first part of rule 4 (1) of Order XXXV of the Civil Procedure

Code and to declare that the plaintiff is discharged from all liability to the defendants in respect of the money claimed, award him his costs, dismiss him from the suit and direct that after getting his taxed costs he must pay the balance of the money in his hands into Court to the credit of the suit.

The order might further provide that it is to be without prejudice to any claim by the defendants or either of them for payment out of Court, or alternatively that the suit may proceed in the names of one of them as plaintiff in place of the original plaintiff or alternatively that an issue be directed to determine the rights of the two defendants *inter se*. **B** KHEMCHAND ISARDAS *v.* KHAIRUDDIN RANGLAHI, 21 BOM L. R. 548 **365**

——— **O. XXXVIII, rr. 1, 3** **367**

——— **O. XXXVIII, r. 5**—Attachment before judgment—Attachment after decree, whether necessary. *See* PLEADER AND CLIENT **20**

——— **O. XXXVIII, r. 11** **20**

——— **O. XXXIX, rr. 1, 2, O. XL, r. 1**—*Temporary injunction, when to be granted—Receiver, appointment of, grounds for—Waste, proof of.*

Proof of waste is a ground for the appointment of a Receiver.

In order to obtain an injunction or the appointment of a Receiver the applicant has to show that the property is in danger of being wasted or alienated and should be preserved from waste or alienation; but while in order to secure an injunction it is enough to show that the applicant has a fair question to raise as to the existence of the right alleged, the Court will not ordinarily appoint a Receiver while one party is actually in possession and an irreparable wrong may be done to him by the Court taking interim possession of the property **M** GURUSWAMI PANDIYAN *v.* SENDATHI KALAI PANDIA CHINNA THAMBIRAR, 10 L. W. 551 **760**

——— **O. XLI, r. 1**—Failure to file copy of decree—Appeal, whether valid. *See* LIMITATION ACT, s. 5 **137**

——— **O XLI, r. 4**—Appeal by one of several plaintiffs—Other plaintiffs, whether necessary parties. *See* ANTE, O. XXII, R. 3 **548**

——— **O. XLI, rr. 19, 21**—*Appeal dismissed in default—Application for review of order dismissing appeal and for re-hearing cross-objections decided ex parte, nature of—Order dismissing application, whether appealable—Revision, whether lies*

A decree for redemption of a garden having been passed against two minors, they appealed to the District Judge praying for enhancement of the amount awarded to them, while the plaintiffs preferred cross-objections contending that they were entitled to the possession of the property without any payment at all. The minors' appeal was dismissed for default and the cross-objections were accepted *ex parte* The defendants then made two applications, one for a review of the order dismissing the appeal in default and the other for setting aside the *ex parte* order deciding the cross-objections. Both these applications having been rejected, the defendants preferred an application for revision in the High Court:

Held, 1) that neither of the orders dismissing the two applications was appealable and that the defend-

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ants were competent to make an application for revision;

(2) that inasmuch as the next friend of the minor defendants had not been served with a notice of the date fixed, the order of dismissal of appeal for default was prejudicial to the minors and could not be sustained. **L** MAHMUD HUSSAIN *v.* MUHAMMAD USMAN 333

——— O. XLI, r. 21 333

——— O. XLI, r. 22—Cross-objections against co-respondent, whether permissible. *See* MORTGAGE 659

——— O. XLI, r. 23—"Preliminary point", meaning of. *See* ANTE, s. 151 417

——— O. XLI, r. 27 274

——— O. XLI, r. 27—Appellate Court, power of, to admit fresh evidence when to be exercised. *See* ANTE, s. 11 567

——— O. XLI, r. 27—*Appellate Court, power of, to take additional evidence, limits of—Evidence improperly admitted—Order directing prosecution based on such evidence, legality of.*

Order XLI, rule 27, of the Civil Procedure Code does not provide that in order to enable the Appellate Court to pronounce judgment in favour of a particular party additional evidence may be admitted in appeal. It only provides that where it is impossible to pronounce judgment at all on the evidence, the Court might admit additional evidence.

The legitimate occasion for the use of the power conferred by Order XLI, rule 27, of the Civil Procedure Code on an Appellate Court is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it.

Where additional evidence is improperly admitted in appeal, the Court has no jurisdiction to direct the prosecution of a witness on the basis of such evidence and an order made under section 476 of the Criminal Procedure Code in such a case cannot be sustained. **Pat** JAGDEO LAL *v.* RAM LAGAN SINGH, 20 CR L. J. 826 826

——— O. XLI, r. 33—Appellate Court, power of, to modify decree. *See* MORTGAGE 659

——— O. XLI, r. 33—Appellate Court, whether can set aside decree which has not been appealed against. *See* APPEAL 883

——— O. XLI, r. 33, *scope of—Appellate Court, power of, in respect of non-appealing parties—Procedure, proper—Joinder of parties.*

The object of Order XLI, rule 33, Civil Prodceure Code, is to enable an Appellate Court to pass judgments or orders which would give consistency to its decisions and although the power to interfere with an order against a person who is not before it should be exercised with great care and caution, the discretion of the Court to grant relief which benefits a partywho has not appealed is not hampered.

The principle that no decree or order should be passed against a person without hearing him does not apply where the non-appealing party is benefited by the order.

The illustration to Order XLI, rule 33, Civil Procedure Code, is not exhaustive of the scope of the rule

Where interference with a decree in favour of a party not before the Court is deemed necessary, the Court should implead him in the exercise of its plenary powers so that he may avail himself of the benefit of the decree in execution. **M** MUKKU VENKATARAMIAH *v.* MUKKU CHINNAIAH, 10 L. W. 357; (1919) M. W. N 807 201

——— O. XLIA, r. 2 (2)—*Madras High Court (Appellate Side) Rules, r. 42—Party not served with notice of appeal, right of, to apply to set aside ex parte order.*

Rule 42 of the Appellate Side Rules of the Madras High Court does not prevent a party who has not been served with notice of appeal, from applying to set aside any order passed *ex parte* in the appeal on the ground that he has not entered appearance. He cannot be penalised for not entering appearance by losing his right to receive notice of interlocutory applications, when such applications are made within the time limited for his entering appearance. **M** SANTHANAM AIYANGAR *v.* SRINIVASARAGHAVAN, (1919) M. W. N. 772; 10 L. W. 564; 37 M. L. J. 693 756

——— O. XLVII, r. 1—*Review—Bengal Tenancy Act (VIII B C. of 1885), s. 104, sub-s. (2), order under, whether open to review on ground of error.*

Proceedings before the Revenue Authorities under sub-section (2) of section 104 of the Bengal Tenancy Act, 1898, as it stood before its amendment, were in the nature of a suit and an order made therein was in the nature of a decree. Consequently, such order is reviewable on the ground of error by the Settlement Authorities. **C** RAM PRASAD NARAYAN *v.* DAUD DURZI, 30 C. L. J. 1 39

——— O. XLVII, rr. 1, 7—*Provincial Small Cause Courts Act (IX of 1887), s. 25—Review, grant of—Sufficient cause - Fresh evidence, discovery of, effect of—Appeal or revision, interference in—Revision in small cause matters—Discretion of Court, exercise of.*

Where a review is granted for sufficient cause, the control to be exercised by an Appellate or Revisional Court need not be strict and when the Court has applied its mind to the circumstances, such control may be exercised with reference to every presumption in favour of its having done so correctly.

The simple fact that fresh evidence will alter or is expected to alter a decision already arrived at is ordinarily not a sufficient cause for granting a review.

Although Order XLVII, rule 7, Civil Procedure Code, is not applicable to Small Cause Courts, its provisions do not limit the discretion which the High Court possesses under section 25 of the Provincial Small Cause Courts Act and should not be used except for substantial reasons. **M** VALLIAMMAI MADATHI *v.* ASSERVADA NADAR 44

——— O. XLVII, r. 7, inapplicable to Small Cause Courts. *See* ANTE O XLVII, R 1 44

——— Sch. II, para. 20—*Arbitration and award—Arbitration, private—Award, bad in part, whether can be split up—Amendment of award, when permissible—Parties signing award, effect of.*

When an award goes beyond the powers of the arbitrator, it is permissible to separate such portion of the award, and to maintain the remainder, if good

Ordinarily, an arbitrator after he has delivered

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his award is *functus officio*, but if the parties after the delivery of the award again make a reference asking for the re-consideration of a part of the award, and the arbitrator thereupon re-considers that part of his award and amends it accordingly, the amendment so made is within his powers.

An award of arbitrators derives its binding force as against the parties entirely from their previous submission, and their subsequent signature in token of consent in no way affects the character of the award. It is neither more binding upon the parties when signed by them nor less binding when they do not sign it. It is binding in the former case, because it is the judgment of a tribunal to which the parties had unconditionally submitted before adjudication and not because they have subsequently acknowledge the justice of the decision. **N** KISANCHANDRA *v.* RAMLAL **992**

——— **Sch. III, para. 11,** transfer in contravention of, void. *See* HINDU LAW—JOINT FAMILY **776**

Companies Act (VI of 1882), s. 142—*Official Liquidator, resignation of—Sanction of Court, whether necessary.*

An Official Liquidator is not at liberty to resign without the sanction of the Court which appointed him. **P** DIGNASSE *v.* CHAJJU RAM, 51 P. R 919 **649**

Companies Act (VII of 1913), ss. 184, 186—*Company in liquidation—Suit by Official Liquidator to recover money due on promissory note—Defendant, whether entitled to set off sum due to him—Liquidation Court, jurisdiction of—Summary process, whether justified—Prior order of Liquidation Judge disallowing plea of set-off, whether bar—Civil Procedure Code (Act V of 1908), O III, r. 6.*

The Official Liquidator of a Bank in Liquidation sued to recover a sum of money due on a promissory note executed by the defendants, who claimed to set off against the plaintiff's demand the money received by the Bank by way of security for the due performance of his duties by *K.*, one of the two defendants, on his appointment as cashier of the Bank. It appeared that the defendants were members of a joint Hindu family and that the money deposited with the Bank belonged to the family. Moreover, the Bank in its dealings had treated the money as belonging to both the brothers:

Held, (1) that the defendants who were debtors on the promissory note were creditors in respect of the money deposited as security and were, therefore, entitled to raise the plea of set-off.

(2) that as the defendants were not contributories of the Bank, the Court conducting the liquidation had no jurisdiction to recover by a summary process the money due from them on the promissory note;

(3) that an opinion expressed by the Liquidation Judge with regard to the plea of set-off did not operate as *res judicata*. **L** OFFICIAL LIQUIDATOR, INDUSTRIAL BANK OF INDIA, LTD. *v.* KESHO DAS **653**

——— **s. 186** **653**

Compromise—*Consideration—Forbearance to sue, whether good consideration*—Bona fide *cause of action.*

In order that a forbearance to sue should amount to a consideration for a compromise, some liability must be shown to exist, or to be reasonably supposed, to exist, by the parties. If one of the parties to the compromise has no case and knows that he has none, the compromise would not be held binding. **P** RALU *v* PHALLA, 137 P. R. 19 9 **497**

——— by female owner, whether amounts to alienation *See* LIMITATION ACT, SCH I, ART 125 **171**

——— *of doubtful claim, validity of—Consideration—Gratuitous compromise, whether can be enforced—Oudh Rent Act (XXII of 1886), s. 108, cl. (5-A)—Forbearance to file non-maintainable suit, whether good consideration for compromise.*

A *bona fide* compromise effected to settle doubtful claims is not legally invalid because the surrender of a doubtful right by one party, and the forbearance by the other of his right to sue, form a good reciprocal consideration for such a settlement. An intending litigant, who *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, does give up something of value, but there must be in fact a serious claim honestly made.

Where a person obtained from the Revenue Court a declaration that he was entitled to under-proprietary rights, but being misled by the opposite party who threatened to file a suit in the Civil Court to challenge the propriety of the finding of the Revenue Court, relinquished the under-proprietary rights conferred upon him, and accepted a *kabuliyat* and was subsequently sued in ejectment:

Held, that inasmuch as section 108 5-A of the Oudh Rent Act forbade the bringing of a suit of the nature threatened, the relinquishment must be regarded as gratuitous and was not enforceable. **O** MAHMUDA *v* SHANKAR BAKHSH SINGH, 1 U. P. L. R. (J. C.) 87; 22 O. C. 163; 6 O. L. J. 401 **104**

——— signed by Pleader not having authority, validity of. *See* DECREE **143**

Confession, *evidentiary value of—Court, whether can accept part and reject part—Corroboration of part, effect of.*

The ordinary rule is that a confession is evidence for the prisoner as well as against him and must be taken altogether. But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part can be accepted as true without accepting the whole.

If other evidence incompatible with a part of the confession is on record, it may be relied on in preference to that part. **N** HASNU *v.* EMPEROR, 20 CR. L. J. 737 **145**

——— *Statement by accused—Guilt, inference as to—Co-accused, whether affected—Accused, presence of, as accessory, effect of—Corroboration.*

A statement made by an accused person which suggests an inference of guilt may amount to a confession, though the person making the statement may directly repudiate his participation in the crime. Such a statement may be taken into consideration against he person making the statement, but it may be unsafe to use it against a co-accused. Where, however, it appears that the person making the statement was at all events an accessory present at the commission of the crime, the statement can be used against the co-accused, if sufficient corroboration is forthcoming. **O** JASODA *v.* EMPEROR, 6 O. L. J. 426; 20 CR. L. J. 787 **691**

Construction of document—*Intention of parties—Conduct--Mortgage by several joint owners—Transaction, whether divisible—Refusal of one to execute, effect of.*

Plaintiff sued for a declaratory decree to the effect that certain land was liable to attachment and sale in execution of his decree against the defendants. It appeared that the land was released from attachment on the objection of *K.*, who contended that it had been mortgaged to him. The mortgage deed was drawn up in favour of *K* and was to have been executed by three persons, who were joint owners in equal shares of the land in dispute. One of these three refused to execute it on the ground that it was without consideration:

Held, (1) that as the mortgage deed was not signed and executed by all three joint owners of the land, it was incomplete and conferred no rights whatever upon *K.*;

(2) that the mortgage was intended to be one single and indivisible transaction and could not be split up.

The construction to be put on a particular transaction must depend upon the intention of the parties as inferred from their acts and conduct. **L** KISHAN DAYAL *v.* RODU **813**

Contract—*Deposit, whether part payment or earnest money—Forfeiture of deposit—Intention of parties*

Where upon an agreement of sale the vendee deposits a sum of money with the vendor, the deposit, unless paid on any special terms, is not merely part payment but is an earnest, so that, on the one hand, if the contract be performed, it is brought into account as part payment; on he other hand, if the purchase makes default, it may be retained by the vendor, and is thus a security for the performance of the purchaser's part of the contract. The test in each case is, did the parties mutually agree, expressly or by implication, that the sum paid was to be treated, not merely as part payment, but as a guarantee for due performance of the contract. **C** HABIBULLAH *v.* ARMAN DEWAN, 30 C. L. J. 1 3; 24 C. W. N. 40 **875**

Contract Act (IX of 1872), s. 11—Contract by minor, validity of—Ratification by minor, effect of. *See* REGISTRATION ACT, s. 17 (*b*) **123**

——— **s. 11**—*Specific Relief Act, (I of 1877), s. 38—Contract with minor, validity of—Minor, whether can be required to make compensation.*

A contract entered into with a minor is not a voidable contract, but is simply a *nudum pactum ab initio* void, and completely outside the scope of Chapter IV and section 38 of the Specific Relief Act. **N** MULIABAI *v.* GARUD, 15 N. L. R. 149 **65**

——— **ss. 11, 65**—*Mortgage by minor, validity of—Minor, whether bound to refund money.*

Where a mortgage turns out to be invalid because the mortgagee, at the date of the mortgage, was a minor, he cannot be held liable to refund the mortgage-money even if he misrepresented his age. **M** GURUSWAMI PANTULU *v.* BUDHKARAN LALL, 10 L. W. 225; 26 M. L. T. 245 **14**

——— **s. 15**—Coercion, plea of. *See* LANDLORD AND TENANT **872**

——— **s. 23**—*Money paid under agreement opposed to public policy, whether can be recovered.*

A person who has paid money under an agreement which is void as opposed to public policy may recover back the money so paid while the agreement is still unperformed.

Defendant promised to marry his daughter to the plaintiff and on the faith of that promise the plaintiff paid a sum of money to the defendant. Subsequently the defendant refused to carry out the agreement and the plaintiff brought a suit to recover the amount paid by him to the defendant:

Held, that the plaintiff was entitled to recover the sum advanced by him inasmuch as the agreement, although void under section 23 of the Contract Act, had not been performed. **P** JIWANA *v.* MALAK CHAND, 113 P. R. 1919 **407**

——— **s. 25**—Compromise, whether new contract. *See* EVIDENCE ACT, s. 92 **527**

——— **s. 45**, *scope of—Debt due to several persons—Decree obtained by one creditor in respect of his share—Suit by others for balance, maintainability of.*

Section 45 of the Contract Act does not provide that when one of several joint creditors has been paid his share of the debt and has thus ceased to be a creditor, the remaining creditors cannot maintain a suit for the balance of the debt.

The words "as between him and them" in section 45 of the Contract Act signify that as between the debtor and the original body of creditors the right to claim payment would rest with that body, but if by part payment the number of creditors is reduced, the right to claim payment will be a right arising as between the debtor and the remaining creditors.

On dissolution of a partnership one-fifth of a debt due to the partnership from the defendant fell to the share of one of the partners, *K.* The latter sued the defendant for recovery of his share of the debt, impleading also as defendants his former partners who refused to join as plaintiffs, and obtained a decree. Subsequently the other partners sued the defendant for recovery of the remaining four-fifths of the debt:

Held, that the suit was not barred under the provisions of section 45 of the Contract Act. **P** BHAG MAL-SADDU RAM *v.* WALIA, 128 P. R. 1919 **416**

——— **ss. 55, 56, 64** **125**

——— **s. 65** **14**

——— **s. 69.** *See* HINDU LAW—WIDOW **796**

——— **s. 69**—*Payment made by* dar-putnidar *on behalf of* putnidar—*Amount paid, whether can be recovered*—Dar-putnidar, *whether can be ordered to account for period during which he has been in possession—Limitation.*

A *dar-putnidar* paying up the arrears of rent due by the *putnidar* to the *zemindar* came into possession of the *putni* under clause (4) of section 13 of the Putni Regulation of 1819 on the 17th of November 1862. He continued in possession for many years. It was not till the 7th August 1899 that his possession was formally terminated. On the 1st February 1901 the *putnidar* instituted a suit for rent against the *dar-putnidar* for the period between May 1895 and January 1901. During the pendency of this litigation the *putnidar* repeatedly made defaults in payment of rent and the *dar-putnidar* had to satisfy the demand of the superior landlord on seven successive occasions from 4th November 1905 to

the 15th November 1908. The *dar-putnidar* then brought a suit to realise these sums after allowing the defendant *putnidar* credit for the rents payable by him a *dar-putnidar* during the period:

Held, (1) that as the payments made by the plaintiff benefited the defendant, the plaintiff was entitled to a decree;

(2) that the claim of the plaintiff could not be postponed merely because accounts had not been taken of the possession of the plaintiff from the 17th November 1862, inasmuch as if a claim were now put forward for an account of this period, it would be successfully met by the plea of limitation. **C** UMESH CHANDRA DE *v.* JAKHOMAL MEHERA, 30 C. L. J. 34 **90**

——— **s. 72,** applicability of. *See* BENGAL TENANCY ACT, s. 171 **553**

——— **s. 73** **125**

——— **s. 73,** *applicability of, to breaches of contract concerning immovable property - Damages, measure of.*

Though the illustrations to section 73 of the Contract Act refer mainly to breaches of contract with regard to movables, there is nothing in the wording of the section itself which would indicate that it is not applicable to contracts dealing with immovable property. A party who suffers from any such breach is entitled to recover from the party responsible for the breach compensation for any loss or damage caused to him thereby which naturally arises in the usual course of things from such breach. **O** JAGAR NATH SINGH *v.* MUSAI SINGH **889**

——— **s. 73**—*Damages, measure of—Lease—Failure of lessor to give possession to lessee—Assessment of damages, mode of.*

Section 73 of the Contract Act lays down the principles to be employed in assessing damages and embodies the principles of English Law on the subject. The loss or damage must arise naturally in the usual course of things from the breach or it must be such as the parties knew to be likely to result from the breach. In estimating the loss, the means which existed of remedying the inconvenience must be taken into account.

In an action for damages for the lessor's failure to give possession of the lands leased to the lessee, the plaintiff is entitled to the primary profits he would have derived had he cultivated the lands in a husbandlike manner, *i.e*, the net and not the gross produce, making deductions for the expenses of cultivation and the failure of season, if any. The amount fixed in the contract cannot form the criterion for assessing damages, and the opportunities which the plaintiff had of renting other lands should be taken into account.

Per *Phillips, J.*—In considering what should be set off against the gross profits it must be assumed that the cultivation was carried on entirely by hired labour. **M** AMANCHI VENKATARAMA SASTRULU *v.* NAMA VENKANNA, 26 M. L. T. 287; 10 L. W. 405; (1919) M. W. N. 893; 37 M. L. J. 335 **191**

——— **ss. 92, 102**—*Sale of goods—Broker liable as principal, position of—Stoppage in transit, right of—Assignment by buyer, effect of.*

A broker liable upon a principal contract both to the seller and the purchaser has a right to enforce the contract and is entitled to sue in respect thereof. His position by virtue of his personal liability to his sellers for the price is that of an unpaid vendor with a right of stoppage in transit conferred by section 99 of the Contract Act, but such right would be defeated if the buyer obtained the documents of title and delivered them to a second buyer who acted in good faith and gave valuable consideration for them, as such delivery would amount to an assignment under section 102 of the Contract Act **C** RAMENDRA NATH ROY *v.* BRAJENDRA NATH DAS, 46 C. 831 **986**

——— **s. 102** **986**

——— **s. 108, Excep. (1)**—*Possession required by - Exception, nature of—Custody - Hire-purchase system—Possession of hirer, nature of*—Bona fides *of transferee—Owner, whether can recover article from transferee.*

The possession referred to in Exception (1) to section 108 of the Contract Act is distinguishable from mere custody or possession held for a specific or limited purpose. It must be juridical possession or held under some right analogous to that of the owner or involving, expressly or impliedly, a power to sell, though the owner may have restricted the exercise of that right in a particular manner.

A person who obtains an article under the hire-purchase system does not become the owner thereof till a payment is made in full in pursuance of the agreement. Till such payment is made, he is only entitled to the use of the article in terms of the agreement and subject to the control of the owner.

Where a person holds a certain article on hire with an option to purchase, the nature of the possession and the powers of the person having it are determined by the contract of hire. When in such a case the hirer sells the article hired to another person, the owner is entitled to recover the same from the purchaser though the latter may have acted in good faith. **O** ALBERT *v.* SINGER SEWING MACHINE COMPANY, 14 U. P. L. R. (J. C.) 43 **50**

——— **s. 128**—*Limitation Act (IX of 1908), Sch. I, Art.* 115—*Principal and surety—Liability of surety, whether co-extensive with that of principal—Limitation for suit against surety, commencement of.*

The liabilities of a principal and his surety, though arising under the same transaction, are distinct, because the liability of a surety does not necessarily in all cases arise simultaneously with that of the principal, and it may happen that the remedy against the principal is barred when the liability of the surety arises. The question depends on the terms of the contract of guarantee by which the surety has bound himself. Section 28 of the Contract Act merely defines the measure of liability and has no reference to the extinction of the liability by the operation of the Statute of Limitation.

Defendants Nos. 1 and 2 borrowed a certain sum from the plaintiff under a registered promissory note payable on demand. Defendants Nos. 3 and 4 by a letter addressed to the plaintiff stood sureties for the debt, stating that they made themselves liable for the debt. The suit on the promissory note was instituted more than three years from the date of the letter by the sureties:

Held, (1) that as against the sureties limitation began to run from the date of the sureties' own contract;

Contract Act—concld.

(2 that the liability of the sureties having arisen simultaneously with that of the defendants Nos. 1 and 2 and with the making of the advance, the suit against the sureties was barred under Article 15, Schedule I to the Limitation Act. **C** CHARU CHANDRA *v.* FAITHFUL **559**

——— **s. 135**—Surety, liability of, where decree passed on compromise *See* CIVIL PROCEDURE CODE, s. 135 **367**

——— **s. 253** 4 —*Partnership—Partners, liability of, for negligence, extent of—Duty of partners.*

Where in a suit for dissolution of partnership and for accounts, the defendants are charged with negligence and contribution is claimed in respect of losses, if the defendants can show that they used such skill and judgment as they possessed in the conduct of the business, they will not be liable to indemnify the plaintiffs for the losses.

The rule of diligence among partners, in the absence of any specific agreement, is that they are not always obliged to use that middle kind of diligence which prudent men employ in their own affairs, they are secure if they act in partnership affairs as they would do in their own, so that if a partner fall into error in the management from want of a larger share of prudence and skill than he is truly master of, he is not liable for the consequences. Good faith is required in a partner as well as diligence and if a partner is guilty of gross negligence, unskilfulness, fraud, or wanton misconduct in the course of the partnership business, he is ordinarily responsible to the other partners for all losses and damages sustained thereby **Pat** SASTHI KENKAR BANDOPADHYA *v.* MAN GOBINDA CHANDRA, (1919 PAT 419 **2**

Contribution, *suit for—Judgment on which suit is based, admissibility of—Trespass by plaintiff and defendant—Joint tort-feasors—Right of plaintiff to contribution.*

Where the basis of a suit for contribution is a judgment in a suit between the same parties, that judgment is admissible in evidence in the suit for contribution not for the purpose of impugning its propriety, but for the purpose of showing the joint liability of the defendant, even though it may not be a judgment *in rem* or operate as *res judicata.*

The plaintiff in a suit for contribution must show some equity in his favour. If he was a joint tort-feasor with the defendant, as where both trespassed on a third party's land, no right to contribution is created. **M** KOPPANNA CHELAMIAH *v.* DATLA SURYANARAYANA, 10 L. W. 261; 37 M. L. J. 346; 26 M. L. T. 363 **77**

Co-sharers—*Joint* khata—*Possession of one co-sharer, whether can be disturbed by anoher—Remedies of dispossessed co-sharer—Specific Relief Act (I of 1877), s. 9.*

The peaceful possession of a person is a substantial right the infringement of which gives rise to a cause of action and although if he is dispossessed, he has the right to sue under section 9 of the Specific Relief Act, he is not bound to do so

In the case of a joint *khata* of agricultural land one co-sharer ordinarily cultivates one field and other co-sharers cultivate other fields, but one co-sharer cannot dispossess the other against his will

Co-sharers—concld.

from the field of which he has possession. Where such dispossession takes place, the dispossessed co-sharer can sue to recover possession of the plot of which he has been deprived. **P** GANESHA MAL *v.* IBRAHIM, 04 P. R 1909 **569**

——— *Partition, private—Each co-sharer collecting his share of profits and paying revenue separately—Profits, liability for.*

Where in a village there is a private partition in force, according to which each co-sharer collects profits to the extent of his share, and the parties have been paying their revenue separately, there can, as between the co-sharers, be no liability for profits, so long as this arrangement remains in force. **O** SUBHANI *v.* JAGDEO SINGH, 6 O. L. J. 468 **776**

Costs—Discretion of Court, exercise of, interference with, when permissible. *See* CIVIL PROCEDURE CODE, s. 35 **7**

———, rule as to award of. *See* HINDU LAW—WIDOW **796**

Court-fee insufficient, on memo. of appeal—Permission to make up deficiency, when to be granted *See* CIVIL PROCEDURE CODE, s. 149 **256**

Court Fees Act (VII of 1870), s. 12, finality of order under. *See* CIVIL PROCEDURE CODE, s. 115 **427**

Criminal Procedure Code (Act V of 1898), ss. 4 (b), 195, 476, 537—*Order under s. 476, whether complaint—S. 195 (5), scope of—Want of complaint, whether irregularity or illegality.*

An order under section 476, Criminal Procedure Code, is not a complaint.

The provisions of section 195 (5) of the Criminal Procedure Code only apply when a Court has, on the application of some person, sanctioned the trial of any of the offences named in section 195 and cannot apply to a case sent to a Magistrate under section 476, Criminal Procedure Code, for an order under the latter section is not a sanction.

Though want of sanction under section 195 of the Criminal Procedure Code may not vitiate a trial, yet where there has been no complaint under section 195 as regards the offence of which the applicant has been found guilty, the absence of a complaint is not a mere irregularity but is fatal to the trial. **N** NANAKRAM *v.* EMPEROR, 20 CR. L. J. 770 **610**

——— **ss. 16, 530 (h)**—*Trial before Bench of Magistrates—Evidence recorded in absence of one member, effect of—Conviction, legality of.*

It is illegal for a Bench of Honorary Magistrates to convict in a case in which the evidence is recorded and the judgment delivered in the absence of one of the members of the Bench **M** TANTRAVAHI BAPIRAJU, *In re.* 10 L. W. 360; 26 M. L. T. 362; 20 CR. L. J. 823 **823**

——— **ss. 20, 29**—*Calcutta Port Act (III B. C. of 1890), ss. 84, 158, 159—Presidency Magistrate, jurisdiction of, extent of—Offence committed outside Calcutta but within limits of port, cognizance of.*

The Presidency Magistrate of Calcutta is an officer authorised to exercise the powers of a Magistrate within the limits of the port of Calcutta and is competent, under section 29 of the Criminal Procedure Code, to entertain a complaint of an offence under section 84 of the Calcutta Port Act, in respect of an offence committed outside the

Criminal Procedure Code—contd.

limits of Calcutta but within the limits of the port of Calcutta.

Per *Newbould, J.*—The provisions contained in the first part of section 158 and the whole of section 159 of the Calcutta Port Act were made through excess of caution and were based upon the provisions of section 29 of the Criminal Procedure Code. C GUNPAT RAI *v.* GOOD, 30 C. L. J. 252; 24 C. W. N. 79; 20 CR. L. J. 782; 47 C. 147 622

——— s. 29 622

——— ss. 103, 190 (1) (a), 200, 537—

—Search without witnesses, validity of—Complaint, cognisance of—Complainant, failure to examine, whether illegality—Irregularities in procedure—Prejudice to accused—Burden of proof—Opium (Act I of 1878,) ss. 9 (c), 14, 20—Illegal possession of opium—Search after sunset without witnesses, validity of—Failure to forward opium seized to nearest Police station, effect of.

A Sub-Inspector of Excise entered the premises of the accused after sunset where he suspected contraband opium had been secreted, after entering the premises he sent for two search witnesses. A search was made and some opium was found The Sub-Inspector thereupon arrested the accused and took him to the Police station, but conducted the investigation himself and retained the opium found on the premises, which he produced in Court when he made his statement. He submitted a report and charge sheet, and the Deputy Magistrate of the District took cognizance of the case, treating the report of the Excise Sub-Inspector as a Police report, and convicted the accused under section 9 (c) of the Opium Act. On appeal the Sessions Judge upheld the conviction, pointing out that the Excise Sub-Inspector's report was wrongly treated by the Magistrate as a Police report, and that he must have taken cognizance of the case under section 190 (a) (1) of the Criminal Procedure Code. The accused moved the High Court on revision:

Held, (1) that the proceedings before the Magistrate were irregular, inasmuch as he was not properly in seizin of the case there was no regular complaint before him, and, even if there was, his omission to examine the complainant on oath as required by section 200 of the Code of Criminal Procedure was an illegality which vitiated the proceedings.

(2) that apart from the foregoing, the conviction could not be maintained by reason of the following serious irregularities committed by the Excise Sub-Inspector, namely:—

(a) his entry of the premises after sunset in contravention of section 14 of the Opium Act;

(b) his entry of the premises without search witnesses in disregard of section 103 of the Criminal Procedure Code;

(c) his keeping the investigation in his own hands and not delivering up the opium found to the nearest Police station, in spite of the peremptory provisions of section 20 of the Opium Act.

Where proceedings bristle with irregularities, it is for the prosecution to show that the accused was not prejudiced thereby. P&C LACHMI NARAIN *v.* EMPEROR, 20 CR. L. J. 742 130

——— s. 106 (3) 436

——— ss. 107, 144, 145, 146—*Dispute as to immovable property—Right doubtful—Order under s. 144, whether proper—Procedure—Notice to opposite party, whether necessary—Successive orders under s. 144, whether competent.*

Where the right or possession of the parties is not free from doubt and there is a danger of disturbance of public tranquility on account of both the parties asserting their right and possession over the lands in question, it is inequitable to take action under section 144 of the Criminal Procedure Code to restrain one party as against the other, the virtual effect of which would be to usurp the functions of the Civil Court and to decide the right and title over the disputed land including the right of possession.

Where the right of a party is clear and there is a threatened invasion of that right by another party, a temporary order under section 144 of the Criminal Procedure Code might be useful and effective. Similarly under section 107 of the Code where parties are in the wrong, they can be bound down in order to prevent a breach of the peace. But where there is a doubt as to the right of the parties to be in possession of immoveable property, the only effective remedy is that provided by section 145 of the Code, under which if the Magistrate after due enquiry comes to the conclusion that one of the parties is in clear possession, he will uphold its possession until it is evicted in due course of law, and if on the other had the Magistrate finds it difficult to decide which of the parties is in actual possession, he has got a remedy to prevent a breach of the peace under section 107 of the Code by attaching the subject-matter of the dispute.

Successive orders under section 144 of the Criminal Procedure Code condemned.

An order passed under section 144 of the Criminal Procedure Code without serving notice on the opposite party to show cause is liable to be set aside. P&C GOURI DUTT *v.* GOBIND SINGH, 20 CR. L. J. 828; 1 P. L. T. 34 829

——— ss. 112, 113, 115, 117, 118—

Proceedings under s. 112 not drawn up—Service on accused, failure of, effect of—Order under s. 118, validity of.

The fact that no proceedings are drawn up under section 112 of the Criminal Procedure Code at the time summonses are issued, and, therefore, no copy thereof is served under section 70 of the Code upon the accused, would not invalidate an order passed under section 118 of the Code, if, before the passing of such order, the proceedings required by section 112 are drawn up in the presence of the accused and are read out and explained to him, and due inquiry is held. M KAVATHAM PATTURAJU, *In re* 20 M. L. T. 300; 10 L. W. 207; (19 8) M. W. N. 638; 20 CR. L. J. 768 491

——— ss. 113, 115, 117 491

——— s. 117 (4)—*Joint enquiry, whether permissible—Prejudice to accused.*

Although in cases of joint inquiries there is a danger of one accused being prejudiced through the evidence against another, which does not directly affect him, being on the record, the law nevertheless allows joint inquiries under section 117, clause (4), of the Criminal Procedure Code. A SHEO SAHAI *v.* EMPEROR, 20 CR. L. J. 700 158

——— s. 118 491

Criminal Procedure Code—contd.

——— ss. 133, 135, 138, 139—*"Magistrate in s. 139, (1), meaning of—Jury, appointment of—Verdict—Disposal of case by Second Class Magistrate after verdict, transfer for—Jurisdiction of First Class Magistrate appointing Jury.*

The words "the Magistrate" in section 139 (1) Criminal Procedure Code, refer to the Magistrate to whom application has to be made under section 135 (*b*) to empanel a Jury and who, under section 138 of the Code, does so empanel one.

A Magistrate who sends a notice under section 133 of the Criminal Procedure Code and directs a party to appear before another Magistrate is alone competent to deal with the matter on receiving the verdict of the Jury empanelled under section 138 and cannot transfer it for disposal by a Second Class Magistrate **M** ANGAPPA MUDALI *v.* RAMAPURAM PERUMAL CHETTY, 37 M. L. J. 313; 10 L. W. 297; (1919) M. W. N. 696; 20 CR. L. J. 761 **489**

——— ss. 133, 137—*Removal of obstruction—Bona fide claim of right—Order directing institution of civil suit within certain period, legality of—Evidence not taken, effect of.*

In a proceeding under section 133, Criminal Procedure Code, for the removal of an obstruction from a riverside *ghat* as being part of public way, the second party claimed the *ghat* as his private property, and the Magistrate, while declaring the good faith of the second party's claim, directed without taking any evidence that unless the second party sought to establish his right in the Civil Court within six months, his *bona fides* would be questioned again by the Magistrate:

Held, that the Magistrate's conditional order was bad in form and that he should not have made it without taking evidence from one side or the other. **C** PEARY LAL MULLICK *v.* SURENDRA KRISHNA MITTER, 23 C. W. N. 774; 20 CR. L. J. 752 **160**

——— s. 135 **489**

——— s. 137 **160**

——— s. 138 **489**

——— s. 139 (1)—"Magistrate", meaning of. *See* ANTE, s. 133 **489**

——— s. 144 **829**

——— ss. 144, 435—*Government of India Act (5 & 6 Geo. V, C. 6), s. 107—Order under s. 144, whether can be revised—High Court, power of interference of, when exercised—Order, construction of—Presumption—Duration of order—Order, whether might be addressed to public generally.*

An order under section 144 of the Criminal Procedure Code does not fall within the scope of section 435 of the Code and can only be revised in virtue of the jurisdiction conferred on the High Court by section 107 of the Government of India Act. But it is only in very rare cases that the High Court will interfere under that section, even where there is a question of jurisdiction; if there is no question of jurisdiction, it would interfere only if very great miscarriage of justice would otherwise result.

In construing a judicial order it is an elementary principle that such construction must, if possible, be adopted as would make the order one in accordance with law, and not an order such as the Court making it had no power to pass.

Where, therefore, an order under section 144 of the Criminal Procedure Code specifies no time during which it is to be in force, the reasonable presumption is that the order would operate for two months and not for an indefinite time.

Under clause 3) of section 144 of the Criminal Procedure Code an order may be directed to the public generally when frequenting or visiting a particular place, but it cannot be directed to the public indefinitely. An order addressed to "all and sundry" frequenting or visiting a particular temple merely means "all and sundry persons who frequent or visit that temple during the course of the two months next following the order." **M** PONNAPPA AIYANGAR *v* SRI VANMAMALAI, 10 L. W. 480; 20 CR. L. J. 755; (1919) M. W. N. 872 **483** **829**

——— s. 145

——— ss. 145, 148, 439—*Possession of land, dispute as to—Delegation of enquiry to Subordinate Magistrate, scope of—Order, final, on evidence partly recorded by Subordinate Magistrate, whether regular—Jurisdiction - Revision—High Court, interference by, limits of.*

Where a 1st class Magistrate passes a final order under section 148, Criminal Procedure Code, on evidence partly recorded by a Subordinate Magistrate under his directions and partly recorded by himself, he cannot be deemed to have acted without jurisdiction so as to call for interference by the High Court in revision.

The essential requisite to give a Magistrate jurisdiction under section 145, Criminal Procedure Code, is that he must be satisfied that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof. Once he is so satisfied, his jurisdiction is complete and his subsequent action must be considered in relation to procedure, not jurisdiction.

An enquiry by a Subordinate Magistrate, to whom a matter is referred under the provisions of section 145 of the Criminal Procedure Code, is not confined to a mere inspection of the locality and a report thereon **M** VELLANKI SRINIVASA JAGANNADHA RAO *v* GOPALAKRISHNA RAO, 10 L. W. 447; 20 CR. L. J. 773; 37 M. L. J. 589 **613**

——— s. 145, *proceedings under—Previous decree or order of Civil Court for possession, value of—Magistrate, duty of—Possession—Jurisdiction.*

A previous order of a Civil Court relating to the property in dispute in a proceeding under section 145 of the Criminal Procedure Code might throw light upon the matter, but the evidentiary value to be attached to such a piece of evidence must depend upon the particular circumstances of each individual case.

There is no inflexible rule of law that in a proceeding under section 145, Criminal Procedure Code, the Magistrate is concluded by every previous order of a Civil or Criminal Court: each case must depend upon its particular circumstances.

Per *Huda, J.*—Decrees of Courts, so far as third parties are concerned, may have different values in different cases.

In a proceeding under section 145, Criminal Procedure Code, a Magistrate cannot be said to have acted without jurisdiction simply because in making the order he went behind a decree or order of the Civil Court. **C** ATUL CHANDRA *v.* SRINATH LAIK, 30 C. L. J. 123; 23 C. W. N. 982; 20 CR. L. J. 840 **936**

——— ss. 145, 435—*Proceedings under s. 145*

Criminal Procedure Code—contd.

—*Revision—High Court, power of interference of, when can be exercised—Jurisdiction—Procedure—Party not given opportunity to appear, effect of.*

Ordinarily orders passed under section 145 of the Criminal Procedure Code will not be interfered with under section 435 of the Code, but where an order purporting to be under the former section exceeds the powers given by it, the High Court will interfere, especially where there has been material irregularity which has prejudiced a party to the proceedings

Proceedings under section 145 of the Criminal Procedure Code are not within jurisdiction unless the procedure prescribed therein is strictly adhered to. Where it appears that a party to the dispute has had no opportunity of appearing and putting in his written statement, the proceedings will be set aside. **N** MADHO PRASAD *v* JAGGANSI, 20 CR L J. 775 **615**

—— — **ss. 145, 439**—*Service of process, method of—Proceedings under s.* 145—*One party not served with notice—Proceedings, legality of—Jurisdiction, want of—Revision—High Court, interference by*

The law for service of a summons in criminal cases is on the same lines as the rules for the service of a summons in a civil case.

In an inquiry under section 145, Criminal Procedure Code, both sides must be heard: consequently, if one of the parties to the enquiry is not served and the Magistrate proceeds with the case, there is a defect of jurisdiction, and his order is liable to be set aside in revision by the High Court. **N** TUKARAM KUNBI *v.* PANJABRAO, 20 CR L. J. 816 **720**

——— **s. 146** **829**

——— **s. 148** **613**

——— **s. 190 (1) (a)**—Complaint, cognizance of. *See* ANTE, s. 103 **150**

——— **ss. 190 (1) (a), 200, 202**—*Complaint—Examination of complainant, omission of, effect of—Order calling upon accused to show cause why he should not be prosecuted for bringing false charge, nature of—Jurisdiction of Magistrate making order to proceed with trial.*

A Magistrate who under section 190 (1) (*a*), Criminal Procedure Code, takes cognizance of a case on a complaint ought to examine the complainant before issuing summons. But his omission to do so is a mere irregularity and does not go to the root of his jurisdiction.

An order passed by a Magistrate calling upon a person to show cause why he should not be prosecuted under section 211 of the Penal Code, is neither in form nor in effect an order under section 202, Criminal Procedure Code. Such an order is not one under any provision of the Criminal Procedure Code and even where it leads to an inquiry by another Magistrate, it does not in any way affect the jurisdiction of the Magistrate who took cognizance of the case to summon the accused and proceed with the trial **C** BHAIRAB CHANDRA *v.* EMPEROR, 29 C. L. J. 318; 23 C. W. N. 484; 46 C. 807; 20 CR L. J 794 **698**

——— **s. 195**—*Certificate, forged, submitted to Collector—Sanction to prosecute, whether necessary.*

Section 195 of the Criminal Procedure Code has no application to a matter coming before a Collector in his administrative capacity.

Where, therefore, an applicant for a Patwarship submitted a certificate as to his age, and criminal proceedings were taken against him on the ground that the certificate had been fabricated:

Held, that section 195 of the Criminal Procedure Code did not apply to the case, and that the proceedings were not bad because the sanction required by that section had not been obtained. **A** SANTI LAL *v.* EMPEROR, 17 A. L. J. 1018; 20 CR L J 798 **702**

——— **s. 195 (5)**, scope of—Want of complaint, whether irregularity or illegality. *See* ANTE, s. 4 (*b*) **610**

——— **s. 195 (7)**—*Court of Subordinate Judge, whether subordinate to District Judge.*

The Court of the Subordinate Judge must, for the purposes of section 195 of the Code of Criminal Procedure, be held to be subordinate only to the Court of the District Judge. **O** HUBDAR KHAN *v.* SAJJAD ALI KHAN, 22 O. C. 159; 20 CR. L. J. 766; 1 U. P. L R. (J. C.) 82 **494**

——— **s. 200** **698**

——— **s. 200**—Complainant, failure to examine, whether illegality. *See* ANTE, s. 103 **150**

——— **s. 202** **698**

——— **ss. 202, 476**—*Complainant not allowed to produce his evidence—Order for prosecution based on preliminary investigation—Failure of Magistrate to record his reasons—Order, whether justified—Penal Code (Act XLV of 1860), s.* 211.

It is doubtful whether an investigation under section 202 of the Criminal Procedure Code can be regarded as a judicial proceeding and may be used for supporting an order under section 476 of the Code.

Where a Magistrate did not himself give any reasons for holding that a complaint was false and did not record any evidence except the statement of the complainant, and proceeding entirely upon the result of the investigation, under section 202 of the Criminal Procedure Code, ordered the prosecution of the complainant under section 211 of the Penal Code:

Held, that the order could not be sustained.

Where a complainant is not allowed to adduce the whole of his evidence in support of his complaint, exceptionally strong reasons are required to justify an order against him under section 476, Criminal Procedure Code. **L** MAQBUL AHMAD *v.* EMPEROR, 20 CR. L. J 815 **719**

——— **ss. 203, 437**—*Complaint against several accused—Magistrate refusing to proceed against some—Order, whether amounts to discharge—Further enquiry, order for—Notice to accused, whether necessary.*

One S. instituted a criminal case against eleven persons. The Magistrate instituted proceedings only against some of them and after their conviction rejected the petition of the complainant to issue process against the remainder. On application by the complainant the District Magistrate under section 437 of the Criminal Procedure Code ordered the remaining accused to be proceeded against. No notice was issued to the accused prior to the passing of the order:

Held, (1) that the order of the Magistrate refusing to issue process amounted to a discharge and that the District Magistrate had, therefore, jurisdiction to proceed under section 437, Criminal Procedure Code;

(2) that no notice was required to be issued to the accused inasmuch as they had never appeared before a Magistrate nor been formally discharged.

Criminal Procedure Code—contd.

Before an order is made under section 437, Criminal Procedure Code, it is not necessary that notice should in all cases be served upon the accused. Notice is necessary only in those cases where the accused have already appeared and have been discharged In cases where the accused have not appeared before the Magistrate and taken their trial, no such notice is necessary. **Pat** HARI LAL CHOUDHRY *v.* EMPEROR, 20 CR. L. J. 835 **931**

——— **ss. 203, 437**—*Dismissal of complaint on report of* panchayat *without hearing complainant —Further enquiry, whether can be directed.*

Where a complaint charging the accused with assault and theft was dismissed by a Magistrate on receipt of the *panchayat* report without hearing the complainant and referring only to the charge on assault:

Held, that further enquiry must be made into the allegations made in the complaint. **C** PURNA CHANDRA DE *v.* AMBIKA CHARAN, 23 C. W. N. 575; 20 Cr. L J. 784 **624**

——— **ss. 203, 437**—*Dismissal, order of, under s. 203—Further inquiry, order for—Notice to accused, whether necessary—Procedure—Summons, whether can be issued to accused before judicial inquiry is complete.*

A party who is not being tried for an offence is not an accused person.

In revising under section 437 of the Criminal Procedure Code an order of dismissal under section 203 or 204 (3) of the Code it is not necessary to issue notice to the other side.

Where a case is dismissed under section 203 of the Criminal Procedure Code and the Magistrate is directed under section 437 of the Code to hold a further judicial inquiry, he has no jurisdiction to issue summons to the accused, until he has completed the judicial inquiry and a *prima facie* case is disclosed against the accused. **Pat** SHEO NARAIN SINGH *v.* RAM PERTAP RAI, 4 P. L. J. 450; 20 CR L. J. 843 **939**

——— **ss. 209, 437**—*Enquiry in respect of two offences - Charge framed in respect of only one offence —Further enquiry, whether can be directed in respect of other offence.*

Accused was placed before a Second Class Magistrate for trial on charges under sections 307 and 323 of the Penal Code. The Magistrate framed a charge under section 323 only and directed the accused to enter on his defence. The District Magistrate called for the record and, after giving notice to the accused and hearing his Counsel, directed a further enquiry in respect of the charge under section 307:

Held, that the order of the Magistrate framing a charge under section 323 amounted to a discharge of the accused under section 307 and that, therefore, the District Magistrate had power to direct further enquiry in respect of the latter offence. **A** SHEO NARAYAN SINGH *v.* RADHA MOHAN, 17A L. J. 1095; 20 CR. L. J. 778; 14 U. P. L. R. (H. C.) 193 **618**

——— **s. 234**—*Joinder of charges -Trial joint on eight counts, legality of—Procedure.*

Accused was sent up for trial under sections 218 409 and 465 of the Penal Code on eight counts and was convicted on four counts under sections 409 and 465:

Held, (1) that having regard to the provisions of section 234 of the Criminal Procedure Code, the accused could only be tried on three counts in one trial;

(2) that the procedure adopted in this case being in contravention of the provisions of section 234 of the Criminal Procedure Code, the trial was illegal and must be set aside. **A** AVADH BEHARI LAL *v.* EMPEROR, 20 CR L. J. 784 **624**

——— **ss. 234, 236, 237**—*Offences of same kind, what are—Joint trial of, offences, when permissible—Penal Code (Act XLV of 1860), ss. 379, 380.*

It is illegal, with reference to section 234 of the Criminal Procedure Code, to charge a person in the same trial and convict him in the same trial of two offences not of the same kind, as *e. g.*, one under section 379 and the other under section 380 of the Penal Code.

Under clause (2) of section 234 of the Code offences are of the same kind when they are punishable with the same amount of punishment under the same section and where this is not the case, neither section 236 nor section 237 can be read with section 234 of the Code. **N** HARSINGH *v.* EMPEROR, 20 Cr. L. J. 784 **159**

——— **ss. 236, 237** **159**

——— **s. 239**—*Bengal Public Gambling Act (II B C of 1867), ss. 3, 4—Joint trial—Same transaction—Keeping and frequenting gaming house.*

Where it is found that a person has opened, kept or used his house as a common gaming house for profit, and that other persons have used that house for the purpose of gambling and have paid charges for the same a joint trial of all such persons for offences under sections 3 and 4 of the Bengal Public Gambling Act is not illegal, as the offences are committed in the same transaction within the meaning of section 239 of the Criminal Procedure Code. **Pat** NATHU THAKUR *v.* EMPEROR, 20 CR. L J. 788 **496**

——— **ss. 248, 345**—*Withdrawal of complaint as against one of several accused, effect of—Compounding offence with regard to one of several accused, effect of.*

Section 248 of the Criminal Procedure Code contemplates the withdrawal of a complaint as a whole. Where a complaint against several accused persons is withdrawn as against one of them, the withdrawal amounts to a withdrawal of the whole complaint in respect of all the accused.

The compounding of an offence in regard to one of several accused persons amounts to a compounding of the offence in regard to all. **Pat** SHAM BEHARI SINGH *v.* SAGAR SINGH, 1 P. L. T. 32; 20 CR. L. J. 824 **824**

——— **s. 250**—*Compensation, order for, at what stage to be made.*

An order under section 250 of the Criminal Procedure Code for compensation should be passed simultaneously with the order of discharge or acquittal, and not in a separate proceeding **A** CHAUTHI AHIR *v.* EMPEROR, 20 Cr. L. J. 774 **614**

——— **s. 25**—*Warrant case—Charge framed—Complainant, absence of—Dismissal and acquittal, legality of.*

It is no part of a complainant's duty to call any witness for cross-examination or any other purpose of the defence once a charge is framed, and section

Criminal Procedure Code—contd.

259 of the Criminal Procedure Code gives no power to the Court to dismiss a warrant case in default after a charge has been framed.

An acquittal cannot be based on a dismissal in default. **N** RAISINGH CHAMMAR *v.* PATIA CHAMAR, 20 CR. L. J 763 **4 I**

——— **s. 288**—*Evidence given at preliminary inquiry retracted at trial—Conviction, whether can be based on such evidence.*

A conviction based solely on evidence given by the witnesses before the Committing Magistrate and retracted by them at the trial is unsustainable **P** SHER DIL *v.* EMPEROR, 17 P. R 1919 CR; 20 CR L. J. 792 **636**

——— **ss. 298, 300**—*Trial by Jury—Omission to direct Jury not to be influenced by non-admissible statement—Misdirection—Juror conversing with stranger before conclusion of charge, effect of—Verdict, whether should be set aside.*

The mere omission to direct a Jury not to be influenced by a statement which they are told is not evidence, does not amount to a misdirection of any importance.

The fact that a Juror has a conversation with a stranger during an adjournment of the Court before the Judge's charge is concluded, is not a sufficient ground for interference by the High Court. **M** PULI SUBBA REDDI, *In re*, 10 L. W. 379; 20 CR. L. J. 790 **694**

——— **s. 300** **694**

——— **s. 345** **824**

——— **s. 345**—*Composition of offence, whether permissible after judgment—Appellate Court, whether bound to give effect to composition.*

The composition of an offence is permissible only up to the time of the judgment, and not after. After conviction there can be no composition without the leave of the Court, and an Appellate Court is not bound to recognise and give effect to an agreement which the parties might enter into after the conviction of the accused. **M** PEDAKANTI CHINNA NAGADU, *In re*, 11 L. W 33; 20 CR L. J. 832 **832**

——— **s. 350**—*Transfer of Magistrate—Trial de novo Return of Magistrate—Trial, whether can be started from stage at which it had arrived before transfer.*

When on the transfer of a Magistrate a criminal case pending before him is taken up by another Magistrate and the trial is started *de novo*, the proceedings which had already taken place before the Magistrate who has been transferred are wiped out, and section 350 of the Criminal Procedure Code gives no jurisdiction to such Magistrate on his re-transfer to the district to proceed with the trial from the point where he had left it. **Pat** JAGO SINGH *v.* EMPEROR, 20 CR L. J 820 **820**

——— **401**—Conviction—Procedure—Practice. *See* PENAL CODE, s. 84 **828**

——— **s. 423 (1) (b)** **488**

——— **s. 423**—*Appeal—Appellant, absence of, effect of—Procedure—Appellate Court, duty of*

In dealing with the petition of appeal of a person convicted of a criminal offence, the Appellate Court is bound, in all cases where the appellant is not represented personally or by Pleader, to peruse the petition of appeal and the copy of the judgment accompanying it, and determine upon such perusal whether the appeal should be admitted or summarily rejected, and if the appeal is admitted, to consider whether there is any ground for interfering with the conviction or sentence It is illegal to record an order dismissing an appeal "in default," as such an order is not contemplated by the provisions of section 423 of the Criminal Procedure Code. **O** BALKARAN SINGH *v.* EMPEROR, 6 O. L. J. 370; 20 CR L. J 744 **152**

——— **s. 423**—*Appellate Court, power of, to alter finding, scope of.*

Although an Appellate Court has power under section 423 of the Criminal Procedure Code to alter the finding of a lower Court while maintaining the sentence, it ought not to use such power if the accused would be prejudiced by the omission to prove the altered charge and if the defence might have been of a different character had the altered charge been framed in the first Court. **M** PULLANNAVARA *v* HANUMANTHA, *In re*, 20 Cr. L. J. 780 **620**

——— **s. 435** **483**

——— **s. 435**—Revision—High Court, power of, when can be exercised. *See* ANTE s. 145 **615**

——— **ss. 437** **618, 624, 931, 939**

——— **s. 437**—*Discharge, order of—Revision by Sessions Judge or District Magistrate—Further enquiry, when to be directed.*

The power of revision granted to a Sessions Judge or District Magistrate under section 437, Criminal Procedure Code, to direct further enquiry in a case of discharge by a Subordinate Magistrate is not to be exercised as if the case were being heard on appeal. The Revisional Court has only to see whether the evidence is of such a character that it is possible to come to only one conclusion upon it, *viz.*, that the accused has been guilty and that there has been a miscarriage of justice consequent upon the one-sided or perverse view taken by the trial Magistrate. **M** KARUPPACHAKKILLI *v* PALANISWAMI GOUNDAN, 10 L. W. 630; 20 CR L. J 817 **817**

——— **s. 437**—*Further enquiry, order directing—Notice to accused, whether necessary.*

Before further enquiry can be ordered under section 437 of the Criminal Procedure Code, notice must be given to the person who has been discharged. **A** DHARAM DEO *v.* EMPEROR, 20 CR. L. J 770 **610**

——— **s. 437**—*Further enquiry, order directing—Notice to accused whether necessary*

Before directing further enquiry under section 437 of the Criminal Procedure Code, the District Magistrate ought to give notice to the persons against whom he proposes to pass orders to show cause. **A** PHOOL SINGH *v.* EMPEROR, 20 CR. L. J. 831 **831**

——— **s. 437**—Further enquiry, order for—Notice to accused, whether necessary. *See* ANTE s. 203 **931, 939**

——— **s. 437**—*Order directing further enquiry—Notice to accused, whether necessary—Penal Code (Act XLV of 1860), s. 420—Cheating—Guilty knowledge—Burden of proof.*

Criminal Procedure Code—contd.

Before a District Magistrate takes action under section 437 of the Criminal Procedure Code, he must give notice to the accused.

Accused pawned six rings which he said were of gold. Subsequently it was discovered that the rings were of silver gilt. Accused was charged with an offence under section 420 of the Penal Code:

Held, that the burden of proving that the accused knew that the rings were not what he suggested them to be was on the prosecution. **A** MATA PRASAD *v.* EMPEROR, 20 CR. L. J. 767 **609**

——— **s. 439** **613**

——— **s. 439**—Jurisdiction, defect of—High Court will interfere with order under s 145 *See* ANTE s 145 **720**

——— **ss. 439, 476**—*Penal Code (Act XLV of 1860,) s. 182—Petition before Magistrate asking that enquiry might be made—Allegations found to be false—Order directing prosecution, legality of—Jurisdiction—Revision—High Court, interference by.*

Accused presented a petition before a Magistrate, stating that a certain person was collecting men and that the accused was under the apprehension that the object was to cause him some injury, and asked that an enquiry might be made through the Police. After the enquiry the Magistrate, holding that the petition was false and vexatious, directed the prosecution of the accused for an offence under section 182 of the Penal Code:

Held, that the accused having given information to a Magistrate which had been held to be false and which was intended to cause the Magistrate to use his lawful powers to the injury or annoyance of another within the meaning of section 182 of the Penal Code, the order directing the prosecution of the accused could not be said to be illegal.

The mere fact that the High Court would, if dealing with a certain matter, have come to a conclusion different from that arrived at by a Subordinate Court is no reason for setting aside in revision an order which is not illegal **Pat.** SADHU CHARAN SINGH *v* UDHO PRASAD SINGH, 20 CR. L. J. 821 **821**

——— **s. 439**—*Revision—Interlocutory orders, interference with—High Court, powers of.*

The High Court can interfere in revision with interlocutory orders, but the power must be exercised with great care and only in most exceptional cases.

It is inadvisable to interfere in a pending case unless there is some manifest and patent injustice apparent from the face of the proceedings and calling for prompt redress. **N** EMPEROR *v.* SETH JIWANDAS, 20 CR. L. J. 764 **492**

——— **ss. 476** **610, 719, 821**

——— **s. 476**—Evidence improperly admitted—Order directing prosecution based on such evidence, legality of. *See* CIVIL PROCEDURE CODE, O. XLI, r. 27 **826**

——— **s. 476**—*Order directing prosecution—No evidence on which conviction can be based—Order, legality of.*

Where there is no evidence on the record to show that an accused person is guilty of the offence with which he is charged, an order for his prosecution under section 476 of the Criminal Procedure Code is bad in law and must be set aside. **P** ASIRUDDIN *v.* EMPEROR, 20 CR. L. J. 818 **818**

——— **s. 476**, proceeding under—Notice to accused, whether necessary—Failure to give notice, effect of *See* PENAL CODE, s 182 **695**

——— **s. 476**, *proceedings under—Notice to accused, whether necessary.*

In order to validate proceedings under section 476 of the Criminal Procedure Code, notice is not legally necessary to the accused, but it is desirable that such notice should be given more especially where the matter has not been already judicially dealt with. **N** PURAN SINGH *v.* EMPEROR, 20 CR. L. J. 771 **617**

——— **s. 520**—*Notice, whether necessary—Order passed in favour of person, whether should be set aside behind his back.*

Although section 520 of the Criminal Procedure Code does not prescribe the issue of notice to any person before an order under that section is passed, yet it is a general principle of law that an order duly passed by a competent authority in favour of any person should not be set aside without that person being heard. **N** RAJARAM *v.* KUNJILAL, 20 CR. L. J. 823 **823**

——— **s. 522**—*Order restoring possession to complainant, setting aside of—Notice to complainant, whether necessary.*

An order under section 522 of the Code of Criminal Procedure ought not to be declared as of no effect without hearing what the complainant, who is the party most interested in the maintenance of the order, has to urge in support of it. **C** MAJID ALI SARDAR *v* ALI ASRAB, 23 C. W. N. 862; 29 C. L. J. 167; 20 CR. L. J. 846 **942**

——— **s. 530**—*Bench of Magistrates, conviction by*—Quorum, *whether necessary—Each member, whether bound to hear whole evidence.*

For a conviction by a Bench of Magistrates to be legal, it must be by a *quorum* of the Magistrates as required by the rules, each member of which has heard the whole evidence in the case. **S** EMPEROR *v.* NIHCHAL, 13 S. L. R. 166; 20 CR. L. J. 769 **609**

——— **s. 530 (h)** **823**

——— **ss. 537** **482, 610**

——— **s. 537**—Irregularities in procedure—Prejudice to accused. *See* ANTE, s. 103 **150**

Criminal trial—*Conviction—Proof—Moral conviction whether sufficient.*

A finding based on a theory not merely unsupported by, but opposed to, the direct evidence available is bad in law. Similarly a moral conviction of guilt is no sufficient foundation for a verdict of guilty, unless it is based on substantial facts which lead to no other reasonable conclusion than that the person charged is guilty. **N** GULZARSHA FAKIR *v* EMPEROR, 20 CR. L. J. 747 **155**

——— *Defence witnesses, credibility of—Insinuation as to relation with accused unsupported by record, value of—Court, duty of.*

The mere fact that some of the witnesses for the defence are fellow-castemen of the accused is no ground for discrediting their evidence.

Execution of decree—contd.

decree holder in not taking any step to proceed with it, a subsequent application cannot be treated as a continuation or revival of the previous application.

Where the stay of a sale in execution is due entirely to the decree holder, such stay cannot be regarded as a legal stoppage of the execution proceedings, so as to entitle the decree-holder to the benefit of section 15 of the Limitation Act.

So long as an application for execution is pending, the judgment-debtor can at any time show that the application is barred and the Court has no option but to dismiss it under section 3 of the Limitation Act It is only when the point of limitation is concluded by proceedings in a previous execution, that the judgment-debtor is not allowed to take an objection on the score of limitation in a subsequent execution of the decree. **Pat** KESHO PRASAD SINGH v HARBANS LAL **85**

——— *Hindu Law—Widow, estate of, sold in execution of decree—Purchaser, estate taken by—Claim to absolute estate—Burden of proof—Sale of widow's estate and reversioner's interest jointly, effect of.*

Where an auction-purchaser of the right, title and interest of a Hindu widow sets up an absolute estate, it is for him to prove that something more than is evidenced by the sale certificate passed to him, and, in the absence of other materials, it is not for a reversioner in a suit brought by him for possession to prove that an absolute estate had not passed.

Where a reversioner joins a widow in a conveyance by which the widow sells her widow's estate and the reversioner his reversionary interest in favour of a reversionary daughter, the sale is good and operative and cannot be assailed. C BHOLA NATH CHOWDHURI v. HARIMANI DASI, 30 C. L. J. 6 **42**

——— *Objections to attachment, dismissal of—Declaration of title, suit for Burden of proof—Transfer of Property Act (IV of 1882), s. 5—Auction-purchaser, whether subsequent transferee.*

Where a person objects to the attachment and sale of property in execution of a decree on the ground that the property is his under a sale-deed and his objection is disposed of otherwise than on the merits, whereupon he sues to obtain a declaration that the property is his and is not liable to attachment, the onus of proving *mala fides* and want of consideration on the plaintiff's part is on those who seek to resist the claim.

An auction-purchaser at a sale in execution of a decree is not a "subsequent transferee" entitled to impeach a previous transfer under section 53 of the Transfer of Property Act. **N** AWADHUT v. PUNJAJI **205**

——— *Order dismissing application for execution—Appeal—Judgment-debtor, whether has right of appeal against finding* Res judicata.

A judgment-debtor has no right of appeal against an order dismissing an application for the execution of a decree on the ground that the decree would only be capable of execution on the decree-holder complying with its terms by executing and registering a lease in favour of the judgment-debtor. In order to give the judgment-debtor a right of appeal not only must he be aggrieved by the reasons given by the Judge, but the finding must be one that would operate as *res judicata*. C HAZARI LAL v. ALAP SUNDARI DASI **558**

Ex parte decree, suit to declare invalidity of, whether maintainable *See* CIVIL PROCEDURE CODE, S. 47 **463**

Extradition Act (XV of 1903), ss. 9, 16 - *Extradition of fugitive criminal of Chandernagore—Procedure, summary—Treaties of 1815 and 1876 Extradition proceedings, nature of.*

The East Indian possessions of France and Britain are entirely excluded from the Treaty arrangements of 1876. In regard to them the arrangement established between the two countries by the Treaty of 1815 is preserved. Consequently the provisions of Chapter II of the Extradition Act have no application to a fugitive criminal of Chandernagore. In accordance with the terms of the Treaty of 1815 procedure for the extradition from British India of a fugitive criminal of Chandernagore is to be summary and no preliminary enquiry is necessary before his extradition.

Extradition on any condition is an invasion of the common law right and when there is a Treaty followed by a Statute recognising the Treaty, the procedure must be in accordance with the Treaty and Statute and no further condition can be imposed by the Courts C RAHMAT ALI v. EMPEROR, 6 C. L. J. 24; 29 CR. L. J. 169; 41 C. 81 **147**

——— **s. 18** **147**

Factories Act (XII of 1911), s. 41 (a) *—Penal Code (Act XLV of 1860), s. 71 —Employing several persons to work in contravention of provisions of Act—Offences, whether separate.*

The language of section 41 *a*) of the Factories Act indicates that what is prohibited is the employment of any person or allowing any person to work contrary to the provisions of the Act, that is to say, it is an offence to employ any person, or allow him to work, contrary to the provisions of the Act. Therefore, where several persons are so employed, the offence is complete and separate in respect of each person employed or allowed to work contrary to any of the provisions of the Act.

To such a case the provisions of section 71 of the Penal Code have no application, because the offence of each workman is distinct and separate and there is not one offence collectively merely by the fact of a number of these offences having been committed at the same time B EMPEROR v JOHNSON, 21 BOM. L. R. 1084; 20 CR. L. J. 881 **933**

Fraud—*Decree obtained by fraud, when can be set aside—Pleadings, particulars required in—Transfer of Property Act (IV of 1882), s. 52—Transfer pendente lite—Transferee, whether can object to decree, passed on ground of fraud.*

A fraudulent decree can only be impeached by a person who has been injured by it but in order to succeed, he must indicate on what ground it is claimed that the decree was obtained by fraud, or set forth facts from which fraud may be directly and conclusively inferred.

Section 52 of the Transfer of Property Act, does not debar a transferee during the pendency of a suit from one party to the suit, from impeaching the decree therein on the ground of fraud by the parties

Fraud—concld.

to the decree effected by acts done after the transfer. **O** RAGHUBAR DAYAL *v.* BINDA PRASAD, 22 O. C. 17; 6 O. L. J. 645; 1 U. P. L. R. (J. C.) 77 **572**

Fraudulent transfer—*Owner continuing in possession for more than twelve years after transfer, effect of—Adverse possession—Fraud carried out—Possession, confirmation of, suit for.*

Where the owner of property executes a fraudulent transfer thereof from some ulterior motive but continues in possession of the property for more than 12 years, he is entitled not only to confirmation of possession but to recover possession if he subsequently loses it, even though the fraud intended to be effected was effected. **Pat** BADRI CHAUDHURI *v.* HURBANS JHA **114**

Ghorewaha Rajputs of Garhshankar Tahsil, Hoshiarpur District. *See* CUSTOM—ADOPTION **404**

Government of India Act 1918, (5 & 6 Geo. V, C. 61) s. 107—High Court, power of interference under, when exercised. *See* CRIMINAL PROCEDURE CODE, S. 144 **483**

Guardian and ward—*Agreement by guardian to pay stipulated sum as profits of estate, effect of—Accounts, liability of guardian to render—Minor, whether can question accounts passed by Court—Guardians and Wards Act (VIII of 890), s. 34.*

Where the guardian of a ward, to save himself the cost of appraising rents, agrees to pay a stipulated sum annually as the profits of the estate, he is bound to take good years with bad, and if, in any year, the collections are less, the loss is his, and not the ward's.

An agreement entered into by a guardian with the mother and uncle of his ward that, in consideration of the ward being allowed to manage the estate himself, the guardian would be indemnified against any suit for rendition of accounts which might be brought against him by the ward on attaining majority is not binding on the ward.

The filing of accounts by a guardian does not relieve him of responsibility for their correctness, nor does the passing of such accounts by the District Judge relieve him of the liability of accounting to his ward. **O** PARTAB SINGH *v.* KHURRAM SINGH, 6 O. L. J. 407 **75**

Guardians and Wards Act (VIII of 1890), ss. 9 (1), 4 (b), 43—*Application for appointment of guardian—Order directing return of application for presentation to proper Court—Appeal, whether lies—Revision—Other remedy open—High Court, power of interference of.*

An order made under the first clause of section 9 of the Guardians and Wards Act, returning an application for appointment as guardian of a minor for presentation to a Court having territorial jurisdiction, is not appealable.

The High Court will not exercise its extraordinary powers of revision where other remedies are open to a petitioner, nor in all cases where a question of jurisdiction is raised. **P** MURAD BIBI *v.* UMAR DIN, 107 P. R. 1919 **563**

——— **s. 25**—*Minor, custody of, suit for, maintainability of—Procedure.*

A civil suit for the custody of a minor will not lie in the Civil Courts. To obtain such custody proceedings must be taken under the Guardians and Wards Act. **M** SATHI *v.* RAMANDI PANDARAM, 9 L. W. 600; 37 M. L. J. 93; 26 M. L. T. 61; (1919) M. W. N. 487; 42 M. 647 **399**

Guardians and Wards Act—concld.

——— **s. 34**—Accounts, liability of guardian to render *See* GUARDIAN AND WARD **75**

——— **ss. 47 (b), 48** **563**

High Court Rules (Mad.), r. 42—Party not served with notice of appeal, right of, to apply to set aside *ex parte* order. *See* CIVIL PROCEDURE CODE, O. XLIA, R. 2 (2) **75**

Hindu Law—*Custom—Inheritance*—Cessat ratio cessat lex, *applicability of—Impartible estates, origin of—Acceptance of* sanad *inconsistent with family custom, whether destroys custom.*

A special family custom of inheritance inconsistent with the ordinary Hindu Law may, if observed and acted upon, survives the primitive condition of things out of which it originally sprang.

In such a case the principle embodied in the expression *cessat ratio cessat lex* does not apply.

One of the ways in which impartible estates may originate is by independent chiefs or feudatories being reduced in course of time to the position of ordinary *zemindars*, but such estates may also owe their origin to family arrangements followed up in practice for generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of the whole family by a single member at a time in a certain order of succession, the other members being entitled to maintenance only. A family may expressly or impliedly agree to continue to observe such a custom, even though the conditions which at one time made it necessary have completely altered.

The mere acceptance by the head of a family governed by such a custom of a *sanad* from the Crown containing clauses inconsistent with the custom cannot destroy the custom or affect the order of succession which it prescribes. **P C** RAO KISHORE SINGH *v.* GAHENABAI, 15 N. L. R. 176; 37 M. L. J. 562; 17 A. L. J. 1077; 26 M. L. T. 494; 1 U. P. L. R. (P. C.) 94; (1920) M. W. N. 82 **630**

——— **Endowment,** *creation of—Trust, how created—Female, powers of—Bengal Tenancy Act (VIII B. C. of 1885), s. 21, Sch. III, Art. 1 (a)—Occupancy rights, firm, whether can acquire—Lease, expiry of—Ejectment—Limitation.*

A dedication in favour of an idol to be effectual must be real and not nominal, and it must be shown that the grantor completely divested himself of every portion of the property which is the subject-matter of the grant. Where there is no proof that the income of the property endowed is applied for the maintenance of the idol, and the whole conduct of the parties is inconsistent with the hypothesis of a valid trust, the dedication must be held to be nominal and where this is so, a subsequent grant made by a female having the estate of a Hindu mother cannot create a valid title in favour of the idol, and therefore, the idol cannot maintain a suit in ejectment.

A lease in favour of a firm or a concern must be taken to be a lease in favour of the individuals

constituting the firm, and in the absence of anything to show that the original grantees are no longer members of the firm, there is nothing to prevent them from acquiring occupancy rights.

Certain land was leased to a firm: the lease expired in 1905, but the firm continued in possession of the land. On the 1st April 1915, they were served with notice to quit but they disregarded the notice On the 24th January 1916, the present suit was brought to eject them:

Held, (1) that the suit, having been brought more than six months after the expiration of the lease, was barred by the special rule of limitation prescribed by Article (*a*) of Schedule III to the Bengal Tenancy Act;

(2) that the firm had acquired a right of occupancy in the land in dispute **Pat** PARMOD BANABIHARI *v.* ATKINS, 4 P. L. J. 533 **106**

——— Endowment, *religious—Bequest in favour of idol to be established, validity of*—Bona fide *purchaser for value of trust property, position of.*

Bequests to an idol to be established in future are not invalid in Hindu Law.

In dealing with property impressed with a trust for religious purposes no question of *bona fide* purchaser for value arises. **C** SARADINDU MUKHERJEE *v* CHARU CHANDRA DUTT, 23 C. W. N. 872 **805**

——— ———, *religious*—Mutt *or* asthal—*Ownership, nature of—Trustees, position of—Application of surplus income—Suit to obtain or control management of* mutt *properties—Limitation—Adverse possession, what is*—Inam *Register, value of.*

The administration of a *mutt, asthal* or similar religious endowment in India must be not for the personal ends of the manager, but entirely for and on behalf of and in the interests of the institution itself. In whomsoever the ownership of the property of such institutions vests, the nature of the ownership is an ownership in trust for the institution itself.

It is the duty of the manager of such a *mutt* to refrain from the personal enjoyment of surplus income, and to add it to capital, and this is equally the case whether the title is in the *gurukkal* or spiritual head, which is the more common case, or in trustees.

The general case in such *mutts* is that the ownership of the property is vested in the *mohunt* or spiritual head. But this is not an invariable rule, and there are many exceptions depending on the constitution, usage and custom of the particular *mutt.*

It is sufficient to constitute adverse possession that the person now claiming to be owner should have stood by while others continued to possess not by derivative title but in practical contravention of his alleged rights It is not necessary to prove that such claimant protested against the violation of his rights, and that the possession went on despite such protest.

In suits to obtain control or management of a religious institution, when no misapplication is proved, and the defendant admits himself to be a trustee for the institution, the ordinary limitation of 12 years applies.

The ultimate purpose of the *Inam Register*, compiled in Madras in or about 1864, was to determine

whether or not the lands comprised therein were tax free But the preparation of that register was a great act of State and the result of elaborate enquiries and though the statements as to tenure set forth in the register cannot displace actual and authentic evidence in individual cases, they are entitled, in the absence of such evidence, to very great weight. **P C** ARUNACHELLAM CHETTY *v.* VENKATACHALAPATHI GURUSWAMIGAL, 37 M. L. J. 470; (1919) M. W. N. 850; 17 A. L. J. 1097; 10 L. W 642; 26 M. L. T. 479; 24 C. W. N. 249 **288**

——— Family arrangement *by female—Court, duty of—Reversioners, whether can question settlement.*

Where the several members of a family effect a settlement of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively, and the settlement thus effected is a *bona fide* settlement for the benefit of the family, and a partition of the estate follows thereupon, the Courts are bound to give full effect to it, and such settlement cannot be questioned by the reversioners by means of a suit to establish their right to some of the properties dealt with thereby. **C** SRINATH BOSE *v.* NIBARAN CHANDRA ROY **945**

——— Gift *to female Presumption—Construction of document—Absolute words of conveyance, effect of—Deed purporting to be sale in consideration of unpaid marriage present*

Where the words of a gift are capable of conferring an absolute estate, the fact that the donee is a Hindu female will not detract from the grant. It is not necessary that there should be express words to the effect that no restriction is placed on the donee's enjoyment or words expressly conferring rights of alienation. It is enough if, from the whole tenor of the document, it can be gathered that the donor intended that the donee should enjoy the property absolutely. The presumption in favour of a limited grant arises only in the absence of such an intention.

A., a Hindu, by deed of sale conveyed to his wife, *M.*, certain immoveable property, in consideration of a sum of money given on the occasion of his marriage for jewellery, but which sum was spent for the family maintenance. *M.* was put in possession with directions to cultivate the lands, enjoy them and pay the *kist* thereon. Some years after *A.'s* death *M.* executed a deed of gift of the property in favour of her daughter, and the present suit was brought by the reversioners of *A* for a declaration that the gift would not affect their reversionary interest. It was contended that the conveyance to *M.* was not of an absolute estate, but only of an estate to be enjoyed for her lifetime, and, therefore, she was not competent to make the gift:

Held, that the plaintiffs' suit must fail; the facts that the conveyance to *M.* was by means of a deed of sale and that the transferee was given the same rights as the transferor possessed himself, *viz.*, the right of one possessing an absolute estate, were strong circumstances indicating that the intention was to pass an absolute estate and the gift; therefore, in favour of the daughter was not open to

Hindu Law—contd.

attack **M** MURUKONDA RAMASWAMI *v.* MURUKONDA LAKSHMIDEVI, 10 L. W. 261 **253**

——Guardianship—*Minor Mother, right of—Remarriage, effect of—Welfare of minor—Grandfather, whether can be appointed guardian in presence of mother—Right of mother to effect marriage of her daughter in presence of paternal grandfather*

Under Hindu law the mother is, after the father, the natural legal guardian of her minor daughter and she does not lose her right by remarriage in any case when such remarriage is recognized as valid by custom.

Unless it can be shown that the welfare of a female minor is being neglected by the mother, it is not permissible to appoint the paternal grandfather as guardian of the person of the minor and to allow him to remove the girl from the custody of the mother

A Hindu mother can effect a valid marriage for her daughter even in the presence of the paternal grandfather. **L** INDER GHANIA **783**

——Joint family—*Alienation by father to pay off debt incurred for purchase of new property, validity of—Antecedent debt, what is—Legal necessity—Sons, failure of, to object at time of alienation, effect of—Delay in objecting, effect of*

In the absence of evidence to the contrary, the consent of the sons of a Hindu to an alienation by their father may be inferred from their failure to object at the time to the alienation.

Where there is delay in impeaching an alienation by a Hindu father of the family property, the burden of proving that the alienation was not for a legally necessary purpose is upon those who seek to have the alienation set aside

A sale of a small portion of a joint Hindu family property to pay off a portion of a debt incurred for the purchase of new property may be justified.

A debt, which is only precedent to but not entirely disconnected with the subsequent debt, is not an antecedent debt.

Where a sale is effected by a Hindu father and the bulk of the consideration is found to have been taken for legal necessity, the sons cannot question that sale. **O** RAM NARAIN *v.* LALTA PRASAD, 6 O. L. J. 504 **664**

—————— *Debts incurred by father—Son, liability of—Pious duty—Co-parcener, transfer by, of share, effect of—Transferee, rights of.*

Under the Hindu law, it is the primary duty of a father to pay debts incurred by him not for any family purpose, but for his own purposes, and the pious duty of a son, if it arises at all, only arises if the father's share or his self-acquisitions are insufficient to meet the debts.

In the Central Provinces the principle is recognised of giving equitable relief in the case of a *bona fide* alienation by a co-parcener of his share in joint family property. **N** NANHUSAO *v.* GANPATI **231**

—————— *Mortgage by father—Interest, high rate of, when justified—Court, interference by*

Where in the case of a mortgage by a Hindu father the security offered is inadequate, the contractual rate of interest, although high, ought not to be interfered with. Each case, however, should be considered on its own merits **O** JAGATPAL SINGH *v.* CHANDRAPAL SINGH, 6 O. L. J. 477 **767**

Hindu Law—contd.

——Joint family—*Mortgage by father—Suit on mortgage—Sons not made parties—Decree, whether binding on sons—Suit by sons to set aside decree—Plea that father was not competent to mortgage as property was under management of Collector, whether can be taken—Res judicata—Civil Procedure Code (Act V of 1908), s 11, Expl IV, Sch III, para 11.*

A transfer made in contravention of paragraph 11 of schedule III to the Civil Procedure Code is void and of no legal effect

R, the father and manager of a joint family consisting of himself and his three sons, mortgaged the entire family property to *A*. *A* brought a suit against *R* on the basis of the mortgage and brought the property to sale in execution: to this suit the sons were not made parties Shortly before the sale the sons instituted the present suit for a declaration that the mortgage and decree thereon were inoperative as the mortgage was executed when the property was under the management of the Collector, or in the alternative that the decree was not binding on the shares of the plaintiffs as the debt was not incurred for the benefit of the family:

Held, (1) that to the extent that the father represented the family, the decree was binding on the sons;

(2) that it was open to the father in the suit against him to plead that by virtue of paragraph 11 of Schedule III of the Civil Procedure Code he was incompetent to make the mortgage but as he did not do so, the sons were debarred under Explanation 4 of section 11 of the Civil Procedure Code from raising it, and obtaining a decision thereon in the present suit

(3) that the sons were entitled to have the question tried as to whether the mortgage executed by the father was binding upon them. **N** MOTIRAM *v.* ASARAM **776**

—————— *Separation—Intention to separate, effect of.*

The unequivocal and unmistakeable manifestation by a member of a joint Hindu family, by his words or conduct, of a fixed or determined intention to become separate is sufficient to effect the separation of his title and the severance of his interest, although division of possession, or partition by metes and bounds, does not take place, or though there be no separation in food and dwelling.

A separating member of such a family may of his own free will accept as his share as small a portion of the joint property as seems good to him, and renounce all claims to the rest. **P** AMBITRAO *v.* MUKUNDRAO, 15 N. L. R. 165 **866**

——Marriage—Asura *form—Presumption—Parisam, whether bride price—Custom of community.*

The payment of *parisam* at the time of marriage as between Hindus does not necessarily constitute it as bride price or render the marriage one in the Asura form The real test is whether in the community or among the parties the payment of *parisam* is tacitly understood as being substantially a payment for taking the girl in marriage

If any money paid by the bridegroom is utilised for the benefit of the bride, it should not be treated as bride price

Ordinarily, the presumption is, whatever may be

Criminal trial—concld.

A Court ought not to permit the making of insinuations by the Police as to the defence witnesses being related to the accused, especially when there is nothing on the record to support such insinuation and the witnesses have not been questioned with reference thereto **O** RAMESHWAR TEWARI *v.* EMPEROR, 20 Cr. L. J. 748 **156**

Criminal Tribes Act (III of 1911), s. 23. *scope of— previous conviction, whether must be after registration.*

The operation of section 23 of the Criminal Tribes Act is not confined to offences that have been committed since the convict was registered. The second conviction referred to in the section does not signify that the previous conviction should have been obtained after the registration of the convict It is enough for the purposes of the section if the convict has been previously convicted, whether before or after his registration. **A** EMPEROR *v.* NAKCHEDI, 20 Cr. L. J. 772 **612**

Crown Grants Act (XV of 1895), s. 2—"Grant", meaning of. *See* REGISTRATION ACT, s. 90 (1) *d* **345**

——— **s. 3** **345**

Custom—*Adoption—Daughter's son, whether can be adopted*—Ghorewaha Rajputs *of Garhshankar Tahsil, Hoshiarpur District*—Riwaj-i-am, *entry in, value of*

A Ghorewaha Rajput of the Garhshankar Tahsil in the Hoshiarpur District is authorised by custom to adopt his daughter's son

The entry in the *riwaj-i-am* of the Hoshiarpur District prepared at the last Settlement stating that there is no custom of adoption among the Rajputs of the Garhshankar Tahsil, is not a correct statement of the custom on the subject. **P** UMAR BAKHSH *v* SOHNE KHAN, 110 P. R. 1919 **404**

——— *Alienation—Sale of ancestral land to pay off father's debt, whether can be avoided—Necessity—Minor, sale by—Property, whether can be recovered by minor—Compensation, minor, whether bound to pay.*

A man who has sold a portion of his ancestral land to pay off his father's debts cannot subsequently avoid the sale merely on the plea that the sale was not for necessity.

A minor, however, is not bound to recognise his father's debts as a charge on the ancestral land and, therefore, where a portion of a minor's ancestral land is sold by his mother to pay off his father's debts, the minor is entitled to recover the property without being made to pay anything. **P** THAMMAN SINGH *v.* SANTA, 119 P. R. 1919 **457**

——— *Guardianship—Alienation—Brother, adult, whether authorised to alienate minor brother's property—Muhammadans of Muzaffargarh District—*Riwaj-i-am, *entry in, value of.*

Among Muhammadans of Muzaffargarh District, on the death of a father the guardianship of the person and property of his minor children devolves on his eldest son, if adult Such guardian is entitled to alienate the property of the minor for payment of the debts of the minor's father, for the marriage or maintenance of the minor or or an object directly advantageous to the minor

A *riwaj-i-am* is a public record prepared by a public officer in discharge of his duties and under

Custom—contd.

Government rules, and, therefore, statements contained in a *riwaj-i-am*, which is not imperfectly compiled, form a strong piece of evidence in support of the custom affirmed therein, even when they are unsupported by instances, provided they are not opposed to the general custom of the country **P** SANUN RAM *v* ALLAH BAKSH, 3 P. R. 1919 **435**

——— *Mortgage by father—Son, whether has interest in redemption—Mortgage, suit for sale on—Son, whether entitled to be impleaded Civil Procedure Code Act V of 1908), O XX IV, r. 1.*

Under Hindu Law a son is a co-parcener, an owner of the ancestral property along with his father and other members of the family Under Customary Law a son has no right of ownership in his father's lifetime. He has only a reversionary interest in the property and a right to protect that interest by interfering to prevent unnecessary alienations. This limited interest that he possesses is not such an interest as is contemplated by Order XXX IV, rule 1, of the Civil Procedure Code. Therefore, where a mortgagee brings a suit to enforce the mortgage, the mortgagor's son is not entitled to be made a party to the suit. **P** SHIV DEV SINGH *v.* JAI RAM, 125 P. R. 1919 **411**

——— *opposed to personal law, proof of—*Wajib-ul-arz, *entry in, value of—Instances, absence of, effect of.*

The record of a custom in a *wajib-ul-arz* that a childless widow has a full estate in the property of her husband is of no value in the absence of any proof of instances showing that effect was given to such custom. **O** KANCHAN *v.* SARABJIT, 5 O. L. J. 517 **740**

——— *or Personal Law—Brahmins—Presumption—Burden of proof*—Criteria *for determining whether a community follows custom—Brahmins of Kungiana, Tahsil and District Ludhiana.*

In a case of disputed succession or alienation on the ground of custom, the universal rule is that a Brahmin is presumed to be governed by his personal law, and if he alleges a custom contrary to the rules of that law, he is bound to prove by cogent and clear evidence that he is governed by such custom.

The question of custom is, primarily, a question of fact and in each case has to be decided with reference to the particular circumstances alleged and proved.

The most important *criteria* for determining whether a particular community has adopted and follows agricultural custom are,—

(*a*) whether the particular community forms a compact agricultural community by itself;

(*b*) whether their source of livelihood is solely or almost solely agricultural;

(*c*) whether the members of the community have given up their old customs under the personal law and have adopted the customs of their agricultural neighbours in matters of alienation and succession.

The Brahmins of Kungiana Tahsil and District Ludhiana, are governed by Hindu Law in matters of alienation and succession. **L** HARBANS LAL *v.* ATRA **858**

——— Succession—Sankaldipi Brahmins—Daughters, exclusion of. *See* WAJIB-UL-ARZ. **725**

——— Wajib-ul-arz, *entry in, effect of—Burden of proof—General law, modification of,*

Custom—concld.

In order to get rid of the binding effect of a custom recorded in a *wajib-ul-arz*, the person seeking to avoid it must show that the custom has been modified by contract or otherwise.

The general law as regards the ownership of trees standing on tenancy land is inapplicable where there is an express provision in a *wajib-ul-arz* that such ownership is with the tenant. **N** AJODHYA PRASAD *v* KARAN **550**

Cy-pres, doctrine of, application of. *See* TRUST **661**

Damages, mode of assessing, measure of. *See* CONTRACT ACT, s 73 **191**

Decree *awarding compensation, construction of—Decree silent as to interest—Interest, whether can be allowed—Compensation, amount of, when to be ascertained—Execution of decree—Duty of executing Court.*

A decree awarding compensation contained the following provisions:—"The defendants are directed to pay compensation at the rate of Rs 1,265 per annum.....and that the sum of Rs 1,[illegible] and odd be paid by the defendants to the plaintiff on account of the costs of the suit with interest thereon at the rate of 6 per cent per annum from this date to the date of realization" In execution the decree-holder claimed interest on the amount awarded as compensation:

Held, that upon a proper construction of the decree, interest was awarded upon the amount of the costs only and not on the amount of the compensation.

Where the amount of compensation is fixed by a decree at a certain sum per year, that sum, unlike mesne profits, is not liable to be ascertained thereafter, except in so far as the length of the period in respect of which it is payable is concerned.

A Court executing a decree must execute it as it finds it, and cannot allow interest if the decree is silent as to interest : NARENDRA LAL KHAN *v* BOMKESH MITTER, 30 C. L. J 205 **227**

———, *whether binding on party who has no notice—Compromise signed by Pleader not having authority, validity of—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution of decree—Sale—Proclamation, omission in, whether ground for setting aside sale.*

A party who is privy to a decree is bound by the decree, whether he has or has not notice thereof.

A compromise signed by a Pleader on behalf of his client which has been acted upon and adopted, cannot afterwards be objected to on the ground that the Pleader had no instructions to enter into the compromise

To render a sale liable to be set aside on the ground of an omission in the sale proclamation, it must be shown that the omission was a material one. It is not for every omission that a sale is liable to be set aside **C** PROMATHA NATH *v.* BEJOY MADHAB **143**

Easements Act (V of 1882), s. 13—*Partition of joint property—Easements enjoyed before partition, how affected—Easement of necessity—Extinguishment of easement—Burden of proof*

On a severance of tenements by a partition of joint property and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent and continuous and necessary for enjoying any of the undivided shares when the partition is effected, pass to the co-parceners to whom such shares are respectively allotted in severalty.

An easement of necessity does not lose its character as such by the mere fact that some other tenement exists over which the right might be enjoyed.

A person who alleges the extinguishment of a right of easement must prove such extinguishment by some agreement or rule of law. **P** BUTA SINGH *v.* LALLA, 101 P. R. 1919 **584**

Easwaran Koil Mahamai lands, meaning of. *See* CIVIL PROCEDURE CODE, s. 11 **33**

Ejusdem generis, rule of, applicability of. *See* REGISTRATION ACT, s. 50 (1) (*d*) **345**

Evidence Act (I of 1872), s. 24—*Confession made after several conversations with Police Officers, admissibility of*

To render a confession admissible it must be made voluntarily, and not as the result of any inducement or threat A confession made after a conversation of several days with the Investigating Officer and other Police Officers cannot be said to be a voluntary confession so as to make it admissible against the person who made it. **C** MOBARAK ALI *v* EMPEROR, 23 C. W. N. 886; 20 CR. L. J. 833 **929**

——— **s. 32**—*Recitals in documents not inter partes, admissibility of—Objection to admissibility not taken in trial Court, whether can be taken in Appellate Court.*

Recitals in documents not *inter partes* are ordinarily irrelevant, unless the statements in the documents can be brought within the conditions of section 32 of the Evidence Act Statements in documents not *inter partes* limiting the interest of the executants by declaring the boundaries of certain land fall within section 32, clause (8) of the Evidence Act, and are, therefore, admissible in evidence if the conditions necessary to bring section 32 into operation are proved.

Where no objection is taken in the first Court to the admission in evidence of documents not *inter partes*, objection cannot be taken in appeal that it has not been proved that the conditions exist which make section 32 applicable. **C** REAJADDI SARKAR *v.* GANGA CHARAN **863**

——— **s. 35**—Report made by peon in execution proceedings, admissibility of. *See* PLEADER AND CLIENT **20**

——— **s. 63**—*Secondary evidence—Document referred to in previous statement—Statement made by party or authorised agent Oudh Rent Act (XXII of 1886), Chap. II A—Lands held rent-free—Grant, lands not held under—Assessment of rent, whether permissible*

A statement made by a party or his authorised agent in a previous suit, in which he refers to a document which is against his interest, is secondary evidence of that document

Chapter VII A of the Oudh Rent Act does not apply to lands held rent-free merely by reason of their being so held, if it is found that they are not held under any grant. **O** PATIPAL SINGH *v.* UDDAI BHAN-PARTAB SINGH, 6 O. L. J 508 **667**

——— ss. 63, 70—*Mortgage—Attestation, proof of—Scribe, whether witness - Burden of proof—Admission by mortgagor, whether binds third parties—Lien, proof of*

It is settled law for the province of Bihar and Orissa that a person who signs a document as a scribe must prove specifically that in signing as a scribe he intended to sign as a witness

In order to prove the due execution of a document, proof of attestation is necessary. Where the only witness to a document is the scribe, who deliberately elects to affix the word 'scribe' to his name in preference to the word 'witness', in the absence of evidence that he signed as an attesting witness, the document is not admissible in evidence.

Where debts are incurred for family necessity by the execution of mortgage deeds, the signature of the managing member of the family, as the guardian of any member who might have been a minor at the time of execution, would be sufficient to bind that minor and create a lien upon the minor's property. But a lien can only be created by a registered instrument, and in order to prove that the original instrument is a mortgage document, it is necessary to observe the provisions of section 68 of the Evidence Act.

An extra judicial admission by the managing member of the family may or may not render it necessary to prove the original documents against himself, but this would not relieve the mortgagee of the necessity to prove them as against the minor. **Pat** NAGESWAR PRASAD *v* BACHU SINGH, 4 P. L. J. 511 **79**

——— s. 70 **79**

——— s. 90—*Ancient document, - Presumption as to execution and attestation—Document, whether must be produced—Custody, proper, proof of—Interpretation of Statutes—Court, duty of.*

The rule of presumption embodied in section 90 of the Evidence Act must be applied with exceeding caution in India, where forgery and fraud are not of rare occurrence. The necessity for such caution makes it necessary to give a strict and narrow, and not a loose and liberal, interpretation to the provisions of the law.

The Legislature, by the plain language used in section 90 of the Evidence Act, has limited the power of the Court to dispense with proof of the execution of documents relied on as evidence, to ancient documents produced in Court at the trial; and the Courts in India have no power to enlarge this legislative provision so as to apply it to cases clearly outside the enactment.

The law makes the production of the document a *sine qua non* for the application of section 90.

Every ancient document for which a presumption of due execution is claimed, must be produced before the tribunal which is asked to make the presumption in its favour, so as to place it in a position to see for itself whether it bears upon the face of it such indications as convince the mind that it is genuine or "betrays from some anachronism or other inconsistency" that it is a fabrication

(Authorities reviewed and discussed.)

It is the duty of a party, who claims that an ancient document should be presumed to have been executed, to prove by clear evidence the fact of

custody, in order that the Court may determine whether or not such custody was proper

The execution and registration of a deed of sale in Berar in favour of a person who does not take possession of the property which the deed purports to sell, but leaves it with the apparent vendor, raises no presumption that the apparent vendee ever had custody of the deed for the purposes of section 90 of the Evidence Act

In interpreting Statute Law in British India the Courts must give effect to the plain language employed by the Legislature, even if it conflicts with what they conceive to be the policy or the intention of the law.

While the Law of Evidence is designed to render the utmost assistance in the discovery of the truth, it does not relieve against the necessity of giving legal proof, any party who may be unable to adduce evidence

It is one of the canons of interpretation that every legislative exception to a general rule of law must be literally and stringently construed, and that there is no justification for extending it by analogy to include cases not reasonably within the purview of the language employed. **N** SHRIPUJA *v* KANHAYA LAL, 15 N. L. R. 192 **947**

——— s. 91—Gift by joint owners—Petition to Collector for mutation of names, whether evidence of gift. *See* ADVERSE POSSESSION **901**

——— ss. 91, 92, 99—*Oral evidence to show that a deed purporting to be a sale-deed is a deed of gift, admissibility of*—Benami *transaction—Adverse possession as against transferor Civil Procedure Code (Act V of 1908), s. 66—"Certified purchaser," whether includes representative.*

Proviso 1 to section of the Evidence Act only permits failure of consideration to be proved by extrinsic evidence as between the parties to a deed and when such failure is pleaded for the purpose of invalidating a document.

Section 91 of the Evidence Act, read with section 99 of the Act, prevents a party to a deed in a suit against a third person from furnishing extrinsic evidence for the purpose of showing that the deed which purports to be a sale-deed is really a deed of gift.

When one member of a family transfers property to another member of the family and the transaction is a sham one designed to save the property from the creditors but not intended to transfer it to the transferee, any ostensible possession of the latter must be deemed to have been with the object of maintaining this design and it cannot be deemed to be adverse to the transferor.

The words "certified purchaser" in section 66 of the Civil Procedure Code include persons standing in the shoes of the Court purchaser **O** ASHFAQ HUSAIN *v.* NAZIR HUSAIN, 3 O. L. J. 563; 22 O. C. 244 **961**

——— s. 91—Promissory note, execution of, for contemporaneous advance—Creditor, rights of. *See* MALABAR LAW **878**

——— s. 92—*Decree, adjustment of—Certification of adjustment—Compromise, whether new contract—Oral evidence, admissibility of, to prove compromise—Contract Act (IX of 1872), s. 25.*

Where in execution of a decree the parties effect

Evidence Act—contd.

a compromise and in consequence certify the adjustment of the decree to the Court, whereupon the execution case is struck off on the ground that the decree is fully satisfied, the order of the Court is binding on the parties and there is no longer an operative decree in existence. The fact that the liabilities under the decree form the consideration for the compromise, does not prevent that compromise from being a new and independent contract which may form the basis of a suit and which may be proved by oral evidence, and such evidence would not amount to "contradicting, varying adding to or subtracting from" the terms of the decree. **N** RATANLAL *v.* ANWAR KHAN **527**

——— **ss. 92, 99**—*Evidence, admissibility of, tendered by persons not parties to document in proof of its true character—'Varying' in s. 99, meaning of.*

Section 99 of the Evidence Act is an enabling section just as section 92 is a disqualifying section.

The word 'varying' in section 99 of the Evidence Act covers the same ground as the words "contradicting, varying, adding to or subtracting from" in section 92 of the Act.

It is competent for persons who are not parties to a document to adduce oral evidence to show that the rights of parties to it are at variance with the rights ostensibly created and declared by the instrument. **M** KRISHNASWAMI AIYAR *v.* MANGALATHAMMAL **243**

———**s. 92, proviso (2)**—Evidence of oral agreement to pay interest, whether admissible. *See* LIMITATION ACT, s. 5 **137**

———**s. 92, proviso (2)**—*Negotiable Instruments Act (XXVI of 1881), s. 80—Promissory note—Oral agreement as to payment of interest, whether admissible—Interest, whether can be allowed Finding of fact as to payment of money, whether can be challenged*

Where a promissory note makes no mention regarding the payment of interest, oral evidence is inadmissible, under the provisions of section 92, proviso 2 of the Indian Evidence Act, to prove a contemporaneous oral agreement to pay interest. All that can be awarded to a plaintiff suing on such a promissory note is interest at 6 per cent per annum under section 80 of the Negotiable Instruments Act

The mere fact that a promissory note or other similar document is not executed for a sum of money alleged to have been advanced, is no ground for holding that the finding of a Court that such sum had been advanced is incorrect. **N** YADO *v.* BEHARILAL **242**

——— **ss. 92, proviso (4), 115**—*Lease—Oral evidence showing that condition was dispensed with, admissibility of—Estoppel*

A written lease for five years provided that if the lessee desired a renewal, he should give a notice in writing three months before the expiration of the term of the lease The last day on which such notice was to be given was the 31st of January 1917. No written notice was in fact given by the lessee, but he brought a suit for the renewal of the lease and wanted to prove that on the 4th of January 1917 one of the lessors had told his wife that there was no need to give a written notice provided for by the lease and hence no written notice for renewal had been given:

Held, (1) that in view of the provisions of section 92, proviso 4, of the Evidence Act, the alleged statement of the lessor regarding the written notice for renewal was not admissible in evidence;

(2) that such a statement, on being assented to by the lessee, amounted either to a modification or re-cission of the contract of lease within the meaning of section 92, proviso 4, of the Evidence Act;

(3) that the statement did not amount to an estoppel on the part of the lessor so as to preclude him from denying that the notice provided for by the lease had in fact been given. **C** D'CRUZ *v.* JITENDRA NATH, 46 C. 1079; 29 C. L. J. 94 **684**

——— **ss. 95 to 97,** provisions of, when can be invoked in aid. *See* SPECIFIC RELIEF ACT, s. 31 **379 961**

——— **s. 99** **243**

——— **s. 99**—"Varying", meaning of. *See* ANTE, s. 92

——— **s. 106**—Puberty, attainment of Presumption—Burden of proof *See* MUHAMADAN LAW **94**

——— **s. 114, ill. (a)**—*"Soon after," meaning of—Person found in possession of stolen goods one year after theft, whether bound to explain possession—Presumption—Penal Code (Act XLV of 1860), s. 411.*

The expression "soon after" in section 114, ill. (*a*), of the Evidence Act would not apply to the case of goods discovered thirteen months after the theft.

A person found in possession of stolen goods 2 or 3 years after the theft is not bound to explain his possession thereof **M** JAIMULLABDIN, *In re*, 11 L. W. 41; 24 M. L. T. 358; 20 CR. L. J. 819 **819**

——— **s. 114, ill. (f)** Presumption of fact. *See* BERAR LAND REVENUE CODE, s. 9 **62**

——— **s. 115**—Estoppel. *See* HINDU LAW—MINOR **412**

——— **s. 115**—Estoppel—Acquiescence by judgment-debtor, whether binds purchaser at Court sale *See* CIVIL PROCEDURE CODE, s. 18 **579 413**

——— **s. 116** **59**

——— **s. 116.** *See* MORTGAGE

——— **s. 116**—*Landlord and tenant—Estoppel, extent of—Tenant, whether can question status of landlord.*

Under section 116 of the Evidence Act a tenant is precluded from denying the title of his landlord, but it is open to him to question the status of his landlord. **Pat** LOKORAM *v.* BIDYA RAM MAHTO, (1920) PAT. 5 **43**

Execution of decree—*Application, when can be regarded as in continuation of previous application—Limitation Act (IX of 1908), ss 3, 18—Limitation, plea of, when can be raised—Stay of sale in execution at instance of decree-holder—Time, whether can be excluded*

Where an application for execution is dismissed for no fault or *laches* on the part of the decree-holder in the prosecution of the execution, a subsequent application, in all respects similar in scope and character to the former application, is a continuation of that application But where an application is dismissed on account of the default of the

Criminal trial—concld.

A Court ought not to permit the making of insinuations by the Police as to the defence witnesses being related to the accused, especially when there is nothing on the record to support such insinuation and the witnesses have not been questioned with reference thereto. **O** RAMESHWAR TEWARI *v.* EMPEROR, 20 CR L. J 748 **156**

Criminal Tribes Act (III of 1911), s. 23. *scope of—Previous conviction, whether must be after registration.*

The operation of section 23 of the Criminal Tribes Act is not confined to offences that have been committed since the convict was registered. The second conviction referred to in the section does not signify that the previous conviction should have been obtained after the registration of the convict. It is enough for the purposes of the section if the convict has been previously convicted, whether before or after his registration. **A** EMPEROR *v.* NAKCHEDI, 20 CR. L. J. 77 **612**

Crown Grants Act (XV of 1895), s. 2—"Grant", meaning of. *See* REGISTRATION ACT, s. 90 (1 *d*) **345**

——— **s. 3** **345**

Custom—*Adoption—Daughter's son, whether can be adopted*—Ghorewaha Rajputs *of Garhshankar Tahsil, Hoshiarpur District*—Riwaj-i-am, *entry in, value of.*

A Ghorewaha Rajput of the Garhshankar Tahsil in the Hoshiarpur District is authorised by custom to adopt his daughter's son

The entry in the *riwaj-i-am* of the Hoshiarpur District prepared at the last Settlement stating that there is no custom of adoption among the Rajputs of the Garhshankar Tahsil, is not a correct statement of the custom on the subject. **P** UMAR BAKHSH *v* SOHNE KHAN, 110 P. R. 1919 **404**

——— *Alienation—Sale of ancestral land to pay off father's debt, whether can be avoided—Necessity—Minor, sale by—Property, whether can be recovered by minor—Compensation, minor, whether bound to pay.*

A man who has sold a portion of his ancestral land to pay off his father's debts cannot subsequently avoid the sale merely on the plea that the sale was not for necessity.

A minor, however, is not bound to recognise his father's debts as a charge on the ancestral land and, therefore, where a portion of a minor's ancestral land is sold by his mother to pay off his father's debts, the minor is entitled to recover the property without being made to pay anything. **P** THAMMAN SINGH *v.* SANTA, 119 P. R. 1919 **457**

——— *Guardianship—Alienation—Brother, adult, whether authorised to alienate minor brother's property—Muhammadans of Muzaffargarh District—*Riwaj-i-am, *entry in, value of.*

Among Muhammadans of Muzaffargarh District, on the death of a father the guardianship of the person and property of his minor children devolves on his eldest son, if adult. Such guardian is entitled to alienate the property of the minor for payment of the debts of the minor's father, for the marriage or maintenance of the minor or or an object directly advantageous to the minor.

A *riwaj-i-am* is a public record prepared by a public officer in discharge of his duties and under

Custom—contd.

Government rules, and, therefore, statements contained in a *riwaj-i-am*, which is not imperfectly compiled, form a strong piece of evidence in support of the custom affirmed therein, even when they are unsupported by instances, provided they are not proposed to the general custom of the country. **P** SANUN RAM *v.* ALLAH BAKSH, 103 P. R. 1919 **435**

——— *Mortgage by father—Son, whether has interest in redemption—Mortgage, suit for sale on—Son, whether entitled to be impleaded—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.*

Under Hindu Law a son is a co-parcener, an owner of the ancestral property along with his father and other members of the family. Under Customary Law a son has no right of ownership in his father's lifetime. He has only a reversionary interest in the property and a right to protect that interest by interfering to prevent unnecessary alienations. This limited interest that he possesses is not such an interest as is contemplated by Order XXX IV, rule 1, of the Civil Procedure Code. Therefore, where a mortgagee brings a suit to enforce the mortgage, the mortgagor's son is not entitled to be made a party to the suit. **P** SHIV DEV SINGH *v.* JAI RAM, 125 P. R. 1919 **411**

——— *opposed to personal law, proof of*—Wajib-ul-arz, *entry in, value of—Instances, absence of, effect of.*

The record of a custom in a *wajib-ul-arz* that a childless widow has a full estate in the property of her husband is of no value in the absence of any proof of instances showing that effect was given to such custom. **O** KANCHAN *v.* SARABJIT, 5 O. L. J. 517 **740**

——— *or Personal Law—Brahmins Presumption—Burden of proof*—Criteria *for determining whether a community follows custom—Brahmins of Kungiana, Tahsil and District Ludhiana.*

In a case of disputed succession or alienation on the ground of custom, the universal rule is that a Brahmin is presumed to be governed by his personal law, and if he alleges a custom contrary to the rules of that law, he is bound to prove by cogent and clear evidence that he is governed by such custom.

The question of custom is, primarily, a question of fact and in each case has to be decided with reference to the particular circumstances alleged and proved.

The most important *criteria* for determining whether a particular community has adopted and follows agricultural custom are,—

(*a*) whether the particular community forms a compact agricultural community by itself;

(*b*) whether their source of livelihood is solely or almost solely agricultural;

(*c*) whether the members of the community have given up their old customs under the personal law and have adopted the customs of their agricultural neighbours in matters of alienation and succession.

The Brahmins of Kungiana, Tahsil and District Ludhiana, are governed by Hindu law in matters of alienation and succession. **L** HARBANS LAL *v.* ATRA **858**

——— Succession—Saukaldipi Brahmins—Daughters, exclusion of. *See* WAJIB-UL-ARZ **725**

——— Wajib-ul-arz, *entry in, effect of—Burden of proof—General law, modification of.*

Custom—concld.

In order to get rid of the binding effect of a custom recorded in a *wajib-ul-arz*, the person seeking to avoid it must show that the custom has been modified by contract or otherwise.

The general law as regards the ownership of trees standing on tenancy land is inapplicable where there is an express provision in a *wajib-ul-arz* that such ownership is with the tenant. **N** AJODHYA PRASAD *v* KARAN **550**

Cy-pres, doctrine of, application of *See* TRUST **661**

Damages, mode of assessing, measure of. *See* CONTRACT ACT, s. 73 **191**

Decree *awarding compensation, construction of—Decree silent as to interest—Interest, whether can be allowed—Compensation, amount of, when to be ascertained—Execution of decree—Duty of executing Court.*

A decree awarding compensation contained the following provisions:—"The defendants are directed to pay compensation at the rate of Rs 1,265 per annum.....and that the sum of Rs 1,60[illegible] and odd be paid by the defendants to the plaintiff on account of the costs of the suit with interest thereon at the rate of 6 per cent per annum from this date to the date of realization" In execution the decree-holder claimed interest on the amount awarded as compensation:

Held, that upon a proper construction of the decree, interest was awarded upon the amount of the costs only and not on the amount of the compensation.

Where the amount of compensation is fixed by a decree at a certain sum per year, that sum, unlike mesne profits, is not liable to be ascertained thereafter, except in so far as the length of the period in respect of which it is payable is concerned.

A Court executing a decree must execute it as it finds it, and cannot allow interest if the decree is silent as to interest. **C** NARENDRA LAL KHAN *v* BOMKESH MITTER, 30 C. L. J. 205 **227**

———, *whether binding on party who has no notice—Compromise signed by Pleader not having authority, validity of—Civil Procedure Code (Act V of 1908), O XXI, r. 90—Execution of decree—Sale—Proclamation, omission in, whether ground for setting aside sale.*

A party who is privy to a decree is bound by the decree, whether he has or has not notice thereof.

A compromise signed by a Pleader on behalf of his client which has been acted upon and adopted, cannot afterwards be objected to on the ground that the Pleader had no instructions to enter into the compromise.

To render a sale liable to be set aside on the ground of an omission in the sale proclamation, it must be shown that the omission was a material one. It is not for every omission that a sale is liable to be set aside **C** PROMATHA NATH *v* BEJOY MADHAB **143**

Easements Act (V of 1882), s. 13

Partition of joint property—Easements enjoyed before partition, how affected—Easement of necessity—Extinguishment of easement—Burden of proof

On a severance of tenements by a partition of joint property and in the absence of a contrary intention,

Easements Act—concld.

expressed or necessarily implied, all such easements as are apparent and continuous and necessary for enjoying any of the undivided shares when the partition is effected, pass to the co-parceners to whom such shares are respectively allotted in severalty

An easement of necessity does not lose its character as such by the mere fact that some other tenement exists over which the right might be enjoyed

A person who alleges the extinguishment of a right of easement must prove such extinguishment by some agreement or rule of law. **P** BUTA SINGH *v.* LALLA, 101 P. R. 1919 **584**

Easwaran Koil Mahamai lands, meaning of. *See* CIVIL PROCEDURE CODE, s. 11 **33**

Ejusdem generis, rule of, applicability of. *See* REGISTRATION ACT, s. 50 (1) (*d*) **345**

Evidence Act (I of 1872), s. 24—*Confession made after several conversations with Police Officers, admissibility of*

To render a confession admissible it must be made voluntarily, and not as the result of any inducement or threat A confession made after a conversation of several days with the Investigating Officer and other Police Officers cannot be said to be a voluntary confession so as to make it admissible against the person who made it **C** MOBARAK ALI *v* EMPEROR. C W N, 8 6; O R L, 8 3 **929**

——— **s. 32**—*Recitals in documents not inter partes, admissibility of—Objection to admissibility not taken in trial Court, whether can be taken in Appellate Court.*

Recitals in documents not *inter partes* are ordinarily irrelevant, unless the statements in the documents can be brought within the conditions of section 32 of the Evidence Act Statements in documents not *inter partes* limiting the interest of the executants by declaring the boundaries of certain land fall within section 3[illegible], clause (3) of the Evidence Act, and are, therefore, admissible in evidence if the conditions necessary to bring section 32 into operation are proved.

Where no objection is taken in the first Court to the admission in evidence of documents not *inter partes*, objection cannot be taken in appeal that it has not been proved that the conditions exist which make section 32 applicable **C** REAJADDI SARKAR *v.* GANGA CHARAN **863**

——— **s. 35**—Report made by peon in execution proceedings, admissibility of. *See* PLEADER AND CLIENT **20**

——— **s. 63**—*Secondary evidence—Document referred to in previous statement—Statement made by party or authorised agent Oudh Rent Act (XXII of 1886), Chap II A—Lands held rent-free—Grant, lands not held under—Assessment of rent, whether permissible*

A statement made by a party or his authorised agent in a previous suit, in which he refers to a document which is against his interest, is secondary evidence of that document

Chapter VII A of the Oudh Rent Act does not apply to lands held rent-free merely by reason of their being so held, if it is found that they are not held under any grant. **O** RATIPAL SINGH *v.* UDDAI BHAN PARTAB SINGH, 6 O. L. J. 508 **667**

Evidence Act—contd.

——— **ss. 63, 70**—*Mortgage—Attestation, proof of—Scribe, whether witness Burden of proof—Admission by mortgagor, whether binds third parties—Lien, proof of*

It is settled law for the province of Bihar and Orissa that a person who signs a document as a scribe must prove specifically that in signing as a scribe he intended to sign as a witness

In order to prove the due execution of a document, proof of attestation is necessary. Where the only witness to a document is the scribe, who deliberately elects to affix the word 'scribe' to his name in preference to the word 'witness', in the absence of evidence that he signed as an attesting witness, the document is not admissible in evidence.

Where debts are incurred for family necessity by the execution of mortgage deeds, the signature of the managing member of the family, as the guardian of any member who might have been a minor at the time of execution, would be sufficient to bind that minor and create a lien upon the minor's property. But a lien can only be created by a registered instrument, and in order to prove that the original instrument is a mortgage document, it is necessary to observe the provisions of section 68 of the Evidence Act.

An extra judicial admission by the managing member of the family may or may not render it necessary to prove the original documents against himself, but this would not relieve the mortgagee of the necessity to prove them as against the minor. **Pat** NAGESWAR PRASAD *v.* BACHU SINGH, 4 P. L. J. 511 **79**

——— **s. 70** **79**

——— **s. 90**—*Ancient document, Presumption as to execution and attestation—Document, whether must be produced—Custody, proper, proof of—Interpretation of Statutes—Court, duty of*

The rule of presumption embodied in section 90 of the Evidence Act must be applied with exceeding caution in India, where forgery and fraud are not of rare occurrence. The necessity for such caution makes it necessary to give a strict and narrow, and not a loose and liberal, interpretation to the provisions of the law.

The Legislature, by the plain language used in section 90 of the Evidence Act, has limited the power of the Court to dispense with proof of the execution of documents relied on as evidence, to ancient documents produced in Court at the trial: and the Courts in India have no power to enlarge this legislative provision so as to apply it to cases clearly outside the enactment.

The law makes the production of the document a *sine qua non* for the application of section 90.

Every ancient document for which a presumption of due execution is claimed, must be produced before the tribunal which is asked to make the presumption in its favour, so as to place it in a position to see for itself whether it bears upon the face of it such indications as convince the mind that it is genuine or "betrays from some anachronism or other inconsistency" that it is a fabrication

(Authorities reviewed and discussed)

It is the duty of a party, who claims that an ancient document should be presumed to have been executed, to prove by clear evidence the fact of custody, in order that the Court may determine whether or not such custody was proper

The execution and registration of a deed of sale in Berar in favour of a person who does not take possession of the property which the deed purports to sell, but leaves it with the apparent vendor, raises no presumption that the apparent vendee ever had custody of the deed for the purposes of section 90 of the Evidence Act.

In interpreting Statute Law in British India the Courts must give effect to the plain language employed by the Legislature, even if it conflicts with what they conceive to be the policy or the intention of the law.

While the Law of Evidence is designed to render the utmost assistance in the discovery of the truth, it does not relieve against the necessity of giving legal proof, any party who may be unable to adduce evidence

It is one of the canons of interpretation that every legislative exception to a general rule of law must be literally and stringently construed, and that there is no justification for extending it by analogy to include cases not reasonably within the purview of the language employed. **N** SHRIPUJA *v.* KANHAYA LAL, 15 N. L. R. 192 **947**

——— **s. 91**—Gift by joint owners—Petition to Collector for mutation of names, whether evidence of gift *See* ADVERSE POSSESSION **901**

——— **ss. 91, 92, 99**—*Oral evidence to show that a deed purporting to be a sale-deed is a deed of gift, admissibility of—Benami transaction—Adverse possession as against transferor—Civil Procedure Code (Act V of 1908), s. 6—"Certified purchaser," whether includes representative.*

Proviso 1 to section 92 of the Evidence Act only permits failure of consideration to be proved by extrinsic evidence as between the parties to a deed and when such failure is pleaded for the purpose of invalidating a document.

Section 91 of the Evidence Act, read with section 99 of the Act, prevents a party to a deed in a suit against a third person from furnishing extrinsic evidence for the purpose of showing that the deed which purports to be a sale-deed is really a deed of gift.

When one member of a family transfers property to another member of the family and the transaction is a sham one designed to save the property from the creditors but not intended to transfer it to the transferee, any ostensible possession of the latter must be deemed to have been with the object of maintaining this design and it cannot be deemed to be adverse to the transferor.

The words "certified purchaser" in section 66 of the Civil Procedure Code include persons standing in the shoes of the Court purchaser **O** ASHFAQ HUSAIN *v.* NAZIR HUSAIN, 5 O. L. J. 563; 22 O. C. 222 **961**

——— **s. 91**—Promissory note, execution of, for contemporaneous advance—Creditor, rights of. *See* MALABAR LAW **878**

——— **s. 92**—*Decree, adjustment of—Certification of adjustment—Compromise, whether new contract—Oral evidence, admissibility of, to prove compromise—Contract Act (IX of 1872), s. 25.*

Where in execution of a decree the parties effect

Evidence Act—contd.

a compromise and in consequence certify the adjustment of the decree to the Court, whereupon the execution case is struck off on the ground that the decree is fully satisfied, the order of the Court is binding on the parties and there is no longer an operative decree in existence. The fact that the liabilities under the decree form the consideration for the compromise, does not prevent that compromise from being a new and independent contract which may form the basis of a suit and which may be proved by oral evidence, and such evidence would not amount to "contradicting, varying adding to or subtracting from" the terms of the decree. **N** RATANLAL *v.* ANWAR KHAN **527**

——— **ss. 92, 99**—*Evidence, admissibility of, tendered by persons not parties to document in proof of its true character—'Varying' in s. 99, meaning of*

Section 99 of the Evidence Act is an enabling section just as section 92 is a disqualifying section.

The word 'varying' in section 99 of the Evidence Act covers the same ground as the words "contradicting, varying, adding to or subtracting from" in section 92 of the Act.

It is competent for persons who are not parties to a document to adduce oral evidence to show that the rights of parties to it are at variance with the rights ostensibly created and declared by the instrument **M** KRISHNASWAMI AIYAR *v.* MANGALATHAMMAL **243**

——— **s. 92, proviso (2)**—Evidence of oral agreement to pay interest, whether admissible. *See* LIMITATION ACT, s. 5 **137**

——— **s. 92, proviso (2)**—*Negotiable Instruments Act (XXVI of 1881), s. 80—Promissory note—Oral agreement as to payment of interest, whether admissible—Interest, whether can be allowed—Finding of fact as to payment of money, whether can be challenged.*

Where a promissory note makes no mention regarding the payment of interest, oral evidence is inadmissible, under the provisions of section 92, proviso (2) of the Indian Evidence Act, to prove a contemporaneous oral agreement to pay interest. All that can be awarded to a plaintiff suing on such a promissory note is interest at 6 per cent per annum under section 80 of the Negotiable Instruments Act

The mere fact that a promissory note or other similar document is not executed for a sum of money alleged to have been advanced, is no ground for holding that the finding of a Court that such sum had been advanced is incorrect. **N** YADO *v.* BEHARILAL **242**

——— **ss 92, proviso (4), 115**—*Lease—Oral evidence showing that condition was dispensed with, admissibility of—Estoppel.*

A written lease for five years provided that if the lessee desired a renewal, he should give a notice in writing three months before the expiration of the term of the lease The last day on which such notice was to be given was the 31st of January 1917. No written notice was in fact given by the lessee, but he brought a suit for the renewal of the lease and wanted to prove that on the 4th of January 1917 one of the lessors had told his wife that there was no need to give a written notice provided for by the lease and hence no written notice for renewal had been given:

Held, (1) that in view of the provisions of section 92, proviso 4, of the Evidence Act, the alleged statement of the lessor regarding the written notice for renewal was not admissible in evidence;

(2) that such a statement, on being assented to by the lessee, amounted either to a modification or rescission of the contract of lease within the meaning of section 92, proviso 4, of the Evidence Act;

(3) that the statement did not amount to an estoppel on the part of the lessor so as to preclude him from denying that the notice provided for by the lease had in fact been given. **C** D'CRUZ *v.* JITENDRA NATH, 46 C. 1079; 29 C. L. J. 94 **684**

Evidence Act—concld.

——— **ss. 95 to 97,** provisions of, when can be invoked in aid. *See* SPECIFIC RELIEF ACT, s. 31 **379**

——— **s. 99** **961**

——— **s. 99**—"Varying", meaning of. *See* ANTE, s. 92 **243**

——— **s. 106**—Puberty, attainment of Presumption—Burden of proof. *See* MUHAMADAN LAW **94**

——— **s. 114, ill. (a)**—*"Soon after," meaning of—Person found in possession of stolen goods one year after theft, whether bound to explain possession—Presumption—Penal Code (Act XLV of 1860), s. 411.*

The expression "soon after" in section 114, ill. (*a*), of the Evidence Act would not apply to the case of goods discovered thirteen months after the theft.

A person found in possession of stolen goods 2 or 3 years after the theft is not bound to explain his possession thereof **M** JAIMULLABDIN, *In re*, 11 L. W. 43; 26 M. L. T. 389; 20 CR. L J 819 **819**

——— **s. 114, ill. (f)**—Presumption of fact. *See* BERAR LAND REVENUE CODE, s. 79 **62**

——— **s. 115**—Estoppel. *See* HINDU LAW—MINOR **412**

——— **s. 115**—Estoppel—Acquiescence by judgment-debtor, whether binds purchaser at Court sale. *See* CIVIL PROCEDURE CODE, s. 18 **579**

——— **s. 116** **413**

——— **s. 116.** *See* MORTGAGE **59**

——— **s. 116**—*Landlord and tenant—Estoppel, extent of—Tenant, whether can question status of landlord.*

Under section 116 of the Evidence Act a tenant is precluded from denying the title of his landlord, but it is open to him to question the status of his landlord. **Pat** LOKORAM *v.* BIDYA RAM MAHTO, (1920) PAT. 15 **43**

Execution of decree—*Application, when can be regarded as in continuation of previous application—Limitation Act (IX of 1908), ss. 3, 15—Limitation, plea of, when can be raised—Stay of sale in execution at instance of decree-holder—Time, whether can be excluded.*

Where an application for execution is dismissed for no fault or *laches* on the part of the decree-holder in the prosecution of the execution, a subsequent application, in all respects similar in scope and character to the former application, is a continuation of that application. But where an application is dismissed on account of the default of the

Execution of decree—contd.

decree-holder in not taking any step to proceed with it, a subsequent application cannot be treated as a continuation or revival of the previous application.

Where the stay of a sale in execution is due entirely to the decree-holder, such stay cannot be regarded as a legal stoppage of the execution proceedings, so as to entitle the decree-holder to the benefit of section 15 of the Limitation Act.

So long as an application for execution is pending, the judgment-debtor can at any time show that the application is barred and the Court has no option but to dismiss it under section 3 of the Limitation Act It is only when the point of limitation is concluded by proceedings in a previous execution, that the judgment-debtor is not allowed to take an objection on the score of limitation in a subsequent execution of the decree. **Pat** KESHO PRASAD SINGH *v* HARBANS LAL **85**

——— *Hindu Law—Widow, estate of, sold in execution of decree—Purchaser, estate taken by—Claim to absolute estate—Burden of proof—Sale of widow's estate and reversioner's interest jointly, effect of.*

Where an auction-purchaser of the right, title and interest of a Hindu widow sets up an absolute estate, it is for him to prove that something more than is evidenced by the sale certificate passed to him, and, in the absence of other materials, it is not for a reversioner in a suit brought by him for possession to prove that an absolute estate had not passed.

Where a reversioner joins a widow in a conveyance by which the widow sells her widow's estate and the reversioner his reversionary interest in favour of a reversionary daughter, the sale is good and operative and cannot be assailed. **C** BHOLA NATH CHOWDHURI *v.* HARIMANI DASI, 30 C. L J. 6 **42**

——— *Objections to attachment, dismissal of—Declaration of title, suit for—Burden of proof—Transfer of Property Act (IV of 1882), s. 53—Auction-purchaser, whether subsequent transferee.*

Where a person objects to the attachment and sale of property in execution of a decree on the ground that the property is his under a sale-deed and his objection is disposed of otherwise than on the merits, whereupon he sues to obtain a declaration that the property is his and is not liable to attachment, the onus of proving *mala fides* and want of consideration on the plaintiff's part is on those who seek to resist the claim.

An auction-purchaser at a sale in execution of a decree is not a "subsequent transferee" entitled to impeach a previous transfer under section 53 of the Transfer of Property Act **N** AWADHUT *v.* PUNJAJI **205**

——— *Order dismissing application for execution—Appeal—Judgment-debtor, whether has right of appeal against finding* Res judicata.

A judgment-debtor has no right of appeal against an order dismissing an application for the execution of a decree on the ground that the decree would only be capable of execution on the decree-holder complying with its terms by executing and registering a lease in favour of the judgment-debtor. In order to give the judgment-debtor a right of appeal not only must he be aggrieved by the reasons given

Execution of decree—concld.

by the Judge, but the finding must be one that would operate as *res judicata*. **C** HAZARI LAL *v.* ALAP SUNDARI DASI **558**

Ex parte decree, suit to declare invalidity of, whether maintainable. *See* CIVIL PROCEDURE CODE, s. 21 **463**

Extradition Act (XV of 1908), ss. 9, 18—*Extradition of fugitive criminal of Chandernagore—Procedure, summary—Treaties of 1815 and 1876—Extradition proceedings, nature of.*

The East Indian possessions of France and Britain are entirely excluded from the Treaty arrangements of 1876. In regard to them the arrangement established between the two countries by the Treaty of 1815 is preserved. Consequently the provisions of Chapter II of the Extradition Act have no application to a fugitive criminal of Chandernagore. In accordance with the terms of the Treaty of 815 procedure for the extradition from British India of a fugitive criminal of Chandernagore is to be summary and no preliminary enquiry is necessary before his extradition.

Extradition on any condition is an invasion of the common law right and when there is a Treaty followed by a Statute recognising the Treaty, the procedure must be in accordance with the Treaty and Statute and no further condition can be imposed by the Courts **C** RAHMAT ALI *v.* EMPEROR, 20 C. L. J. 24; 20 CR. L. J. 739; 47 C. 37 **147**

——— **s. 18** **147**

Factories Act (XII of 1911), s. 41 (a)—*Penal Code (Act XLV of 1860), s. 71—Employing several persons to work in contravention of provisions of Act—Offences, whether separate.*

The language of section 41 *a)* of the Factories Act indicates that what is prohibited is the employment of any person or allowing any person to work contrary to the provisions of the Act, that is to say, it is an offence to employ any person, or allow him to work, contrary to the provisions of the Act. Therefore, where several persons are so employed, the offence is complete and separate in respect of each person employed or allowed to work contrary to any of the provisions of the Act.

To such a case the provisions of section 71 of the Penal Code have no application, because the offence of each workman is distinct and separate and there is not one offence collectively merely by the fact of a number of these offences having been committed at the same time. **B** EMPEROR *v.* JOHNSON, 21 BOM. L R. 1059; 20 CR. L. J 837 **933**

Fraud—*Decree obtained by fraud, when can be set aside—Pleadings, particulars required in—Transfer of Property Act (IV of 882), s. 52—Transfer pendente lite—Transferee, whether can object to decree, passed on ground of fraud.*

A fraudulent decree can only be impeached by a person who has been injured by it: but in order to succeed, he must indicate on what ground it is claimed that the decree was obtained by fraud, or set forth facts from which fraud may be directly and conclusively inferred.

Section 52 of the Transfer of Property Act, does not debar a transferee during the pendency of a suit from one party to the suit, from impeaching the decree therein on the ground of fraud by the parties

Fraud—concld.

to the decree effected by acts done after the transfer. **O** RAGHUBAR DAYAL v. BINDA PRASAD, 22 O. C. 17; 6 O. L. J. 615; 1 U. P. L. R. (J. C.) 77 **572**

Fraudulent transfer—*Owner continuing in possession for more than twelve years after transfer, effect of—Adverse possession—Fraud carried out—Possession, confirmation of, suit for.*

Where the owner of property executes a fraudulent transfer thereof from some ulterior motive but continues in possession of the property for more than 12 years, he is entitled not only to confirmation of possession but to recover possession if he subsequently loses it, even though the fraud intended to be effected was effected. **Pat** BADRI CHAUDHURI v. HURBANS JHA **114**

Ghorewaha Rajputs of Garhshankar Tahsil, Hoshiarpur District. *See* CUSTOM—ADOPTION **404**

Government of India Act 1918, (5 & 6 Geo. V, C. 61) s. 107—High Court, power of interference under, when exercised. *See* CRIMINAL PROCEDURE CODE, s. 144 **483**

Guardian and ward—*Agreement by guardian to pay stipulated sum as profits of estate, effect of—Accounts, liability of guardian to render—Minor, whether can question accounts passed by Court—Guardians and Wards Act (VIII of 890), s. 34.*

Where the guardian of a ward, to save himself the cost of appraising rents, agrees to pay a stipulated sum annually as the profits of the estate, he is bound to take good years with bad, and if, in any year, the collections are less, the loss is his, and not the ward's.

An agreement entered into by a guardian with the mother and uncle of his ward that, in consideration of the ward being allowed to manage the estate himself, the guardian would be indemnified against any suit for rendition of accounts which might be brought against him by the ward on attaining majority is not binding on the ward.

The filing of accounts by a guardian does not relieve him of responsibility for their correctness, nor does the passing of such accounts by the District Judge relieve him of the liability of accounting to his ward. **O** PARTAB SINGH v. KHURRAM SINGH, 6 O. L. J. 407 **75**

Guardians and Wards Act (VIII of 1890), ss. 9 (1), 4 (b), 43—*Application for appointment of guardian—Order directing return of application for presentation to proper Court—Appeal, whether lies—Revision—Other remedy open—High Court, power of interference of.*

An order made under the first clause of section 9 of the Guardians and Wards Act, returning an application for appointment as guardian of a minor for presentation to a Court having territorial jurisdiction, is not appealable.

The High Court will not exercise its extraordinary powers of revision where other remedies are open to a petitioner, nor in all cases where a question of jurisdiction is raised. **P** MURAD BIBI v. UMAR DIN, 107 P. R. 1919 **563**

——— **s. 25**—*Minor, custody of, suit for, maintainability of—Procedure.*

A civil suit for the custody of a minor will not lie in the Civil Courts. To obtain such custody proceedings must be taken under the Guardians and Wards Act. **M** SATHI v. RAMANDI PANDARAM, 9 L. W. 600; 37 M. L. J. 93; 26 M. L. T. 61; (1919) M. W. N. 487; 42 M. 647 **399**

Guardians and Wards Act—concld.

——— **s. 34**—Accounts, liability of guardian to render *See* GUARDIAN AND WARD **75**

——— **ss. 47 (b), 48** **563**

High Court Rules (Mad.), r. 42—Party not served with notice of appeal, right of, to apply to set aside *ex parte* order. *See* CIVIL PROCEDURE CODE, O. XLIA, R. 2 (2) **75C**

Hindu Law—*Custom—Inheritance*—Cessat ratio cessat lex, *applicability of—Impartible estates, origin of—Acceptance of sanad inconsistent with family custom, whether destroys custom.*

A special family custom of inheritance inconsistent with the ordinary Hindu Law may, if observed and acted upon, survives the primitive condition of things out of which it originally sprang.

In such a case the principle embodied in the expression *cessat ratio cessat lex* does not apply.

One of the ways in which impartible estates may originate is by independent chiefs or feudatories being reduced in course of time to the position of ordinary *zemindars*, but such estates may also owe their origin to family arrangements followed up in practice for generations, whereby it was originally agreed that the family property should be impartible and be held and managed for the benefit of the whole family by a single member at a time in a certain order of succession, the other members being entitled to maintenance only. A family may expressly or impliedly agree to continue to observe such a custom, even though the conditions which at one time made it necessary have completely altered.

The mere acceptance by the head of a family governed by such a custom of a *sanad* from the Crown containing clauses inconsistent with the custom cannot destroy the custom or affect the order of succession which it prescribes. **P C** RAO KISHORE SINGH v. GAHENABAI, 5 N. L. R. 176; 27 M. L. J. 562; 17 A. L. J. 1077; 26 M. L. T. 494; 1 U. P. L. R. (P. C.) 94; (1920) M. W. N. 82 **630**

——— **Endowment,** *creation of—Trust, how created—Female, powers of—Bengal Tenancy Act (VIII B.C. of 1885), s. 21, Sch. III, Art.) (a)—Occupancy rights, firm, whether can acquire—Lease, expiry of—Ejectment—Limitation.*

A dedication in favour of an idol to be effectual must be real and not nominal, and it must be shown that the grantor completely divested himself of every portion of the property which is the subject-matter of the grant. Where there is no proof that the income of the property endowed is applied for the maintenance of the idol, and the whole conduct of the parties is inconsistent with the hypothesis of a valid trust, the dedication must be held to be nominal and where this is so, a subsequent grant made by a female having the estate of a Hindu mother cannot create a valid title in favour of the idol, and therefore, the idol cannot maintain a suit in ejectment.

A lease in favour of a firm or a concern must be taken to be a lease in favour of the individuals

constituting the firm, and in the absence of anything to show that the original grantees are no longer members of the firm, there is nothing to prevent them from acquiring occupancy rights.

Certain land was leased to a firm: the lease expired in 1905, but the firm continued in possession of the land. On the 1st April 1915, they were served with notice to quit but they disregarded the notice On the 24th January 19 6, the present suit was brought to eject them:

Held, (1) that the suit, having been brought more than six months after the expiration of the lease, was barred by the special rule of limitation prescribed by Article (*a*) of Schedule III to the Bengal Tenancy Act;

(2) that the firm had acquired a right of occupancy in the land in dispute **Pat** PARMOD BANABIHARI *v.* ATKINS, 4 P L. J. 533 **105**

——— **Endowment,** *religious—Bequest in favour of idol to be established, validity of*—Bona fide *purchaser for value of trust property, position of.*

Bequests to an idol to be established in future are not invalid in Hindu Law.

In dealing with property impressed with a trust for religious purposes no question of *bona fide* purchaser for value arises. **C** SARADINDU MUKHERJEE *v.* CHARU CHANDRA DUTT, 23 C W. N. 872 **855**

——— ———, *religious*—Mutt *or* asthal—*Ownership, nature of—Trustees, position of—Application of surplus income—Suit to obtain or control management of* mutt *properties—Limitation—Adverse possession, what is*—Inam *Register, value of.*

The administration of a *mutt*, *asthal* or similar religious endowment in India must be not for the personal ends of the manager, but entirely for and on behalf of and in the interests of the institution itself. In whomsoever the ownership of the property of such institutions vests, the nature of the ownership is an ownership in trust for the institution itself.

It is the duty of the manager of such a *mutt* to refrain from the personal enjoyment of surplus income, and to add it to capital, and this is equally the case whether the title is in the *gurukkal* or spiritual head, which is the more common case, or in trustees

The general case in such *mutts* is that the ownership of the property is vested in the *mohunt* or spiritual head. But this is not an invariable rule, and there are many exceptions depending on the constitution, usage and custom of the particular *mutt*.

It is sufficient to constitute adverse possession that the person now claiming to be owner should have stood by while others continued to possess not by derivative title but in practical contravention of his alleged rights It is not necessary to prove that such claimant protested against the violation of his rights, and that the possession went on despite such protest.

In suits to obtain control or management of a religious institution, when no misapplication is proved, and the defendant admits himself to be a trustee for the institution, the ordinary limitation of 12 years applies.

The ultimate purpose of the *Inam* Register, compiled in Madras in or about 1864, was to determine whether or not the lands comprised therein were tax free But the preparation of that register was a great act of State and the result of elaborate enquiries and though the statements as to tenure set forth in the register cannot displace actual and authentic evidence in individual cases, they are entitled, in the absence of such evidence, to very great weight. **P C** ARUNACHELLAM CHETTY *v.* VENKATACHALAPATHI GURUSWAMIGAL, 37 M. L. J 40; (1919) M. W. N. 850; 17 A. L. J. 1097; 10 L. W 642; 26 M. L. T. 479; 24 C. W. N. 249 **288**

——— **Family arrangement** *by female—Court, duty of—Reversioners, whether can question settlement.*

Where the several members of a family effect a settlement of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively, and the settlement thus effected is a *bona fide* settlement for the benefit of the family, and a partition of the estate follows thereupon, the Courts are bound to give full effect to it, and such settlement cannot be questioned by the reversioners by means of a suit to establish their right to some of the properties dealt with thereby. **C** SRINATH BOSE *v.* NIBARAN CHANDRA ROY **945**

——— **Gift** *to female - Presumption—Construction of document—Absolute words of conveyance, effect of—Deed purporting to be sale in consideration of unpaid marriage present.*

Where the words of a gift are capable of conferring an absolute estate, the fact that the donee is a Hindu female will not detract from the grant. It is not necessary that there should be express words to the effect that no restriction is placed on the donee's enjoyment or words expressly conferring rights of alienation. It is enough if, from the whole tenor of the document, it can be gathered that the donor intended that the donee should enjoy the property absolutely. The presumption in favour of a limited grant arises only in the absence of such an intention.

A., a Hindu, by deed of sale conveyed to his wife, *M.*, certain immoveable property, in consideration of a sum of money given on the occasion of his marriage for jewellery, but which sum was spent for the family maintenance. *M.* was put in possession with directions to cultivate the lands, enjoy them and pay the *kist* thereon. Some years after *A.*'s death *M.* executed a deed of gift of the property in favour of her daughter, and the present suit was brought by the reversioners of *A* for a declaration that the gift would not affect their reversionary interest. It was contended that the conveyance to *M.* was not of an absolute estate, but only of an estate to be enjoyed for her lifetime, and, therefore, she was not competent to make the gift:

Held, that the plaintiffs' suit must fail; the facts that the conveyance to *M.* was by means of a deed of sale and that the transferee was given the same rights as the transferor possessed himself, *viz.*, the right of one possessing an absolute estate, were strong circumstances indicating that the intention was to pass an absolute estate and the gift, therefore, in favour of the daughter was not open to

Hindu Law—contd.

attack. **M** MURUKONDA RAMASWAMI *v.* MURUKONDA LAKSHMIDEVI, 10 L. W. 269 **253**

——**Guardianship**—*Minor—Mother, right of—Remarriage, effect of—Welfare of minor—Grandfather, whether can be appointed guardian in presence of mother—Right of mother to effect marriage of her daughter in presence of paternal grandfather.*

Under Hindu Law the mother is, after the father, the natural legal guardian of her minor daughter and she does not lose her right by remarriage in any case when such remarriage is recognized as valid by custom.

Unless it can be shown that the welfare of a female minor is being neglected by the mother, it is not permissible to appoint the paternal grandfather as guardian of the person of the minor and to allow him to remove the girl from the custody of the mother.

A Hindu mother can effect a valid marriage for her daughter even in the presence of the paternal grandfather. **L** INDU *v.* GHANIA **783**

——**Joint family**—*Alienation by father to pay off debt incurred for purchase of new property, validity of—Antecedent debt, what is—Legal necessity—Sons, failure of, to object at time of alienation, effect of—Delay in objecting, effect of.*

In the absence of evidence to the contrary, the consent of the sons of a Hindu to an alienation by their father may be inferred from their failure to object at the time to the alienation.

Where there is delay in impeaching an alienation by a Hindu father of the family property, the burden of proving that the alienation was not for a legally necessary purpose is upon those who seek to have the alienation set aside.

A sale of a small portion of a joint Hindu family property to pay off a portion of a debt incurred for the purchase of new property may be justified.

A debt, which is only precedent to but not entirely disconnected with the subsequent debt, is not an antecedent debt.

Where a sale is effected by a Hindu father and the bulk of the consideration is found to have been taken for legal necessity, the sons cannot question that sale. **O** RAM NARAIN *v.* LALTA PRASAD, 6 O. L. J. 504 **664**

————*Debts incurred by father—Son, liability of—Pious duty—Co-parcener, transfer by, of share, effect of—Transferee, rights of.*

Under the Hindu Law, it is the primary duty of a father to pay debts incurred by him not for any family purpose, but for his own purposes, and the pious duty of a son, if it arises at all, only arises if the father's share or his self-acquisitions are insufficient to meet the debts.

In the Central Provinces the principle is recognised of giving equitable relief in the case of a *bona fide* alienation by a co-parcener of his share in joint family property. **N** NANHUSAO *v.* GANPATI **231**

————*Mortgage by father—Interest, high rate of, when justified—Court, interference by.*

Where in the case of a mortgage by a Hindu father the security offered is inadequate, the contractual rate of interest, although high, ought not to be interfered with. Each case, however, should be considered on its own merits. **O** JAGATPAL SINGH *v.* CHANDRAPAL SINGH, 6 O. L. J. 477 **757**

Hindu Law—contd.

——**Joint family**—*Mortgage by father—Suit on mortgage—Sons not made parties—Decree, whether binding on sons—Suit by sons to set aside decree—Plea that father was not competent to mortgage as property was under management of Collector, whether can be taken*—Res judicata—*Civil Procedure Code (Act V of 1908), s 11, Expl IV, Sch. III, para. 11.*

A transfer made in contravention of paragraph 11 of Schedule III to the Civil Procedure Code is void and of no legal effect

R., the father and manager of a joint family consisting of himself and his three sons, mortgaged the entire family property to *A.* *A.* brought a suit against *R.* on the basis of the mortgage and brought the property to sale in execution: to this suit the sons were not made parties. Shortly before the sale the sons instituted the present suit for a declaration that the mortgage and decree thereon were inoperative as the mortgage was executed when the property was under the management of the Collector, or in the alternative that the decree was not binding on the shares of the plaintiffs as the debt was not incurred for the benefit of the family:

Held, (1) that to the extent that the father represented the family, the decree was binding on the sons;

(2) that it was open to the father in the suit against him to plead that by virtue of paragraph 11 of Schedule III of the Civil Procedure Code he was incompetent to make the mortgage but as he did not do so, the sons were debarred under Explanation 4 of section 1 of the Civil Procedure Code from raising it, and obtaining a decision thereon in the present suit:

(3) that the sons were entitled to have the question tried as to whether the mortgage executed by the father was binding upon them. **N** MOTIRAM *v.* ASARAM **776**

————*Separation—Intention to separate, effect of.*

The unequivocal and unmistakeable manifestation by a member of a joint Hindu family, by his words or conduct, of a fixed or determined intention to become separate is sufficient to effect the separation of his title and the severance of his interest, although division of possession, or partition by metes and bounds, does not take place, or though there be no separation in food and dwelling.

A separating member of such a family may of his own free will accept as his share as small a portion of the joint property as seems good to him, and renounce all claims to the rest. **P** AMRITRAO *v.* MUKUNDRAO, 15 N. L. R. 165 **866**

——**Marriage**—Asura *form—Presumption—Parisam, whether bride price—Custom of community.*

The payment of *parisam* at the time of marriage as between Hindus does not necessarily constitute it as bride price or render the marriage one in the Asura form. The real test is whether in the community or among the parties the payment of *parisam* is tacitly understood as being substantially a payment for taking the girl in marriage.

If any money paid by the bridegroom is utilised for the benefit of the bride, it should not be treated as bride price.

Ordinarily, the presumption is, whatever may be

the caste to which the parties belong, that a marriage should be regarded as being in the Brahma form, unless it can be shown that it was in the Asura form. **M** GABRIELNATHASWAMI *v.* VALLIAMMAI AMMAL, 10 L. W. 491; 26 M. L. T. 348; (1920) M. W. N. 158 **423**

——— **Minor**—*Sale of minor's property by mother, validity of—Civil Procedure Code (Act V of 1908), s 11—Decree against minor, whether* res judicata—*Guardian* ad litem, *negligence of—Evidence Act (I of 1872), ss.* 115, 116—*Estoppel—Minor whether estopped—Landlord and tenant—Minor taking lease of property sold, effect of.*

Under the Hindu Law the female natural guardian of a minor is not justified in disposing of the property of the minor merely because she wishes to live with her relatives so as to obtain their help in managing the ancestral properties. The fact that her relatives and those of the minor advise her to do this would not make any difference.

Where the guardian *ad litem* of a minor is guilty of negligence in conducting the defence on behalf of the minor, a decree obtained by the plaintiff would not bind the minor, nor would it operate as *res judicata* in a subsequent suit brought by the minor.

Although in matters of pure contract or transfer of property a minor cannot be held to be estopped by his conduct within the meaning of section 115 of the Evidence Act, yet when he enters into possession of property on a lease obtained on his behalf by his guardian, he cannot be allowed to set up his title to the property as a bar to a suit in ejectment on the expiry of the lease. **M** PONNUSWAMI PILLAI *v.* SUBRAMANIA PILLAI **412**

——— **Partition**—*Joint family consisting of a person, his father and grandfather—Allocation of share to father—Other shares not specified, effect of——Grandfather and grandson, whether continue joint—Partition deed, construction of.*

There is no rule of Hindu Law that a father cannot separate himself without disrupting the joint family. He can leave the family after taking his own share, just as any other co parcener who is not a father can do When, therefore, a man becomes divided from his father, his sons retain a joint status with the latter.

By a deed of partition one *S.*, his son and grandson as representing one branch and his brother Sevu and his sons and grandsons as representing the other branch effected a division of their family properties, the reason being that *U*, the son of *S*, was leading an extravagant life. The properties were divided into two shares; one share was allotted to Sevu's branch and one-twelfth out of the other share was given to *U.* and the rest to *S.* and the son of *U.* The share of *U.* alone was specified:

Held, that both by law and by the construction of the document *S.* and his grandson, *i. e.*, the son of *U.* did not become separated *inter se.* **M** RAJAGOPALA AIYANGAR *v.* SINGARAVELU THEVAN, 10 L. W. 438; (1919) M. W. N. 800 **590**

———, *suit for—Disruption of family—Limitation—Burden of proof.*

In a suit for partition of joint family property if the disruption of the joint family is proved, it is for the plaintiff to show that it took place within

12 years prior to the suit or that he had been in possession within that period. **O** AJUDHIA *v.* MATA BADAL **928**

——— **Reversioner,** *suit to establish title as—Burden of proof—Appeal—Appellate Court, duty of, to come to clear findings of fact.*

In a suit to establish title as a reversionary heir the plaintiff must show that he is the nearest reversionary heir. It is no part of the duty of the defendant to set up any nearer heirs. The whole of the onus is on the plaintiff.

In trying an appeal it is the duty of the first Appellate Court to come to clear findings of fact, as they are final and the High Court in second appeal cannot go behind them. **C** HARI PADA MUKHERJEE *v.* RADHA BULLAV PAL, 23 C. W. N. 1048 **1007**

——— **Succession**—*Blindness—Rule of exclusion from inheritance on ground of blindness, whether obsolete—Tests for determining, whether rule has become obsolete—Reversioner, whether can sue for declaration as to limited nature of widow's estate—Will conferring absolute title and power to adopt on widow—Specific Relief Act (I of 1877), s. 42.*

The rule of Hindu Law which prevents a person born blind from claiming interest along with his brothers as a co-owner in ancestral properties has become obsolete and cannot be enforced.

(Authorities considered

A mere contingent Hindu reversioner is entitled to sue, under section 42 of the Specific Relief Act, for a declaration as to the limited nature of the widow's title to her husband's properties where there is a Will giving absolute rights to the widow. It is not necessary, to found a cause of action under the section, that the widow should actively set up her title. The setting up by the widow of an authority to adopt, however, is not sufficient to found a cause of action for the reversioner.

Per *Sadasiva Aiyar, J.*—The exclusion of a blind man from inheritance was not based on his incapacity to perform Vedic ceremonies.

A rule becomes obsolete owing to change of time and circumstances, and the strict rules in the older Smritis have to be relaxed in this Kaliyuga owing to such changes.

If a rule of law has become obsolete, a Judge is not prevented from laying down the law as it exists merely because the obsolete rule is socially unjust and his decision negativing the old rule would also promote social reform and justice As regards questions of Hindu Law, extreme conservatism is not to be commended so long as the Legislature is slow to move in the direction of recognising that customs have become obsolete or do require alterations.

Per *Napier, J.*—In archaic conditions of life a blind man could not take his share in cultivation and in the protection of the family. It was, therefore, not unnatural that he should be excluded from a share in the property. In modern days, however, owing to improved methods of education there is nothing to prevent a person born blind from being taught how to transact business and to take his proper share in the responsibility of family affairs, and there is, therefore, no reason why such a disqualification should still continue. **M** YELLAVAJHULA

SURAYYA v. YELLAVAJHULA SUBBAMMA, 46 M. L. T. 154; (1919) M. W. N. 580; 37 M. L. J. 405; 43 M. 4 498

——— **Succession**—*Sister, whether can succeed as* bandhu.

Under the Hindu Law a sister can come in as a *bandhu*.

The decision of the question, however, depends upon the special circumstances of each case and on the consideration of the respective relationships of the parties.

As against an utter stranger a sister of the deceased has undoubtedly a preferential right of succession. **L** NANAK GIR v. KISHE KAUR, 162 P. R 1919 815

——— **Widow,** *adoption by—Agreement postponing, vesting of estate till after adopter's death, validity of—Alienation by widow, effect of.*

An agreement made at the time of effecting an adoption by a widow under which the adoptee assents to his adoption, but the vesting of the estate in him is postponed till after the death of the adopter, is binding upon the adoptee, and it is not open to him to contest an alienation made by the adopter. **S** GOVERDHANDAS v LALOOMAL, 13 S. L. R. 55 546

——— ———, *alienation by—Reversioner joining in alienation, effect of—Necessity, proof of—Presumption—Burden of proof—Reversioner, right of, nature of—Estoppel.*

The circumstance that a conveyance of a portion of her husband's estate is executed jointly by a Hindu widow and the then next reversioner, does not by itself create an indefeasible title in favour of the vendee, who can successfully resist a claim by the reversioners only on proof of legal necessity or such *bona fide* inquiry as entitles him to protection from a Court of Equity. A mere recital in the deed as to the existence of such necessity, by itself, is insufficient. Where, however, the alienation is made with the concurrence of, or jointly with, the then next reversioner, there is a presumption in favour of the validity of the transaction.

In order to discharge the burden of proving the existence of legal necessity, the true rule is that the creditor, to protect himself, where he is not shown to have made a *bona fide* inquiry, must prove that there was an actual pressure on the estate or danger to be averted, such as a threatened suit on a genuine debt, an outstanding decree or an impending sale, which the widow had no funds to meet.

Where persons contesting an alienation by a Hindu widow claim not through their father but directly as reversioners to the estate of the last male owner, they are not precluded by any rule of estoppel from disputing the validity of the alienation, nor are they affected by the circumstance that they had, after the death of their father and before the death of the widow, taken by inheritance land transferred by the widow by way of gift to their father. **C** RAMES CHANDRA CHAKRABARTI v SASI BHUSAN UPADHAY, 30 C. L. J. 5; 23 C. W. N. 625 654

——— ———, alienation by—Reversioners, right of. *See* LIMITATION ACT, SCH I, ART. 125 171

——— ——— *Compromise of suit effected by widow—Reversioner, whether bound by compromise.*

Where there is a litigation pending in the subject-matter of which a Hindu widow is interested, she has a discretion as to how to conduct that litigation and to come to an arrangement with her opponent, if she believes that it would be in the interests of the estate. But a reversioner is entitled to show that the compromise was not arrived at with due care and caution and was such as really showed negligence on the part of the widow, and if he succeeds in showing that, the compromise will not be binding upon him. **M** GANGAMIRTHAM PILLAI v RAJAMANIKKATHAMMAL, (1919) M. W. N. 658; 26 M. L. T. 354 555

——— **Widow,** *decree against, whether binding on reversioner—Burden of proof—Appeal, withdrawal of, effect of.*

In a suit by a reversioner on the death of a widow, in which he challenges the binding nature of a decree against the widow, the onus is on him to prove that there has not been a fair trial of the right in suit.

Where a decree is passed against a widow on a ground personal to herself, and which would not have been passed but for an admission made by her, her admission is not binding upon her reversioner.

The withdrawal of an appeal has the effect of making the decree appealed against final. **B** BAI KANKU v. BAI JADAV, 21 BOM. L. R. 837; 48 B. 869 164

——— ———, *estate of Renunciation by widow, how effected—Surrender, validity of.*

A Hindu widow can renounce her estate in favour of the nearest reversioner of her husband, and can by a voluntary act efface herself from the succession as effectively as if she had then died.

Such voluntary self-effacement can be effected by any process whereby there is a *bona fide* and total renunciation of the widow's right to hold the property.

Where, therefore, a widow compromised with the reversioner her claims to her husband's estate, and the documents of compromise were drawn up on the footing, not that the widow surrendered her right, but that she admitted that it did not exist:

Held that the widow was precluded from asserting any further claim against the estate, and that such estate vested absolutely in the reversioner. **P C** BHAGWAT KOER v DHANUKDARI PRASHAD SINGH, 37 M. L. J. 512; 7 A. L. J. 1036; (1919) M. W. N. 560; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27 347

——— ———, estate of, sold in execution of decree, effect of. *See* EXECUTION OF DECREE 42

——— ——— *Maintenance payable under agreement Right to recover maintenance, whether transferable—Transferee becoming owner of part of property charged with payment of maintenance, effect of—Apportionment of claim Transfer of Property Act (IV of 1882), s. 60*

Under a deed of maintenance a Hindu widow was entitled to get Rs. 60 as well as certain quantity of rice per annum, with the payment of which the properties mentioned in the schedule to the deed of maintenance were charged. The plaintiff, who was a purchaser of a portion of the properties charged with the payment of the maintenance, also purchased the right of the widow to receive the said sum of money and rice. In a suit by the

plaintiff to recover the whole arrears payable and deliverable to the widow out of the charged properties not purchased by him:

Held, (1) that the plaintiff, having become a partial owner of the charged properties, was bound under section 60 of the Transfer of Property Act to apportion the money which he sought to recover as between the properties acquired by him which were subject to the charge and the rest of the charged properties;

(2) that the widow's claim under the deed of maintenance was not a mere personal right but was one which the widow had under a deed of covenant for which there was a charge on certain properties and that it was capable of transfer. **C** RAJAT KAMINI DEBI *v.* SATYA NIRANJAN CHAKRABARTY **587**

———**Widow**—*Maintenance, suit to recover, by pauper widow—Suit decreed in part—Costs, rule as to award of—Contract Act (IX of 1872, s. 69—Expenses incurred by widow in performing marriage of daughter, whether can be charged on ancestral property—Limitation for suit*—Bangles *and* seemantham *ceremonies, expenses of, whether can be recovered.*

In a maintenance suit by a pauper widow where the right to maintenance is established by decree, the plaintiff alone ought, as a rule, to be given costs in proportion to the amount of her success.

A claim by a Hindu widow for the expenses of the marriage of a daughter might be made a charge on ancestral property by a decree of Court, but it does not become a complete charge till it is so constituted by the decree. Such expenses are recoverable from the person legally bound to defray them either under section 69 of the Contract Act, or on a principle of equity analogous to that underlying the section. A suit to enforce such a claim must be brought within six years of the date of incurring the expense.

The expenses incurred in the *bangles* ceremony and *seemantham* ceremony respectively are not such as would create any legal obligation on the girl's uncles to discharge **M** VISALAKSHI AMMAL *v.* KALI NARAYANASWAMI AIYAR, 10 L. W. 54; 19 M. W. N. 878 **796**

———, *mortgage by—Mortgagee, position of—Interest, high rate of—Reversioner, whether bound to pay stipulated rate of interest—Adverse interest, widow whether can set up—Widow, whether represents estate—Reversioner, whether bound by decree against widow.*

A person who takes a mortgage from a Hindu widow ought to know that he is dealing with an individual who has ordinarily only a limited interest in the property which she proposes to mortgage, and if he charges a high rate of interest in consideration of the risk he incurs, that covenant cannot be enforced against the persons to whom the property ultimately goes after the death of the widow, even with regard to that portion of the consideration which may be found to be supported by legal necessity, unless the circumstances, attending the loan, indicate that the rate of interest charged was reasonable Ordinarily, per cent per mensem is a reasonable rate of interest in such cases.

A Hindu widow cannot set up an adverse title against herself or do anything prejudicial to the interest of the reversionary heirs of her husband, so long as she remains in possession in succession to her husband.

A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to anything which she may have done herself to the prejudice of these reversionary heirs. She represents the estate as against strangers for the purpose of protecting or preserving it. Anything done by her for a purpose unconnected with the protection or preservation of the estate or without any legal necessity cannot bind the reversionary heirs of her husband.

A decree obtained by a mortgagee against a Hindu widow alone, on the basis of a mortgage which is found not to have been made by her for legal necessity, cannot bind the reversioners.

Where a decree is obtained against a Hindu widow alone on the foot of a mortgage which is found to have been made by her partially for legal necessity, it is not equitable to make the reversioners of her husband liable to pay the costs of the mortgage suit to the extent of that amount of the mortgage money which was taken for legal necessity. **O** BAIJ NATH *v* SHEORAJ SINGH, 6 O L. J. 469; 22 O. C. 260 **761**

———**Widow,** *mortgage executed by, jointly with reversioners—Legal necessity—Presumption—Reversioner, whether can impugn mortgage.*

A joint mortgage by a widow and the reversionary heirs of her husband, detailing the property mortgaged by each, shows that the reversioners assented to the mortgage by the widow, and such assent is presumptive evidence of the existence of legal necessity Until that presumption is rebutted, it is not open to one of the reversioners, who eventually succeeds to the reversionary rights, to impugn the mortgage made by the widow. **O** BHAGWANA *v.* RAMESHWAR, 6 O L. J 460; 22 O. C. 266 **674**

———— *Partition—Widow, whether can get absolute right to estate of husband on partition with sons.*

On partition between her sons, a Hindu widow can, by special agreement or arrangement with the sons, get an absolute right to that portion of the estate of her husband which is allowed to her. **C** DUKHIT RAM MALI *v.* NEWAJ ALI **426**

———— *Surrender by widow of her estate to reversioner—Provision for maintenance and residence, effect of—Requisites of surrender.*

A reasonable stipulation for residence and maintenance contained in a deed of surrender by a Hindu widow of her estate to the reversioner does not affect the validity of the deed, provided the surrender is a *bona fide* one of the entire interest of the widow in the whole estate and is not a mere device to divide the estate with the next reversioner.

Per *Oldfield, J.*—The surrender which the law recognises is a surrender of the estate held by the widow as such and it will not be the less total owing to a reservation in her favour of a right of maintenance, to which she was not previously entitled as widow, even if that right be secured on part of the property comprised in her widow's estate.

Per *Seshagiri Aiyar, J.*—To make a surrender

effectual, it must comply with the following requirements:—(1) it must be in favour of the nearest reversioner, (2) there must be no reservation, (3 it should be made *bona fide* and not as a device to effect a bargain between the widow and the reversioner. A provision for maintenance does not, in the least, affect the spiritual character of the surrender or derogate from its completeness. If a transaction is *ex facie* and in intention a surrender and reserves no portion of the property surrendered to the widow, the fact that the surrenderee agrees to provide for the maintenance of the surrenderor would not vitiate the transaction. **M** ANGAMUTHU CHETTI *v.* VARATHARA JULU CHETTI, 37 M. L J. 384; 26 M. L. T. 301; (1919) M. W. N. 716; 10 L. W. 11; 42 M. 854 **386**

——— **Widow**—*Surrender of estate, validity of—Surrender in favour of secondary reversioner, with consent of immediate reversioner, effect of.*

A Hindu widow can renounce her husband's estate in favour of the nearest reversioner, if there is only one, and in favour of all the reversioners nearest in degree, if more than one exist at the moment, that is to say, she can by a voluntary act part with her own title *qua* the estate inherited by her from her husband and accelerate the devolution in favour of the donee. A surrender by a widow of her husband s estate in favour of the secondary male heir with the consent of the nearest female heir can be treated as a joint surrender by both, the result being to vest an absolute title in the secondary male heir. **O** JANKI *v.* SUNDAR LAL, 22 O. C. 166; 6 O. L. J. 466 **462**

——— ——— *Surrender to reversioner—Maintenance, provision for, as part of transaction of surrender—Reservation of absolute interest in large properties far in excess of maintenance allowable—Validity of surrender.*

The provision for the maintenance of a widow is consistent with the validity of a surrender of her husband's estate to the nearest reversioner.

If, however, the provision for maintenance is a cloak or device by the widow to divide the property with the reversioner or to secure large benefits for herself quite out of proportion to the maintenance that is legitimately awardable to her compatibly with her position and status in life, the surrender is invalid. **M** RAMACHENDRA THEVAR *v.* NAGAMUTHU NACHIAR **785**

——— **Will,** *construction of—Bequest of life-estate with remainder over, validity of—Hindu Wills Act (XXI of 1870), applicability of—Succession Act (X of 1865), ss. 100, 101, applicability of, to Will made before Act.*

Section 100 of the Succession Act has no application to a Will made before the Hindu Wills Act came into operation, nor can section 101 of the Succession Act be invoked for the construction of Hindu Wills made before that section came into operation By reason of the saving clause in the Hindu Wills Act neither of the foregoing sections, though embodied in that Act, has any application to Hindu Wills

A Hindu testator made a disposition of his properties in the following manner:—

(*a*) to his wife during her lifetime;
(*b*) on the death of his wife, to his daughter or daughters then living, during her or their lifetimes:
(*c*) on the death of his daughters, to his grandson or grandsons then living, during his or their lifetimes:
(*d*) on the death of his grandsons, to his younger brother and nephew, or on their death to their descendants in succession.

In the case of (*a*), (*b*) and (*c*) the succession was not to be by right of inheritance, and in each case the properties were to be kept intact. The plaintiff, the widow of a grandson of the testator, brought the present suit, contending that the gift over to the brother and nephew of the testator was bad and inoperative, and that after the death of the testator's daughters, the estate vested absolutely in her husband and she was entitled to it as a Hindu widow:

Held, (1) that the bequest was not affected by the rule of remoteness and did not offend against the rule against perpetuities;

2 that the husband of the plaintiff, who was in existence at the time the Will was made, though not specifically named therein, took only a life-estate under the Will: and that the remainder rightly vested in the brother and nephew of the testator. **C** DAKSHAYANI DASSI *v.* AMRITA LAL GHOSE SARKAR, 23 C. W. N. 826 **779**

——— **Will,** *construction of, rule of—Notions of Hindus, whether can be taken into consideration.*

In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially ancestral, shall be retained in his family and that a Hindu knows that, as a general rule at all events, women do not take absolute estates of inheritance which they are unable to alienate.

All the expressions of a Will must be taken together, without any one being insisted upon to the exclusion of others. **N** DEORAO *v.* BAPUJI **195**

Hindu Wills Act (XX of 1870), s. 3—Disposition creating life estate and bequeathing ulterior estate to person on attaining age, validity of *See* SUCCESSION ACT, s. 101 **203**

——— applicability of. *See* HINDU LAW—WILL **779**

Hire purchase system—Possession of hirer, nature of. *See* CONTRACT ACT, s. 108, EXCEP. (1) **50**

In forma pauperis—Petition for leave to sue—Court, jurisdiction of, to inquire into merits. *See* CIVIL PROCEDURE CODE, O XXXIII **239**

Inam *attached to hereditary office, enfranchisement of, effect of—Registration, effect of—Persons in whose names inam registered, whether can sue for recovery of lands attached to office without impleading other members of family.*

The effect of the enfranchisement of an *inam* attached to a hereditary office is to disannex the *inam* from the property and to convert it into ordinary property, with the result that the lands

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after enfranchisement, are held by the family which was entitled to the office.

The registered holders of an hereditary office, whose names had been registered before enfranchisement, represent the *inam* for the purpose of recovering it after enfranchisement and are entitled to institute a suit for the purpose without joining the other members of the family as parties to the suit. **M** ADDAGANTI CHINNA VENKATA SUBBA ROW *v.* YEMMANUR VENKATRAMAYYA, 10 L W 422 **161**

Income Tax Act (VII of 1918), ss. 2 (1) (b), 4 – *Profits derived by factory from sale of finished product manufactured from raw material grown by its servants, whether assessable*

The profits derived by a factory from the sale of a finished product, such as sugar, manufactered at the factory from the raw material grown by its servants on its own land is not exempt from the payment of income tax, as the income so derived is not agricultural income within the meaning of section 2 (1) (*b*) of the Income Tax Act. **Pat** THE BHIKANPUR SUGAR CONCERN, *In the matter of*, (1919) PAT. 3 7 **301**

——— **ss. 3, 9, 51**—*Reference to High Court under s 51 – Right to begin—Business carried on outside British India—Income, whether liable to assessment.*

In the case of a reference made to the High Court under section 51 of the Income Tax Act by the Board of Revenue, the assessee on whose application the reference is made is entitled to be heard first.

Where the only part taken by the proprietor of a business, carried on on his behalf by his agents outside British India, is to acquaint himself with the state of the business and occasionally to issue instructions, he is not liable to be taxed under the Income Tax Act in respect of the income of such business. **M** SECRETARY TO THE COMMISSIONER *v.* RAMANATHAN CHETTI, (1919) M. W. N. 526; 10 L. W. 570; 37 M. L. J. 663; 26 M. L. T. 447; 43 M. 75 **976**

——— **s. 4** **301**

——— **ss. 9, 51** **976**

Injunction *in respect of land, suit for—Pleadings—Boundaries of land in dispute to be clearly defined—Issues, definite—Court, duty of.*

In cases where an injunction is sought to restrain the defendant from erecting buildings on land alleged to belong to the plaintiff, it is essential that the boundaries of the land should be given in order to assist the Court to find out what is actually in dispute and against what portion of the land the injunction is sought to be effected A map ought to be attached to the plaint, and vague descriptions of the boundary ought not to be accepted.

In such cases it is desirable that issues should be so framed that the Court may understand the actual points arising for its determination, and it ought not to be left open to the parties to raise equivocal, ambiguous and evasive issues. **C** RAMSASI ROY *v.* BOLAI LAL SEAL **890**

Insolvency proceedings—*Property acquired by insolvent after order of adjudication—Transfer, validity of*

Transactions in respect of all property, moveable and immoveable, acquired by an insolvent after the order of adjudication, with any person dealing with him *bona fide* and for value and completed before the intervention of the Official Assignee, are valid. **B** ALIMAHMAD ABDUL HUSSEIN *v.* VADILAL DEVCHAND PAREKH, 21 BOM. L. R. 849; 43 B. 840 **197**

Interest, oral agreement as to payment of—Interest, whether can be allowed *See* EVIDENCE ACT, s. 92, PROV. (2) **242**

Joint decree—One of several joint decree-holders, whether can apply for execution. *See* CRIMINAL PROCEDURE CODE, O. XXI, R. 15 **803**

Jurisdiction, distinct finding as to, whether necessary—Determination of, by relief claimed and not by averments in plaint. *See* MADRAS ESTATES LAND ACT, s. 6 **308**

Jurisdiction of Civil and Revenue Courts – *Landlord and tenant – Proprietary or under-proprietary rights, determination of—Ejectment—Revenue Courts, jurisdiction of, to determine status and terms of tenancy.*

In cases to which the U. P Land Revenue Act applies, the Courts of Revenue have the exclusive jurisdiction to determine the status of a tenant and the special and other terms on which such tenant holds.

The Civil Courts can decide whether or not a person holds the proprietary or under-proprietary rights, but they cannot set aside an ejectment proceeding or determine its validity if the interest affected is not under-proprietary. **O** EWAZ ALI KHAN *v* QUDRAT ALI **921**

——— Proprietary title, plea of. *See* AGRA TENANCY ACT, s. 34 **190**

Kanganam lands, meaning of. *See* CIVIL PROCEDURE CODE, s. 11 **33**

Land Acquisition Act (I of 1894), ss. 9, 12, 16, 18, 45 – *Award—Possession taken by Government—Property, whether vests in Government – Notice under s , failure to give, effect of—Person aggrieved by award, remedy of—Reference to Court.*

Under section 16 of the Land Acquisition Act the making of an award and taking possession of land thereunder vest the property absolutely in the Government and the mere fact that notice has not been served on the occupier of the land in accordance with sections 9 (3) and 45 of the Act does not render the award or subsequent proceedings void, nor does it prevent the vesting of property in the Government.

The remedy of a complainant who has had notice of an award under section 12 of the Land Acquisition Act is to apply for a reference under section 18 of the Act No other remedy is provided by the Act. **M** KASTURI PILLAI *v* MUNICIPAL COUNCIL, ERODE, 10 L. W. 331; 6 M L. T. 268; 37 M. L. J 618 **646**

——— **ss. 12, 16** **646**

——— **ss. 17, 26, 30** – *Award made by Collector—Objection taken by landlords alone—Enhancement of amount of compensation—Apportionment of compensation—Tenants, whether entitled to share in enhanced portion.*

Where in a proceeding under the Land Acquisition Act the landlords alone take exception to the award of the Collector, and on their objection the amount awarded is enhanced by the Judge in respect of all the interests in the land, and not merely the landlords' interests, the landlords are entitled to receive payment in respect of their interests only, but the

Land Acquisition Act—concld.

tenants, not having objected, are not entitled to any share of the amount by which the Collector's award is enhanced. C SECRETARY OF STATE FOR INDIA v. MANOHAR MOOKERJEE, 23 C. W. N. 720 **238**

——— **s. 18** **646**

——— **ss. 18, 30, 54** *Reference under s.* 30 *—Decision, whether portion of award—Appeal, whether lies—Distinction between reference under s.* 18 *and one under s.* 30.

The decision of a Court given under a reference made under section 30 of the Land Acquisition Act is a portion of an award and is appealable under section 54 of the Act.

The only distinction between a reference made under section 18 of the Land Acquisition Act and one made under section 30 thereof, is that the reference under the latter section is made solely on the question of title by the Acquisition Officer of his own motion, while the reference under the former section is made on the application of persons interested in the compensation money and not by the acquiring officer on his own motion. **P** HAZURA SINGH *v.* SUNDAR SINGH, 97 P. R. 1919 **589**

——— **ss. 26** **238**

——— **s. 30** **238, 589**

——— **s. 45** **646**

——— **s. 54** **589**

——— **s. 54**—*Appeal to High Court from award—Limitation Act (IX of 1908), Sch. I, Art* 156, *scope of—"Appeal under Code of Civil Procedure," meaning of.*

Article 156 of Schedule I to the Limitation Act applies to appeals preferred to the High Court under section 54 of the Land Acquisition Act.

The expression 'an appeal under the Civil Procedure Code' is not restricted to an appeal the right to prefer which is conferred by the Code of Civil Procedure. It means an appeal the procedure with respect to which from its inception is governed by the Civil Procedure Code.

Scope of Article 156 of Schedule I to the Limitation Act explained. **M** RAMASWAMI PILLAI *v.* TAHSILDAR OF MADURA, 37 M. L. J. 10; 26 M. L. T. 1st; 0 L. W. 226; 919 M. W. N 565; 43 M 51 **405**

Landlord and tenant—*Adverse possession by tenant—Acquisition of limited interest.*

A tenant who occupies land other than that comprised in his tenancy for more than twelve years acquires the limited interest of a tenant in the land by adverse possession **C** JNANADA SUNDARI *v.* JILAPI BEWA **184**

——— *Agricultural holding, what is—Cess Return, entry in, value of—Holding partly homestead and partly cultivated.*

Where there is a question whether certain land is agricultural land within the meaning of the Bengal Tenancy Act, the evidence of persons who have known the land for years and have taken part in the cultivation of it, coupled with a Cess Return in which the land is described as agricultural, would warrant the conclusion that the land originally was agricultural, and this conclusion is not contradicted by the fact that in a subsequent *chitta* the land is described as *bastu* land, nor is it inconsistent with the fact that a portion of the land is occupied by a homestead C ANUKUL CHANDRA CHAKRABERTI *v.* TUFANI SHEIKH **945**

Landlord and tenant—contd.

——— *Agricultural holding, whether transferable—Tenant right transfer of—Transferee, position of—Transfer by limited owner, effect of.*

An agricultural holding is a personal right, not transferable unless expressly declared to be so by contract or by statute. In Berar there is no law which permits an annual tenant of an agricultural holding to transfer his right.

Under the Berar Land Revenue Code a tenant right is heritable and transferable as "property", but a transferee of a tenant right by contract who does not make any fresh contract with the landlord obtains only the right, title and interest of the transferor, and if the transfer is from a woman with a limited interest, his right to occupy the land would come to an end on her death or re-marriage **N** HAJI BEGUM *v* SHANKAR RAO PARBAT RAO **543**

——— Compensation awarded in land acquisition proceedings enhanced on objection of landlord alone—Tenant, whether entitled to share in enhanced portion. *See* LAND ACQUISITION ACT, s. 17 **238**

——— *Declaration that defendants are not under-proprietors, suit for—Possessory title, whether sufficient.*

A mere possessory title is not sufficient for the maintenance of a suit against tenants, for a declaration that they are not under-proprietors, nor is the possibility of some danger arising in the future to the exercise of possessory rights sufficient for this purpose.

An application by tenants to the Revenue Court to be recorded as under-proprietors does not amount to an invasion of, or interference with, the rights of a person whose only right is merely to remain in possession. **O** ANNAPURNA KUAR *v.* SHAMBHU NATH, 6 O. L. J. 499 **746**

——— *Holding, purchaser of—Failure to get possession of one plot—Suspension of rent—Abatement.*

Lands appertaining to three *jotes* were sold in execution of rent decrees and were purchased by the defendant, who was subsequently recognized by the plaintiff as tenant of the *jotes*. Before the defendant's purchase the plaintiff was in possession of a plot of land included in one of the *jotes* and he settled it with another party after the defendant's purchase and after his recognition as a tenant. In a suit for rent in respect of the said *jotes*, the defence was that the defendant had not obtained possession of a plot of land included in the *jotes* and so there ought to be a suspension of rent:

Held, 1 that this was not a case of a demise by the plaintiff and the latter could not, therefore, be held responsible for giving possession to the defendant and the question of suspension of rent did not arise, although if the subsequent settlement was bad the defendant could set that aside:

2 that the plaintiff was not entitled to rent of the plot of land of which the defendant had not got possession. C PRAVAKAR MAJUMDAR *v.* UPENDRA NATH **564**

——— "Ijara," *meaning of—Lessor and lessee, rights of, inter se—English Law, principles of, whether applicable Sub-lease granted in contravention of provisions of lease, validity of—Re-entry, right of, when can be exercised.*

Landlord and tenant—contd.

The word "*ijara*" has no settled meaning which would make its use inconsistent with the interest of a tenure-holder. The usual meaning of "*ijara*" is a lease for a term.

The general rights between the lessor and the lessee as laid down in the English Law would govern cases under the Bengal Tenancy Act, unless that Act contains anything to the contrary.

Where the terms of a lease give the lessor a right of re-entry in case of a breach of covenant in the lease, unless and until that right is exercised, a sub-lease granted in breach of the terms of the ease would operate as valid.

Plaintiffs brought a suit for recovery of *khas* possession of land, basing their title on a *raiyati* lease granted by persons who had obtained a lease from the superior landlord for six years and by which they covenanted with their lessor not to assign, underlet or part with any part of the *parganah* in which the land in suit was situate:

Held, that the plaintiffs' *raiyati* lease, even if granted in breach of a covenant in the head lease, was not void but voidable at the option of the head lessor and that a third party could not challenge the rights of the plaintiffs, who were entitled to succeed on the basis of their *raiyati* lease. C BROJAVASHI RUDRA PAL *v.* SARAT CHANDRA RUDRA PAL 545

——— Kabuliyat, *suit for rent on basis of—Coercion, plea of—Burden of proof—Contract Act (IX of 1872), s.* 15.

Where a suit for rent upon a *kabuliyat* is resisted by the defendant on the ground that the *kabuliyat*, having been obtained from him by coercion, is not binding on him, it is for him to prove his allegation and, unless he does so, he is bound by the terms of the *kabuliyat*. In such a case it is not for the plaintiff to prove the inception of the tenancy, the area of the land demised and the rent payable by the defendant. C WHYTE *v.* BHAIRAB MAJI, 30 C. L. J. 121 872

——— *Lease, construction of—Rent payable in cash and in kind—Value of grain fixed, effect of—Tenant, liability of.*

Where a *mokarrari maurasi* lease sets out that the rent is payable partly in cash and partly in kind, and that if the latter is not delivered the tenant would pay a certain sum, which the parties themselves fix as its value, the meaning of the document is that the parties intended to fix the value of that part of the rent which was payable in kind, and that in case of default of payment of rent in kind the tenant is liable only to pay the sum fixed. C DWARIKA NATH *v.* DWIJENDRA NATH, 30 C. L. J. 37; 47 C. 139*n* 103

——— *Lease, grant of—Prior lessee refusing to vacate—Subsequent lessee, remedy of—Ejectment of prior lessee, suit for, maintainability of.*

Where a lessee is unable to obtain possession of the premises leased to him in consequence of a prior lessee being in possession and refusing to vacate, his proper remedy is to recover from the lessor the money advanced to him with reasonable interest through the Civil Court. It is not open to him to sue the prior lessee in ejectment. O IBAD ULLAH KHAN *v.* RAM CHARAN SAH, 6 O. L. J. 378 140

Landlord and tenant—contd.

——— *Lease—Inundation by sea water of premises demised—Rent, suit for—Abatement, claim for, whether available to tenant Transfer of Property Act (IV of 882), s* 108 *B) e), scope of.*

Where a portion of property demised under a document of lease is inundated by sea water and is rendered unfit for cultivation, the tenant is, in an action for rent, entitled to proportionate abatement.

The principle underlying section 108 (B) *e)* of the Transfer of Property Act is not applicable to such a case. M SUBRAMANIA PATHAN *v.* KATTAMBATH RAMA, 19 L. W. 26; 26 M. L. T. 266; 37 M. L. J. 654; 43 M. 132; (1920) M. W. N. 153 397

——— Minor taking lease of property sold, effect of *See* HINDU LAW—MINOR 412

——— Mourasi mokarrari *lease, construction of—Rent payable partly in cash and partly in kind—Value of paddy payable, fixing of, effect of.*

In a *mourasi mokarrari* lease the rent was fixed at the rate of Rs. 1-6-8 *gandas* per year in cash in addition to paddy rent at the rate of 7 *aris* per year, and the price of the paddy was fixed at a certain rate per *ari* and taking the cash and the price of paddy together the total rent was stated in the lease to be fixed at Rs. 16-6-8 *gandas*. In the lease there was also a clause that there shall be no increase or abatement in the *jama*:

Held, per *Curiam* (*Newbould, J.*, dissenting)—(1) that the lease being *mourasi mokarrari* the rent was a fixed one, and that the landlords were entitled to recover only at the rate of Rs. 16-6-8 *gandas* per year, as noted in the lease, as the total rent and not at any higher sum, though the price of paddy might vary from time to time;

(2) that the parties should be held to that which the yhad said in the contract and the Court should not speculate to arrive at the conclusion that the provision regarding the total yearly rent had been inserted merely for the purpose of registration fee.

Per *Mookerjee, J.* The Court will give effect only to such intention as the parties were able to express by the language used in the document, and it will not be concerned with any unexpressed intention which they might have entertained. The suggestion that the quantity of paddy deliverable might have been valued for the purpose of payment of the registration fee was a speculation for which there was no foundation.

To hold that the amount of rent would vary from year to year according to the market price of the paddy would be to destroy the character of the lease as *mourasi mokarrari*.

Per *Newbould, J.*—The recovery of paddy rent at its cost value as it varies from year to year is not inconsistent with the tenure being a *mokarrari* one. When the value of the paddy varies, the value of the cash may also be said to vary in comparison with the paddy

In the absence of any agreement in the *kabuliyat* to pay the total rent in cash, the statement fixing the total rent at Rs. 16-6-8 *gandas* can be taken as a statement added to the document for the purpose of fixing the stamp duty and the registration fee. C ASUTOSH MUKHOPADHYA *v.* HARAN CHANDRA MUKERJEE, 30 C. L. J. 41; 28 C. W. N. 1021; 47 C. 133 382

Landlord and tenant—concld.

——— Sanklap, *whether under-proprietary holding —Interest created—Grant, terms of.*

Some *sanklaps* are under-proprietary holdings, while others are not.

A *sanklap* is a grant, but a grant may be a grant of a lease-hold or a heritable but non-transferable tenure, not liable to termination at the will of the grantor or on the happening of any contingency: the former invests the *sanklap*-holder with the status of a mere privileged lessee and the latter makes him an under-proprietor.

The terms of the *sanklap* grant have to be ascertained in each case for the determination of the nature of the interest created. **O** JANKI *v.* GANGA PAL **974**

——— *Service tenure—Co-sharer landlord, whether entitled to sue tenant for assessment of fair and equitable rent on failure of service.*

In the case of a service tenure created by all the co-sharers in a *zemindari* not governed by the provisions of the Bengal Tenancy Act, a co-sharer landlord is not competent to sue the tenant for assessment of fair and equitable rent payable in respect of his share for failure of service originally performed. **C** MANMOHAN SINGHA ROY *v.* BENODE BEHARI DUBEY **248**

——— Surrender of tenancy for consideration, validity of. *See* TRANSFER OF PROPERTY ACT, s. 111 (c) **17**

——— Tenant, whether can question status of landlord. *See* EVIDENCE ACT, s. 106 **43**

Lease, construction of. *See* BENGAL TENANCY ACT, s. 5 **12**

Letters Patent (Bom.), cl. 15—*"Judgment", meaning of—Order refusing injunction to restrain suit, whether judgment—Appeal, whether lies.*

An order refusing to restrain the defendant from prosecuting a suit filed by him against the plaintiff in a Court of a Native State is not a judgment within the meaning of clause 15 of the Letters Patent of the Bombay High Court, and no appeal, therefore, lies against such an order under that clause.

Per *Macleod, C. J.*—The word "judgment" in clause 15 of the Letters Patent of the Bombay High Court means a decision which affects the merits of the question between the parties by determining some right or liability.

Per *Heaton, J.*—If an order directly involves a real question of jurisdiction, if its effect is to give jurisdiction or to take away from the Court jurisdiction, then an appeal will lie against such order under clause 15 of the Letters Patent. **B** VANICHAND RAJPAL *v.* LAKHMICHAND MANECKCHAND, 21 BOM. L. R. 955 **395**

Limitation, period of, for suit by Hindu widow for expenses of marriage of a daughter. *See* HINDU LAW—WIDOW **796**

Limitation Act (IX of 1908), s. 3—Limitation, plea of, when can be raised. *See* EXECUTION OF DECREE **85**

——— **s. 5**—*Appeal, second—Time spent in obtaining copy of 1st Court's judgment, whether can be allowed—Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Failure to file copy of decree—Appeal, whether valid—Cross-appeals—Matter in issue same*—Res judicata—*Evidence Act (I of 1872), s. 92, prov. (2)—Entry in bahi—Evidence of oral agreement to pay interest, whether admissible.*

Plaintiff sued defendant for the recovery of Rs. 825 principal and Rs. 44[illegible] interest on a *bahi* entry, alleging that the defendant owed him Rs. 725 on a previous *bahi* account, that that *bahi* had been lost and that Rs. 100 had been advanced at the time of the defendants signing the entry sued on. The Rs. 725 were made up of three items, *viz*, Rs. 150, Rs. 310 and Rs. 225 The 1st Court, holding that the items of Rs. 150 and Rs 350 had not been proved, gave plaintiff a decree for Rs. 325 with interest at 2 per cent per annum making a total of Rs 448-8-0. Both parties appealed. The District Judge wrote a judgment covering both appeals and dismissed the defendant's appeal and accepted that of the plaintiff, allowing him Rs. 825 principal and Rs. 264 interest. Separate decrees were given in the two appeals. The defendant preferred a second appeal to the High Court and attached copies of the judgment of the 1st Court, the two judgments in appeal and the decree in the plaintiff's appeal but no copy of the decree in his own appeal:

Held, (1) that the appellant was entitled to an extension of the period of limitation to the extent of the time occupied in obtaining a copy of the 1st Court's judgment;

(2) that inasmuch as no copy of the lower Appellate Court, decree in the defendant's appeal to that Court had been filed, there was no valid appeal in the High Court from that decree:

(3) that on the general principles of the doctrine of *res judicata* the present appeal was barred in respect of Rs. 448-8-0, inasmuch as the sum was directly in issue in the defendant's appeal to the lower Appellate Court;

(4) that the findings as to the items of Rs. 150 and 350 were conclusive and a mere alleged error in weighing evidence was not a sufficient ground for second appeal.

Evidence relating to an oral agreement entered in a *bahi* to pay interest is admissible under the 2nd proviso to section 92 of the Evidence Act, and the existence of such an agreement is a question of fact which cannot be considered in second appeal. **L** BHAN SINGH *v* GOKAL CHAND **137**

——— **s. 10**—*Suit for recovery of trust property against trustee of shrine and his donee—Limitation—Trustee of shrine, whether competent to acquire private property.*

A suit for recovery of property against a person in whom the property has become vested in trust for the upkeep of a shrine and against his assign who is not an assign for valuable consideration, for instance a donee, is covered by the provisions of section 10 of the Limitation Act.

The custodian of a shrine who is not a member of a religious fraternity is not incompetent to acquire private property of his own. **P** JAMIAT SINGH *v.* RAJI, 109 P. R. 1919 **577**

——— **s. 12, Sch. I, Art. 158**—*Award, filing of, what amounts to—"Court," meaning of—Application to set aside award—Limitation—Time spent in obtaining copy of award, exclusion of.*

Limitation Act—contd.

The word "Court" in Article 158 of Schedule I to the Limitation Act means the Court, and not the chief ministerial officer of the Court, such as, in the case of a High Court, the Registrar. And "submission" in that Article means submission to the Court and not to such officer.

In computing the period prescribed for an application to set aside an award the time requisite for obtaining a copy of the award should be excluded. C SOVA CHAND BHUTORIA v. HURRY BUX DEORA, 23 C. W. N. 280; 45 C. 721 46

——— **s. 14**—*Civil Procedure Code (Act V of 1908), s. 24, O. XXI, r. 63—Suit instituted in wrong Court—Transfer of suit—Time spent in prosecution in wrong Court, whether can be allowed—Jurisdiction, want of, effect of Suit to set aside order dismissing objection—Burden of proof—Proof, quantum of.*

Where a suit is undervalued and as a consequence of the undervaluation is instituted in a Court which would not have had jurisdiction to entertain it had it been correctly valued, the time spent in prosecuting the suit in such Court cannot, under section 14 of the Limitation Act, be allowed in computing the period of limitation applicable to the suit.

An order for the transfer of a suit from one Court to another under section 24 of the Civil Procedure Code cannot be made unless the suit has been brought in a Court having jurisdiction.

A suit under Order XXI, rule 63, of the Civil Procedure Code, in which a transferee from the judgment-debtor seeks to establish his title to the property transferred, is in effect a suit to set aside an order passed under rule 58 of the Order and, therefore, the onus lies upon the person relying upon the deed of transfer not merely to prove that it was properly executed and that consideration passed but that the document is really what it purports to be and is not merely a colourable transaction.

The burden is not discharged by merely pointing to the innocent appearance of the instrument under which the plaintiff claims, he must show that the instrument is as good as it looks. The defendant is not bound to show that the transaction is colourable. Pat BIBI SAIRAH v. GOLAB KUAR, (1918) PAT. 392 892

——— **s. 14**—*Suit filed in wrong Court—Plaint returned for presentation to proper Court—Time within which plaint must be re-presented—Limitation, extension of.*

The latest date for filing a suit for possession of certain lands was the 10th May 1911. The suit was filed in the Court of a Munsif on the 10th May 1911. On the 4th May 1912 the Munsif returned the plaint for presentation to a Court having jurisdiction to try the suit and directed that this should be done within one month. The plaint was filed in the proper Court on the 1st June 1912:

Held, that the suit was barred by limitation; that the only period, which the plaintiff was entitled to exclude was that provided in section 14 of the Limitation Act, viz., the period between the 10th May 1911 and the 4th May 1912 and that in order to save the bar of limitation the plaint should have been re-filed on the 5th May 1912, inasmuch as the Munsif had no power to alter the period within which the suit ought to have been filed. C RAMGOPAL MANDAL v. KUMAR KAMALA RANJAN ROY, 30 C. L. J. 522 955

——— **s. 15, Sch. I, Art. 182**—*Execution of decree—Order permitting execution subject to furnishing security, effect of—Stay of execution—Exclusion of time.*

The appellant obtained a decree from the High Court on 4th July 1914, and on 15th December instituted execution proceedings and attached certain property belonging to the judgment-debtor. The latter, having applied for leave to appeal to His Majesty in Council from the decree, petitioned the High Court in January 1914 to stay execution of the decree pending the decision of the Privy Council. On this application the High Court on 27th January 1914 passed an order directing execution to proceed upon the decree-holder giving security to the satisfaction of the executing Court for the due performance of any order made by the Privy Council. The Court, on 17th February 1914, fixed the amount of the security and called upon the decree-holder to furnish the same in one month. Owing to the inability of the decree-holder to provide the security the Court, on 25th March 1914, dismissed the execution proceeding. On 15th October 1915 the judgment-debtor's appeal to the Privy Council was dismissed for want of prosecution. On 12th April 1916 the decree-holder again applied for execution, but the judgment-debtor objected that the application was barred owing to the expiration of more than three years from the date the last step was taken, *i. e.*, the 15th December 1913. The decree-holder contended that under section 15 of the Limitation Act, the period between the 27th January 1914, when the High Court made the order directing execution to proceed on the furnishing of security, and the 15th October 1915, where the judgment-debtor's appeal was dismissed, should not be computed in the period of limitation. The Court, being of opinion that section 15 of the Limitation Act did not apply as the High Court's order of the 27th January 1914 was not an order staying execution, held that execution was barred by limitation. The decree-holder appealed to the High Court:

Held, that the order of the High Court of the 27th January 1914, whatever the form of it, did in fact, in the circumstances, stay the execution of the decree that apart from any order, the decree-holder already had the right to proceed with the execution, and an order in form allowing him to do that which he was otherwise entitled to do unconditionally but imposing a condition which was impossible of performance and thereby depriving him of his right, was an order depriving him of the right, he otherwise would have had, to continue the execution proceedings, just as much as if the order had been one in form staying execution until the condition was performed and, as the condition could not be performed, the effect was to stay execution altogether; and that, under section 15 of the Limitation Act, the time which had elapsed between the 27th January 1914 and the 15th October 1915 should not be reckoned in computing the period of limitation

Limitation Act—contd.

for filing the execution petition. **Pat** SATDEO NARAIN *v.* RADHEY KUAR, (1919) PAT. 434; 5 P. L. J. 39 **9**

——— **s. 15**—Stay of sale in execution at instance of decree-holder—Time, whether can be excluded *See* EXECUTION OF DECREE **85**

——— **s. 19**—*Acknowledgment* — Abichalnama *containing recitals of mutual liability, whether acknowledgment—Acknowledgment accompanied by refusal to pay, effect of.*

Where an *abichalnama* between the parties stated that it had become necessary to make an adjustment of accounts and determine the dues and liabilities of each party after examining the account of their business and went on to say that if after examining the accounts and taking all other evidence the arbitrators, either unanimously or by a majority, should decide that any sums were due to or from either of the parties, the parties would be bound to accept the same as their respective dues and liabilities:

Held, that the *abichalnama* contained an acknowledgment that accounts remained unadjusted which the arbitrators were to adjust and could be relied upon as a document constituting an acknowledgment within the meaning of section 19 of the Limitation Act.

Under section 9 of the Limitation Act it is not necessary that the acknowledgment should be addressed to any particular person and it is a sufficient acknowledgment even if it is accompanied by a refusal to pay. **C** JANARDAN SHAHA *v.* RADHA BULLAV, 23 C. W. N. 921 **898**

——— **s. 19**—*Acknowledgment*—Hatchitta *executed in lieu of old one, effect of.*

Where a borrower executes a *hatchitta* in respect of a debt in substitution of one previously executed in respect of the same debt, the *hatchitta* so executed amounts to a fresh acknowledgment within the meaning of section 19 of the Limitation Act. **C** MAHENDRA NATH CHATTERJEE *v.* LALIT MOHAN DATTA, 46 C. 746 **854**

——— **s. 19**—*Acknowledgment, whether must be express—Bond making mention of other bond, whether acknowledgment.*

An acknowledgment of liability under section 19 of the Limitation Act need not be express, but may be implied.

A bond executed by the defendant made mention of there being a separate bond for a certain sum executed by him in favour of the plaintiff:

Held, that this statement implied that money was due to the plaintiff separately on the other bond and that, therefore, it amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act. **P** ARUR SINGH *v.* PARTAB SINGH, 131 P. R. 1919 **425**

——— **s. 19**—Authority to sign acknowledgment, whether need be express. *See* MALABAR LAW **878**

——— **s. 20**—Acknowledgment and payment by manager not as manager, whether saves limitation. *See* MALABAR LAW **878**

——— **s. 20**—*Payment of interest by principal debtor—Limitation, whether extended as against surety.*

The liability of a surety being co-extensive with that of the principal debtor, the benefit accruing to a creditor under section 20 of the Limitation Act is not restricted against the payer alone, but is enforceable against any one liable for it.

Therefore, a payment of interest by the principal debtor within the period of limitation gives a fresh starting point for limitation against the surety under section 20 of the Limitation Act. **P** HARBANS LAL *v.* NATHU, 105 P. R. 1919 **586**

——— **Sch. I, Art. 11**—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 61, 63—Execution of decree—Claim, dismissal of—Order, whether affects persons not parties to proceedings—Landlord and tenant—Occupancy tenant claiming by virtue of settlement from co-sharer landlord, position of—Co-sharer landlord, right of, to make settlement.*

R had two sons *S.* and *I. S.* had two sons, defendants Nos. 9 and 10, and *I.* had two sons, defendants Nos. 11 and 12. *R.* devised his properties to his four grandsons in equal shares. Plaintiffs obtained a settlement of an 8-annas share in the tenure from defendants Nos. 9 and 10. Subsequently in execution of a money decree against *S.* and *I* the whole tenure was sold after the claims preferred by the defendants Nos. 9 to 12 were rejected. No suit was brought to set aside the order in the claim case. In a suit by the plaintiffs, who were not parties to the claim case, for a declaration of their occupancy right in the 8-annas share of the disputed property:

Held, (1) that defendants Nos. 9 and 10 were, as co-sharer landlords, entitled to make a settlement proportionate to their share;

(2) that though the order in the claim case and Article 11, Schedule I of the Limitation Act, were a bar to a suit by the defendants Nos. 9 and 10, the plaintiffs in the present case were entitled to prove that at the time of the settlement defendants Nos. 9 to 12 had a good title to the interest claimed by them;

(3) that Article 11 of Schedule I to the Limitation Act could have no application to the present suit, as the plaintiffs were no parties to the claim case. **C** BARKAT ALI *v.* DAS KAZI **260**

——— **Art. 14**—Inams, *post-Settlement, granted by zemindar, enfranchisement of, by Government, legality of—Enfranchisement proceedings, whether should be set aside—Madras Proprietary Estates Village Service Act (II Mad of 1894), s. 27—Madras Inams Act (VIII Mad. of 1869).*

Where facts are undisputed and do not give an officer jurisdiction, but he nevertheless holds that he has jurisdiction to deal with the subject-matter, his decision must be regarded as *ultra vires*. Where, therefore, the Inam Commissioner, with knowledge that lands with which he was dealing were post-Settlement *inams*, makes an order in respect thereof in enfranchisement proceedings, his order would not affect the actual rights of the parties entitled to the property and his proceedings need not be set aside under Article 14 of Schedule I to the Limitation Act **M** MANNA SULTAN *v.* SECRETARY OF STATE, 10 L. W. 372; 26 M. L. T. 265; 37 M. L. J. 661 **332**

——— **Arts. 89, 115**—*Accounts, suit for, by principal against agent—Failure of agent to render account, whether amounts to refusal within meaning of Art. 89—Limitation.*

Article 89 of Schedule I to the Limitation Act is applicable to a suit for accounts by a principal against his agent, although there is an agreement by the agent to render accounts every year Article 115 of the same Schedule does not apply to such a suit.

The mere failure of the agent to render accounts on demand does not amount to refusal to render accounts within the meaning of Article 89 of Schedule I to the Limitation Act. The question whether the failure of the agent to render accounts amounts to refusal within the meaning of Article 89, depends upon the circumstances of each case. **C** BHABATARINI DEBI *v.* SHEIKH BAHADUR SARKAR, 30 C. L. J. 90 **675**

——— Sch. I, Art. 120—*Declaration of title, suit for—Limitation, commencement of—Custom—Succession*—Pagwand *versus* chundawand—*Burden of proof.*

A suit for a declaration of his title to immoveable property by a person in possession as proprietor is not barred, if brought within six years from the time when the defendant attempts to oust him from the land, although a right to sue the defendant who had been recorded as owner of the property in the Settlement Record had already accrued and become barred.

Ordinarily, under customary law, sons, whether by the same or different wives, share equally, and, therefore, where a party alleges that the rule of *chundawand* governs the succession in any particular case, the burden of proving the custom of *chundawand* would be on the person who alleges it. **P** JAHANA *v.* WALI, 98 P. R. 1919 **595**

——— ——— Art. 120—*Declaratory suit—Limitation, commencement of—Denial of title, when furnishes cause of action—Revenue Court, refusal of, to effect partition, effect of—Possession not disturbed.*

Where a person is in possession of property, it is not obligatory upon him to file a suit for a declaration of his title, unless the denial of his title by the opposite party has the effect of disturbing his possession or doing him other injury not capable of being remedied otherwise than by a suit for declaration.

The refusal of a Revenue Court to effect partition of a joint *khewat* till the shares of the contending parties are determined by the Civil Court, does not necessarily vest the opposite party with an adverse title, if the possession of the person, against whom the order is passed, remains undisturbed. **O** PARMESHWAR DIN *v.* RAM NATH **1005**

——— ——— Art. 125—*Alienation by Hindu widow—Reversioners, right of suit of—Limitation—Compromise by female owner, whether amounts to alienation.*

There is only one cause of action for a declaratory suit for all reversioners, next and remote, and when that cause of action once becomes barred under Article 125 of Schedule I to the Limitation Act, by the failure to bring a suit by any of the reversioners within the period fixed by that Article, no reversioner, whether in existence or not at the date of the alienation, can afterwards bring such a suit.

The compromise of a litigation entered into by a female owner, with rights over property, her title to which is disputed by the opposite party, the compromise recognising the disputant's title to the property, does not amount to an alienation of the property in the disputant's favour by her and the disputant does not hold the property thereafter under any new title derived from, or created by her.

The daughter of a Hindu widow brought a suit to set aside an alienation by her mother and the suit was compromised. Subsequently, the reversioners brought a suit impeaching the same alienation:

Held, that the period of limitation for such a suit was that prescribed by Article 125 of Schedule I to the Limitation Act, and that as the compromise by the daughter did not amount to a fresh alienation, no fresh cause of action accrued to the reversioners. **M** GADIRAJU SOMARAJU *v.* DANDU VENKIAH, 26 M. L. T. 180 **171**

——— Sch. I, Arts. 134, 148—*Transfer by trustee or possessory mortgagee, effect of—Consideration—Good faith—Transferee, position of.*

In determining whether Article 134 of Schedule I to the Limitation Act applies to a suit for the recovery of immoveable property transferred by a trustee for valuable consideration, the question of good faith is very material, for if the transferee has acquired the property from a trustee in good faith for a valuable consideration without having notice of the trust, he acquires an immediate title to the property under section 64 of the Trusts Act. But if he has not acted in good faith and has paid valuable consideration, he acquires a title after the lapse of the period necessary for extinguishing the rights of the beneficiary to follow the trust property in his hands, and to this class of cases Article 134 applies. To the former class no occasion for applying that Article arises.

The transfer by a possessory mortgagee of the mortgaged property as if it were his own stands, however, on a different footing If the transferee has notice that the transferor has no higher interest than that of a mortgagee, he cannot, by reason of any misrepresentation which had not the effect of misleading him or by dint of any collusive misdescription of the interest conveyed, acquire a higher right than that which the transferor actually possessed within his knowledge or curtail the period of limitation provided for a suit for redemption by Article 148, for no secret compact between two persons can affect or alter the law of limitation to the prejudice of a third party. Where the transferee purchases in good faith and for a valuable consideration without having any notice that the transferor had no higher interest than that of a mortgagee, Article 134 protects him from a claim by the mortgagor, unless the mortgagor enforces his right as against such transferee within 12 years from the date of the transfer. **O** MUHAMMAD ABBAS *v.* NASIBAN, 6 O. L. J. 384 **168**

——— Art. 148 **168**

——— ——— Art. 156, scope of. *See* LAND ACQUISITION ACT, s. 54 **405**

——— ——— Art. 158—"Court", meaning of. *See* ANTE, s. 12 **46**

——— ——— Arts. 165, 181—*Application by judgment-debtor for restoration of property in excess of that decreed—Limitation.*

An application by a judgment-debtor for the restoration of immoveable property in excess of

Limitation Act—concld.

what has been decreed is governed by Article 181 and not by Article 165 of Schedule I to the limitation Act **M** THATTANTAVITA *v.* PUTHALATHAU KANDI KOMBI ALIASSAN, 37 M. L. J. 34; 10 L. W. 410; 26 M. L. T. 297; (1919) M. W. N. 732; 47 M. 753 **437**

——— **Sch. I, Art. 166**—Application to set aside sale in execution on ground of omission to give notice of settlement of sale proclamation—Article applicable. *See* CIVIL PROCEDURE CODE, s 47 **809**

——— ——— **Art. 166**—Policy of Legislature in providing short periods of limitation. *See* CIVIL PROCEDURE CODE, s. 115 **135**

——— ——— **Art. 181** **437**

——— ——— **Art. 181** inapplicable to application to set aside sale in execution. *See* CIVIL PROCEDURE CODE, s 47 **809**

——— ——— **Art. 182,** *See* ANTE, s. 15 **9**

——— ——— **Art. 182 (2)**—Surety, execution of decree against—Limitation applicable. *See* CIVIL PROCEDURE CODE, s. 145 **187**

Lis pendens, doctrine of, applicability of, where suit terminates by compromise. *See* TRANSFER OF PROPERTY ACT s. 52 **833**

———, doctrine of, scope of. *See* TRANSFER OF PROPERTY ACT, s 52 **428**

Madras City Municipal Act (III of 1904), s. 366, Health Officer's order under —Disobedience, whether an offence under s. 269, Penal Code. *See* PENAL CODE, s 269 **689**

Madras Estates Land Act (I of 1908), ss. 3, 8, 189 (1)—*Civil Procedure Code (Act V of 1908), O VII, r. 10 Suit by temple trustee to eject* purakkudi *tenants—Occupancy rights, plea of—Jurisdiction of Civil Court, objection to—Dismissal of suit on ground that holding was part of estate and that defendants should be deemed to be occupancy tenants—Return of plaint to Revenue Court—Jurisdiction, distinct finding as to, whether necessary—Jurisdiction, determination of, by relief claimed and not by averments in plaint—Burden of proof—Landlord and tenant—Presumption as to tenants of temple lands in Tanjore district—Terms negativing occupancy rights in* pattas *and* muchilikas, *construction of—Presumption—*'Purakkudi', *meaning of—Determination of meaning by reference to documents and evidence—Definitions of terms and expressions in glossaries, acceptance of.*

The direction in Order VII, rule 10, Civil Procedure Code is mandatory.

The plaintiff, as trustee of a temple in the Tanjore district claming to be entitled to both *varams*, sued to eject the defendants alleging them to be *purakkudis* or tenants liable to be ejected at will. The latter claimed occupancy rights and objected to the jurisdiction of the Civil Court. The Munsif decreed the suit, holding that the Civil Court had jurisdiction. On appeal the Subordinate Judge, without recording a distinct finding on the question of jurisdiction, dismissed the plaintiff's suit on the merits, holding that the land was comprised in an estate and that under section 6 of the Madras Estates Land Act the defendants should be treated as occupancy tenants:

Held, (1) that on the said finding the lower Appellate Court should not have assumed jurisdiction

Madras Estates Land Act—concld.

but should have returned the plaint for presentation to the Revenue Court;

(2) that a distinct finding as to jurisdiction should have been recorded

The person seeking to oust the jurisdiction of a Civil Court in which an action has been laid should establish its want of jurisdiction

The non-maintainability of a suit on the ground of want of jurisdiction depends on the relief claimed and not on the plaint averments.

The decision of Ayling, J., in *Muna Muhammad Rowther* v *Muthu Alagappa Chettiar*, 44 Ind Cas 894; 34 M. L. J. 234; 23 M. L. T. 161; 7 L. W. 380, does not authorise a general presumption against occupancy rights in the case of lands belonging to temples in the Tanjore district, but only indicates the conclusion justified by authority in any case in which similar facts are found. In each case the Court must decide whether such facts exist.

Courts cannot refuse to consider terms in *pattas* and *muchilikas* negativing occupancy rights on the general ground of the tendency of land-holders since the decision in *Chockalinga Pillay's case*, 6 M. H. C. R. 354, to import such terms, but should consider each contract on its merits and with reference to the burden of proof

The use of vernacular descriptions of tenures in some places is elastic and the definitions of these terms derived from glossaries and works of reference must be accepted with caution as corresponding at most to their normal meanings and subject, in each particular case, to revision in the light of its circumstances It is because such terms are often used in different senses that attention to collateral indications of sense, in which they are actually used, is most necessary.

The term '*purakkudi*' is ordinarily inaplicable to a permanent tenancy.

It may, however, be shown with reference to the evidence that that interpretation is inapplicable to a particular case. **M** AMBALAVANA PANDARA SANNADHI *v.* PICHAKUTTI ODAYAN, 40 L. W. 565; (1920) M. W. N. 163 **308**

——— **s. 8** **308**

——— **ss. 155, 192 (e)**—*Landlord and tenant—Rent, suit for—Set-off Tenant, whether can set off* manibham *as against rent.*

Where, admittedly, arrears of rent are due on a holding, and, admittedly also, a certain sum of money is due from the landlord to the tenant for *manibham*, the tenant is not entitled to set off what is due to him against the rent. Section 192 (e) of the Madras Estates Land Act distinctly negatives the right of the tenant to plead any set-off as a defence to a claim for rent. **M** RAJA RAJESWARA SETHUPATHI *v.* VENKATARAMA AIYAR, 37 M. L. J. 270; 10 L. W. 303; (1919) M. W. N. 794; 43 M. 69 **I 308**

——— **s. 189 (1)** **I**

——— **s. 192 (e)**

Madras Hindu Transfers and Bequests Act (I of 1914), s. 2 (2)—"Time which is subsequent to such date", meaning of—Vesting after passing of Act, effect of. *See* SUCCESSION ACT, s 6 **203**

Madras Inams Act (VII. Mad. of 1869) **332**

Madras Motor Vehicles Rules, r. 16A, whether applies to absent owner. *See* MADRAS MOTOR VEHICLES ACT, s. 16 ... 25

Madras Proprietary Estates Village Service Act (II Mad. of 1894), s. 27 ... 332

Malabar Compensation for Tenants' Improvements Act (I Mad. of 1900), s. 19. *See* REGISTRATION ACT, s 90 111 (*d*) ... 345

Malabar Law—Tarwad—*Grant of* kanom *by* karnavan—*Payment of rent to transferee by tenants of* tarwad—Anandravan, *right of, to sue for possession, where transfer not binding on* tarwad—*Tenants, whether necessary parties* - Anandravan *alienee, position of.*

Where a *karnavan* of a Malabar *tarwad* grants a *kanom* which is found not to be binding on the *tarwad*, and the tenants of the *tarwad* attorn to the alienee, an *anandravan* or a junior member of the *tarwad* has the right to sue for possession of the alienated properties on behalf of the *tarwad*, and his remedy is not confined to merely suing for a declaration.

Receipt of rent is possession which can be recovered in a suit. Where tenants are in actual possession, rival claimants to the property can sue for possession without impleading the tenants as defendants.

The position of an *anandravan* who gets an alienation of the *tarwad* properties is not different from that of a stranger. If he ousts the *tarwad*, he may be sued by the other members just as if he was a stranger. **M** CHERA KUNHI POCKER *v.* MALIKAI-AMMAL, 37 M. L. J. 541; 10 L. W. 496; 26 M. L. T. 359; (1919) M. W. N. 815 ... 71

——— Tarwad, *incidents of* - Karnavan, *right of, to carry on trade out of* tarwad *assets—Trade carried on by member—Right of succession by* tarwad—*Continuance of trade by* karnavan—*Liability of* tarwad *for debts contracted in course of trade—Malabar Wills Act (Mad. V of 1898), s. 9—Validity of oral bequests.*

The pursuit of trade does not come within the ordinary powers of a Malabar *karnavan*, nor is trade the chief occupation or *kolachar* of the Nairs of Moplahs of Malabar.

The members of a *tarwad* are liable for debts contracted by the *karnavan* in the course of a trade carried on by him, if it is proved either that the business was a family business or that the members consented to the trade being carried on for and on behalf of the family.

Though it is the exception and not the rule to find a *karnavan* conducting a trade on behalf of the *tarwad*, any profit that might be made by an individual by trading would, on his death, become part of the *tarwad* assets in the absence of a valid bequest by the deceased.

There is no presumption of law that properties acquired by one member of a *tarwad* in his own name belong to the *tarwad* and that is a matter which must be proved like any other question of fact.

The fact that the male members of a *tarwad* habitually pursue trade as their occupation would not in itself make the trade which an individual member carries on on his own account and which, on his death, is inherited by the *tarwad*, a family concern, unless the *tarwad* inheriting the assets of the deceased member's trade can be held to have

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continued it as the business of the *tarwad* through its *karnavan*.

Under section 9 of the Malabar Wills Act all Wills, whether relating to immoveable property or not, must be in writing Oral bequests are invalid

Incidents of a Malabar *tarwad* discussed **M** KADIRI KANAKKAPILLANTAKATH ABDUREHEMAN KUTTI HAJI *v.* KOCHIPALLI HUSSAIN KUNHI HAJI, 10 L. W. 204; 26 M. L. T. 195; 37 M. L. J. 311; (1919) M. W. N. 600; 42 M. 761 ... 262

——— Tavazhi, *manager of, debt contracted by, for current* tavazhi *expenses Junior members, liability of—Decree, whether can be passed against junior members—Acknowledgment and payment by manager not as manager—Limitation, whether saved as against junior members—Promissory note, execution of, for contemporaneous advance—Creditor, rights of—Limitation Act (IX of 1908), ss.* 19, 20—*Evidence Act (I of 1872), s.* 91.

The junior members of a *tavazhi* are liable for a debt on a pro-note executed by the *karnavan* for current *tavazhi* expenses The creditor can sue both the *karnavan* and the other members of the *tavazhi* and obtain a decree against all.

An acknowledgment or payment by the manager, though not expressly stated to have been made or signed as manager, saves limitation also as against the junior members.

The authority to sign an acknowledgment under section 19 of the Limitation Act need not be expressly given by the parties sought to be made liable. The agency to sign can follow from the act of the Court or from rules of statutory or partnership law or the personal law of the parties

Per *Sadasiva Aiyar, J*—When a promissory note is executed for money borrowed at the time of the execution of the note itself, the creditor cannot join two separate causes of action in the same suit on two independent heads of claim, namely, one based on the borrowing of the money the instant before the execution of the promissory note, and the other on the promissory note itself. Having regard to section 91 of the Evidence Act, two distinct causes of action do not vest in such cases in the creditor.

Per *Spencer, J* - On the pleadings in the case, the suit was based on the liability for the debt as evidenced by the promissory note.

A manager of a joint family or *tarwad* can acknowledge liability on behalf of the members whom he represents so as to extend the period of limitation against them as well as against himself. **M** THANKAMMAL VAYAMKAR AMMA *v.* KUNHAMMA, 37 M. L. J. 569 ... 878

——— Tavazhi *of woman, whether can consist of branches—Gift to wife by one husband, whether enures for benefit of children by another husband—Presumption.*

The *tavazhi* of a woman may consist of two branches, one branch made up of children by one husband and the other branch of children by another husband, and each branch might own separate properties acquired from their respective fathers In other words, a separate branch of a *tavazhi* can be established consisting of a woman and her children by one husband to the exclusion of the children by another husband **M** IMBICHI PEEVI UMMA *v.* ERANHIPPURATHA RAMAN NAIR, 10 L. W. 118; 26 M

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L. T. 119; 37 M. L. J. 220; (1919. M. W. N. 538; 42 M. 869 **249**

Malabar Wills Act (V Mad. of 1893), s. 9—Oral bequests invalid. *See* MALABAR LAW **262**

Malicious prosecution, *damages for, suit for—'Malice'—'reasonable and probable cause' proof of, requisites of Finding as to want of reasonable and probable cause, nature of.*

So far as the Courts in India are concerned, a finding as to want of reasonable and probable cause in an action for malicious prosecution is a finding of fact and not of law

The expressions 'reasonable cause' and 'probable cause' are synonymous. Any distinction that is sought to be made, that in any particular case there might be probable cause but not reasonable cause and that there should be an absence both of probable and reasonable cause to sustain an action for malicious prosecution as if the two could be distinguished, is opposed to the rules laid down on this branch of the Law of Torts.

Whether it is called 'reasonable *and* probable cause' or 'reasonable *or* probable' cause, the meaning is reasonably probable cause, *i.e.*, a cause which an ordinarily reasonable man, having knowledge of facts and the belief (arrived at in a reasonable manner) as to facts which the defendant then had, would be justified in considering as affording a fair basis for the opinion that a criminal offence has been committed by the plaintiff and hence as being a probable cause for the institution of criminal proceedings against the plaintiff.

The fact that a civil suit for damages was a better or more appropriate remedy has little relevancy on the question of want of reasonable and probable cause. A man is entitled to pursue any of the legal remedies in any order he likes.

There is no real distinction between legal malice and malice in fact. If a man has been reckless, whether the charge be true or false, that might amount to malice, but not recklessness in coming to the conclusion that there is reasonable and probable cause. **M** KASIREDDI CHINNAREDDI *v.* PATCHIPULUSU VENKATASWAMI, 26 M. L. T. 214; 10 L. W. 314; (1920) M. W. N 171 **70**

Mesne profits—*Dispossession—Plaintiff wrongfully kept out of possession of land, whether entitled to mesne profits—Limitation.*

Where a plaintiff succeeds in establishing that he has been kept out of possession of land to which he was entitled, he should be allowed reasonable mesne profits for the period during which he has been kept out of possession, subject to any law of limitation. JOGESH CHANDRA ROY *v.* SECRETARY OF STATE FOR INDIA **124**

Minor, contract with, validity of. *See* CONTRACT ACT, s. 11 **65**

———, whether bound to refund mortgage-money. *See* CONTRACT ACT, s. 11 **14**

Mokarari lease, whether incumbrance. *See* TRANSFER OF PROPERTY ACT, s 111 (*d*) **16**

Mortgage - *Mortgagee, whether can question title of mortgagor*—Benamidar, *whether can sue on mortgage—Usufructuary mortgagee, liability of, to render accounts—Estoppel—Evidence Act (I of 1872), s. 116.*

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A mortgagee who accepts a mortgage from a person cannot question his title to redeem the property upon payment of such sum as may be found due by the Court.

A suit for foreclosure, sale or redemption can be maintained by the person named in the mortgage-deed as mortgagee or mortgagor, as the case may be.

A usufructuary mortgagee was placed in possession of a property of which the area and the income were liable to variation. It was stated in the deed that the net profit of the property would be Rs. 110, out of which Rs. 80 would be set off against interest and the balance against the principal:

Held, that the parties did not intend to have their rights and liabilities adjusted on the basis of the actual figures mentioned in the mortgage-deed and that, therefore, the mortgagee was not exoneroted from his ordinary liability to render an account. **C.** SURENDRO NATH MITRA *v.* KSHITINDRA MOHUN MITRA, 29 C. L. J. 414 **59**

——— *Redemption, postponement of, effect of—Covenant to pay double the principal sum on redemption—Clog on equity of redemption—Court, power of, to give relief.*

A covenant postponing the redemption of a mortgage till the lapse of a certain period is not by itself illegal, but where along with other circumstances its effect is to create an unreasonable and oppressive fetter on the right to redeem, a Court may allow redemption irrespective of that term on such conditions as it may deem fit to impose.

Where a usufructuary mortgage-deed contained a covenant, postponing redemption for 99 years and further requiring the mortgagor to pay double the amount of the principal money at the time of redemption, and it was found that the profits of the mortgaged property were very small:

Held, that the covenant operated as an unreasonable clog on the equity of redemption and could not be enforced except in so far as it allowed the mortgagee reasonable interest to make up the deficiency in the profits from the date of the mortgage till the date of redemption **O** MATHURA PRASAD *v.* HARAKH NARAIN, 6 O. L. J. 474; 22 O. C. 191; 1 U. P. L. R. (J. C.) 88 **770**

——— by several joint owners—Transaction, whether divisible. *See* CONSTRUCTION OF DOCUMENT **813**

——— *to several tenants-in-common—Mortgagees, rights of*—Pardanashin *lady, transaction with—Test to be applied in determining validity of transaction*

Where a mortgage is made by one mortgagor to two tenants-in-common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of his debt failing the consent of the co-mortgagee, is to add the co mortgagee as defendant, and ask for the proper mortgage decree, which in such case should provide for all necessary accounts and payments, except that there can be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor.

To validate transactions with a *pardahnashin* lady, it is not necessary to prove that she understood every detail of the matter. It is sufficient that she should understand its general effect, and that people disinterested and competent to give advice should,

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with a fair understanding of the whole matter, advise her to enter upon it. **P C** SUNITABALA DEBI *v.* DHARA SUNDARI DEBI, 37 M. L. J. 483; 17 A. L. J. 997; (1919) M. W. N. 82 ; 22 BOM. L. R. 1; 24 C. W. N. 297; 11 L W. 227 **131**

———, *suit on—Decree providing for sale of other properties in event of mortgaged property proving insufficient, nature of—Mortgagee, right of, to personal decree.*

A decree in a mortgage suit which provides that in the event of the mortgaged properties fetching a price insufficient to meet the mortgage debt, there shall be a personal decree against the other properties of the mortgagor, is not a mortgage-decree in the strict sense of the term.

If a mortgagee brings a suit upon his mortgage bond and it is found that the mortgage is invalid, the mortgagee can realise his dues from other properties of the mortgagor, unless there is an express stipulation in the bond that the mortgage-debt is to be realised from the mortgaged properties alone. **Pat** RAKHAL CHANDRA DIGAR *v* SIDHI NATH SINGH, (1919) PAT. 390 **922**

———, *suit on—Minority, plea of—Burden of proof.*

Where a defendant alleges minority in order to escape liability under a mortgage, the burden lies upon him to prove that he was a minor at the time the transaction was entered into. **O** NIAMATULLAH KHAN *v.* GAJRAJ SINGH, 6 O. L. J. 376; 22 O. C. 162; 1 U. P. L. R. (J. C.) 83 **136**

——— *of undivided share—Partition—Mortgaged property, allotment of, to co-sharer—Mortgagee, remedy of—Civil Procedure Code (Act V of 1908), O. XLI, rr. 22, 33—Cross-objections against co-respondent, whether permissible—Appellate Court, power of, to modify decree.*

A mortgage of an undivided share in property which under a partition is allotted to another co-sharer cannot, in the absence of fraud, be enforced by the mortgagee except against the share allotted to the mortgagor in lieu of the share mortgaged. The remedy of the mortgagee is to proceed against the substituted property

The filing of cross-objections by a respondent against a co-respondent is not illegal, and where an Appellate Court cannot do complete justice between the parties without opening the whole case, it can take into consideration the objections filed by one of the respondents, not only against the appellant, but against the co-respondent also, and to modify the decree, if necessary. **O** SAIYID MUHAMMAD *v.* JAWAD HUSSAIN, 6 O. L. J. 495 **659**

———, *usufructuary—Redemption—Mortgagee, whether entitled to growing crops.*

In Burma an ordinary usufructuary mortgagee or his tenant is entitled to all the crops sown or planted by him on the land which were growing thereon at the time of redemption and to free ingress and egress to gather and carry them provided that such crops were grown or planted before the person who grew them had notice of the intended redemption. **U B** MAUNG GAW YA *v.* MAUNG TALOK, 8 U. B. R. (1919) 141 **444**

———, whether act of insolvency. *See* PRESIDENCY TOWNS INSOLVENCY ACT, s. 9 (*b*) **175**

Motor Vehicles Act (VIII of 1914), s. 16—*Madras Motor Vehicles Rules, r. 16A, whether applies to absent owner—Non-lighting of car, conviction for, legality of, when owner not in or near car.*

Rule 16A of the Madras Motor Vehicle Rules does not apply to an absent owner, and the conviction of the owner under the rule for not lighting the car is illegal when the owner was not in the car or so near it as to be aware that the lamps were not lighted. **M** KRISHNASWAMI IYER, *In re*, 10 L. W. 399; 26 M. L. T. 331; 20 CR. L. J. 825 **825**

Muafidar, *interest of, nature of—Transfer of Property Act (IV of 1882), s. 6, applicability of—Oudh Rent Act (XXII of 1886), s. 107 (H).*

A *muafidar* holding a rent-free tenure liable to resumption has no higher position than that of a tenant entitled to hold the land rent-free, unless he is a grantee under other conditions.

Section 6 of the Transfer of Property Act does not apply to such a holding, because tenants having an untransferable right of occupancy have been expressly excluded from the operation of that section.

The possibility of a declaration that a *muafidar* has acquired under-proprietary rights under section 107 (H) of the Oudh Rent Act being made in a future suit which may be brought against him by the landlord cannot be taken into account for determining whether the *muafidar* has at present a saleable interest or not. **O** SURAJ BAKHSH SINGH *v.* BALDEO BIHARI, 22 O. C. 186; 6 O. L J. 490; 1 U. P. L. R. (J. C. 83 **459**

Muhammadan Law—*Puberty, attainment of—Presumption—Burden of proof—Evidence Act (I of 1872), s. 106.*

Under the Muhammadan Law although there is presumption that a girl who has attained the age of 15 years has also attained puberty, there is no converse presumption that a girl who has not reached that age has not attained puberty.

The fact that a Muhammadan girl below the age of 15 years has attained puberty is a fact within her special knowledge and the burden of proving that fact lies on her

In a suit by a Muhammadan husband for restitution of conjugal rights, the wife pleaded that the marriage was invalid inasmuch as consent was given by her father although she had attained the age of puberty and was, therefore, competent to give her consent. The lower Appellate Court found that the age of the girl at the date of her marraige was less than 15 years:

Held, that as the defendant relied entirely on the legal presumption to prove puberty and did not plead that she was entitled to rely on the physical fact of puberty if her age was less than 15 years, nor give any evidence to prove the fact of puberty, the presumption of puberty did not arise and she must, on the finding of the lower Appellate Court, be held to have been a minor at the date of her marriage. **C** HELALONNESSA *v.* RAJAB ALI **94**

——— **Dower**—*Widow, lien of, for unpaid dower, nature of—Transferee of lien, position and rights of.*

A Muhammadan widow, who is lawfully and without force or fraud in possession of her husband's property, is entitled to retain possession of such property as against his other heirs until her dower is satisfied, even though such possession was not

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obtained with the consent, express or implied, of, or under an agreement with her husband or his other heirs, and such property would not be divided among the heirs until the dower debt is satisfied.

A vendee from a Muhammadan widow in possession of her husband's property for payment of her dower is entitled to retain possession of the property sold to him as against the heirs till the unpaid dower-debt is satisfied, but the sale itself is invalid and not binding on the heirs.

(Authorities reviewed.)

Per *Abdur Rahim, Offg. C. J.*—A Muhammadan widow can transfer a dower-debt as also her right to remain in possession as a means of realising that debt. It may be that she does not acquire all the rights of a mortgagee properly so called by virtue of this lien; for instance, she may not be entitled to sue for the sale of the property to realise the debt, or to claim a preference as against an auction-purchaser in execution of a decree passed on a mortgage executed by her husband, but to the limited extent that this right is recognised as security for payment of the dower-debt, there is no reason why it cannot be passed to a transferee of the dower-debt or transmitted to her heirs.

Per *Seshagiri Aiyar, J.*—The right to retain possession and to pay herself out of the proceeds which a Muhammadan widow acquires to realise her dower-debt is not of the same kind as the lien considered in English cases. It is more in the nature of a charge on the property, because the right to pay herself out of the income is incidental to the possession taken by a widow. **M** BEEJU BEE *v.* MOORTHUJA SAHIB, 37 M. L. J. 627; 26 M. L. T. 419; 11 L. W. 150; 48 M. 214 **905**

——— **Gift**—Heba-bil-ewaz—*Failure to prove consideration, effect of—Party failing to prove consideration, whether can claim under simple* heba *—Pleadings and proof.*

A *heba-bil-ewaz*, which is a gift for consideration, has incidents very different from those of a simple gift *heba*. Therefore, if a party claiming under a deed of *heba-bil-ewaz* fails to prove the passing of consideration for the *heba*, the *heba* cannot be treated as valid as a simple gift without consideration and accompanied by delivery of possession. **C** JIDDA JAN BIBI *v.* BAKTAR **420**

——— **Succession**—*Alienation by one heir to discharge debts of deceased, whether binding on co heirs—Co-heirs, whether bound to pay share of debt.*

A voluntary alienation by some of the heirs of a deceased Muhammadan in possession of the estate, for the purpose of paying the debts of the deceased, is not binding upon the co-heirs who do not join in making the alienation, but in view of the provision of the Muhammadan Law that the payment of debts takes precedence over the inheritance, such an alienation can only be set aside on condition of the claimants paying their share of the debt due by the person through whom they claim title which has been discharged by the sale. **O** AHMAD SHAH *v.* ABDUL SAMAD, 6 O. L. J. 463 **721**

——— ——— *Great-grandfather's great-grandfather's descendant in agnatic line and daughter's son, priority as between—Residuary heirship—Grandfather, meaning of.*

Muhammadan Law—contd.

Under Muhammadan Law the great-grandfather's great-grandfather's descendant in the agnatic line is entitled to succeed to the estate of the propositus as a residuary heir in preference to his daughter's son.

Agnates, however, remote, are entitled to inherit as residuaries in the absence of nearer agnates and residuary heirship is not confined either to the father's descendants or to grandfather's grandfather's descendants, but extends to the agnate descendants of a "true" grandfather, however high in scale.

The word 'grandfather' indicates, in Muhammadan Law, an ancestor in the paternal line, however remote.

The examples given in the Muhammadan texts are only illustrative, not exhaustive. **M** ABDUR SAMAD *v.* CHINNATHAMBI SAHIB, (1914) M. W. N. 710; 37 M. L. J. 509 **873**

——— **Waqf**—Cy pres, *doctrine of, applicability of, to India*—Sajjadanashin, *powers and duties of—Court, whether can remove* sajjadanashin—"Urs" *and* "fateha", *performance of, legality of—Appeal, second—Remand—Matter decided in order of remand, whether can be re-opened.*

The doctrine of *cy pres*, being in harmony with the spirit of the Muhammadan Law relating to the administration of charities, is applicable to India, and is applied when from lapse of time and change of circumstances it is no longer possible beneficially to apply the property left by the founder or donor in the exact way in which he has directed it to be applied but it can only be applied beneficially for similar purposes by different means.

A Court has the power to remove a *sajjadanashin*, or to appoint a new man in the office, supposing it to be one which truly involves the performance of the duties of a spiritual and religious character inseparably connected with the personality of the *sajjadanashin*, unless there is very strong and clear evidence of custom and usage by which it can be shown that if the *sajjadanashin* misconducts himself in his office he cannot be interfered with by the Court. The ordinary law of *waqfs*, with such modifications as may be required by the practice of the institution concerned or of similar institutions, applies to a *sajjadanashin*.

The performance of *urs* and *fatehas* is valid according to the Muhammadan Law, as administered in India, if these rites involve the distribution of food to the poor.

It is not open to the High Court to re-open any decision arrived at by it in an order of remand in second appeal, when the matter again comes up before it after remand. **M** SUJJADA SHAH *v.* SHAW HABIT, (1919) M. W. N. 662 **677**

——— ——— *Family settlement by way of wakf, validity of—Test determining validity—Maintenance—Successive allowances in favour of unborn persons, validity of—Parties, whether can validate invalid* wakf—*Construction of document—Mussalman Wakf Validating Act (VI of 1913), whether retrospective.*

A *wakf* created before the passing of the Mussalman Wakf Validating Act, in which the gift to charity is illusory and in which the chief, if not the sole object of the settlor, appears to have been to

create a settlement in perpetuity for the aggrandisement of the family, is invalid in law. The test to be applied in determining the validity of such a *wakf* is whether there is a substantial dedication of the property to charitable uses at some period of time or other.

Statutes which are properly of a merely declaratory character have a retrospective effect. But the nature of a Statute must be determined from its provisions, and the mere fact that the expression "it is declared" has been used is by no means conclusive as to the true character of the legislation.

The Mussalman Wakf Validating Act is not a purely declaratory Statute and is not retrospective in operation. The language used in sections 3 and 4 of the Act leaves no room for doubt that the Legislature intended to make its provisions applicable only to *wakfs* created after the date of the enactment.

A scheme for the grant of maintenance allowances to the members of a family which is founded on and is intimately associated with *wakfs* that are invalid in law, cannot take effect. The assertion of the parties or their representatives cannot validate an illegal *wakf*, and the Court cannot be utilised for the enforcement of a scheme elaborately devised to carry out a plan of family aggrandisement under the colour of a *wakf* in contravention of the whole policy of the law.

Whenever a *wakf* is created, the ownership of the appropriator in the thing dedicated is extinguished and there is a detention of the thing in the implied ownership of God in such a manner that its profits may revert to or be applied for the benefit of mankind. Consequently it would be wrong to assume that a person creating a *wakf*, in which there is a provision for the maintenance of the members of his family, could ever have intended that such maintenance would be a charge upon the dedicated estate

The creation of a succession of allowances for maintenance from generation to generation in favour of unborn persons, which are not charged upon an estate apart from a scheme of valid *wakf*, does not appear to be recognised by Muhammadan Law

A well-known rule of construction of a document which offends against the rule against perpetuities is that the document is first to be construed without reference to the rule against perpetuities and then the validity of the disposition made by it is to be tested by the application of the rule **C** HABIBULLAH *v.* SOLEMAN QUADER, 30 C. L. J. 102; 24 C. W. N 18 **764**

——— **Waqf** *for religious and charitable purposes —Evidence to show contrary intention of settlor, whether admissible.*

Where *wakfs*, which have been created by document, in terms establish religious and charitable trusts, evidence is not admissible to show that the settlor had no intention to give effect to the trusts or that the trusts were not in fact given effect to **C** MOHAMED NAGOR *v* ABDUL JALIL, 30 C. L. J. 67 **537**

———, *validity of—Admission of parties, effect of—Court, whether bound to enforce illegal transaction where parties do not object.*

Where the chief, if not the sole, object of a *wakf* is to create a settlement in perpetuity for the aggrandisement of the family of the testator, the

deed of *wakf* is invalid and inoperative in law. To amount to a valid *wakf* there must be a substantial dedication of property to charitable uses at some period of time or other: where this is not so, the Court is not bound by the assumption of the parties as to the legality of the *wakf* and cannot be invited to adjudicate upon their claim in relation thereto.

If the illegality of a transaction is brought to the notice of a Court, the Court will not assist the person invoking its aid, even though the defendant has not pleaded the illegality and does not wish to raise the objection. **C** ATIKULLA *v.* HABIBULLA, 30 C. L J 241; 24 C W. N. 306 **773**

Musalman Waqf Validating Act (VI of 1913), whether retrospective. *See* MUHAMMADAN LAW—WAQF **764**

Negotiable instruments—Hundi—*Maker of* hundi, *liability of, extent of*

The maker of a *hundi* is responsible for the money payable thereon, and his liability is not discharged by the holder in due course getting payment of what is due, and the ultimate drawee is entitled to recover from the maker what he paid on it. **O** JHAMMAN LAL *v.* BHAGWANDAS, 6 O. L J. 492 **652**

Negotiable Instruments Act (XXVI of 1881), s. 80—Promissory note—Oral agreement as to payment of interest, admissibility of. *See* EVIDENCE ACT, s. 92, prov. 2) **242**

N. W.-P. Rent Act (XII of 1881), s. 9. *See* AGRA TENANCY ACT, s 22 (*c*) **85**

Opium Act (I of 1878), s. 9 (c)—Illegal possession of opium. *See* CRIMINAL PROCEDURE CODE, s. 103 **150**

——— **ss. 9 (c), (e), 14**—*Illegality in exercise of right of search, whether invalidates conviction.*

Mere illegality in the exercise of the right of search under the Opium Act is not in itself a sufficient ground for setting aside a conviction under the Act **Pat** LALU PANDIT *v.* EMPEROR, 20 CR. L. J, 745 **153**

——— **s. 14** **153**

——— **s. 14**—Search after sunset without witnesses, validity of. *See* CRIMINAL PROCEDURE CODE, s 103 **150**

——— **s. 20**—Failure to forward opium seized to nearest Police Station, effect of. *See* CRIMINAL PROCEDURE CODE, s 103 **150**

Oudh Estates Act (I of 1869), Sch. II—Title acquired, nature of. *See* UNDER-PROPRIETARY HOLDINGS **98**

Oudh Laws Act (XVIII of 1876), s. 10—*Pre-emption Notice, issue of, time of—Contract of sale entered into prior to issue of notice, effect of—Fraud, absence of—Period during which notice should remain affixed—Co-sharers aware of notice, effect of*

In order to comply with the provisions of section 10 of the Oudh Laws Act, it is not necessary that the notice must be issued before any contract to sell has been entered into: the notice is quite good if it is issued after the contract has been entered into but before the actual sale has been completed: nor is it, in the absence of any fraud on the part of the vendor

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or the vendee in the publication of the notice, necessary that the notice should remain affixed on the *chaupal* or other public place of the village in which the property is situate for the whole period of three months, especially in a case where it is found that the notice did remain so affixed for a sufficiently long period, that the co-sharers were aware of the issue of the notice and that along with the affixation of the notice the proposal of sale was notified throughout the village by beat of drum. **O** CHIRANJU *v.* MOHAN LAL, 6 O. L. J 501 **647**

Oudh Rent Act (XXII of 1886), s. 107 (H), declaration of under-proprietary rights under, effect of. *See* MUAFIDAR **459**

——— **ss. 108, 135**—*Civil Procedure Code (Act V of 1908), O. II, r. 3—Joinder of claims—Claim for share of profits as co-sharer, whether can be joined with claim for arrears of revenue as* lambardar.

A plaintiff can join a claim for a share of profits as co-sharer with a claim for arrears of revenue, etc, as *lambardar* in one suit. Section 108 of the Oudh Rent Act does not contain anything which would make this improper or unlawful, and under Order II, rule 3 of the Code of Civil Procedure, read with section 135 of the Oudh Rent Act, a plaintiff can unite in the same suit the two causes of action. **O** BHEEM SHANKAR DATT *v.* KEDAR NATH, 22 O. C 183; 1 U P. L. R (J. C.) 85 **455**

——— **s. 103, cl. (5-A)**—Forbearance to file non-maintainable suit, whether good consideration for compromise. *See* COMPROMISE **104**

——— **s. 135** **456**

——— **Chap. VII A,** applicability of, to lands held rent free *See* EVIDENCE ACT, s. 63 **667**

Pakkilal lands, meaning of. *See* CIVIL PROCEDURE CODE, s. 11 **33**

Pardanashin lady, contract with—Test for determining, validity of transaction. *See* MORTGAGE **131**

Partition, *suit for—Prayer for demarcation and possession of share, whether includes ejectment—Ejectment, whether can be granted.*

A suit in which the plaintiff asks that certain survey numbers be partitioned and possession given to him of his particular share as demarcated, includes a claim to relief by ejecting any defendant who raises the contention that the plaintiff is not entitled to partition of one of those survey numbers and that that survey number is in such defendant's possession and ownership. he mere fact of the plaintiff not specifically asking for relief by ejectment of defendants from any part of his demarcated share, of which they had possession, would not debar the Court from granting such relief if the Court thinks it just to do so **S** NARAINDAS *v.* BUTO, 13 S L R 159 **722**

Partners, liability of, for negligence, extent of—Duty of partners. *See* CONTRACT ACT, s. 253 **2**

Penal Code (Act XLV of 1860), s. 71, applicability of, to offence under Factories Act. *See* FACTORIES ACT, s 41 *a* **933**

——— **ss. 84, 302**—*Murder, commission of, by person subject to insane fits some time previous to occurrence—Knowledge of nature of act, absence of, not proved—Criminal responsibility of accused—*

Penal Code—contd.

Conviction—Procedure—Practice—Criminal Procedure Code (Act V of 1898), s. 401.

The accused was charged with having stabbed his wife with a knife as a result of which she died It was proved that sometime before the occurrence he was subject to insane fits, but there was no proof that when he committed the murder he did not know the nature or the consequences of his act. The accused was convicted and sentenced to transportation for life:

Held, that the conviction was right, but that the papers should be submitted to the Government under section 401, Criminal Procedure Code, for such action as it might think fit to take. **M** MUTHUSAWMI ASARI, *In re*, 10 L. W. 377; (1919) M. W. N. 796; 26 M. L. T. 361; 20 CR. L. J. 828 **828**

——— **s. 147**—*Criminal Procedure Code (Act V of 1898), ss. 106 (3), 423 (1) (b), 537—Rioting—Charge not specifying common object of unlawful assembly—Prejudice to accused, absence of—Irregularity—Security to keep peace, whether enhancement of sentence.*

An accused person is entitled to know what he is being charged with.

Where a person is constructively made liable for the acts of another under section 147, Indian Penal Code, it is especially necessary to set out in the charge the common object of the assembly. But if the absence of particulars regarding the common object does not prejudice the accused in their defence, the irregularity would be cured by section 537 of the Criminal Procedure Code, and the High Court will not interfere

In dealing with a case under section 147, Penal Code, an Appellate Court is expressly empowered to pass an order under section 106 (3) of the Criminal Procedure Code requiring security to keep the peace from the appellants. The making of such an order does not amount to enhancing the sentence. **N** MAHARAJ SINGH *v.* EMPEROR, 20 CR. L. J 760 **488**

——— **s. 182**—*Giving false information of threatened breach of peace—Burden of proof—Offence, essentials of—Criminal Procedure Code (Act V of 1898), s 476, proceeding under—Notice to accused, whether necessary—Failure to give notice, effect of.*

Where proceedings are initiated against a person under section 182 of the Penal Code for giving false information of a threatened breach of the peace, it is necessary for the prosecution to prove not merely an absence of a reasonable and probable cause for giving the information but a positive knowledge or belief of the falsity of the information given.

Although notice to the person immediately concerned is not essential in a proceeding under section 476 of the Criminal Procedure Code, yet an order passed without such notice, particularly where there is no evidence one way or the other to show a dishonest motive, will not be upheld. **O** BRINDABAN *v* EMPEROR, 6 O. L. J. 457; 20 CR. L. J. 791 **695**

——— **s. 228**—*Scuffle in verandah of Court—Offence.*

Accused had a scuffle with some person in the verandah of a Court room The Chaprasi of the Court intervened and put an end to it. No inter-

Penal Code—contd.

ruption was caused to the Court and it was found that there was no intention on the part of the accused to insult the Court:

Held, that the accused was not guilty of an offence under section 228 of the Penal Code. **A** MANGHAI RAM *v.* EMPEROR, 20 CR. L. J 777 **617**

——— **s. 269,** *scope and applicability of—Madras City Municipal Act (III of 1904), s* 366—*Small-pox patient directed to be removed by Health Officer to Isolation Hospital—Removal to isolated house, whether unlawful disobedience of order—Prevention of infection—Prosecution, what to prove.*

In a case under section 269, Indian Penal Code, the prosecution must make out not only that there was disobedience to an order of an executive officer directing the doing of a certain act to prevent the spread of an infectious disease but also that the disobedience was unlawful and negligent and had also the effect of spreading the infectious disease. The gist of the unlawful act is that there must be danger of the infection spreading. If care is taken to avoid the infection, the act cannot be said to be unlawful or negligent and no offence is committed under the section. The mere failure to carry out an order which could otherwise have been *bona fide* obeyed by the avoidance of the danger of infection, cannot be regarded as an offence under section 269 of the Penal Code.

The Health Officer of the Madras Municipality directed the removal of a small-pox patient to an Isolation Hospital, but the patient's father removed him instead to an isolated house under the advice of his doctor:

Held, that the disobedience to the Health Officer's order under section 366 of the Madras City Municipality Act did not amount to an offence under section 269, Indian Penal Code, as the accused's action prevented the spread of the infectious disease. **M** KANDASWAMI MUDALIAR, *In re*, 20 CR L J. 785; 26 M. L T. 356; 10 L. W 627; 35 M L.J. 80 **689**

——— **ss. 300, 302, 304**—*Murder—Assault causing death—Offence.*

The accused, two in number, who were incensed against the deceased, committed a brutal assault upon the latter who was defenceless and unarmed, and caused his death:

Held, that the accused were guilty of murder. **A** GARIB *v.* EMPEROR, 17 A. L J. 985; 20 CR. L. J. 767 **4 5**

——— **s. 302** **495, 828**

——— **ss. 302, 392**—*Murder and robbery—Evidence—Recent possession of stolen goods—Presumption.*

In a case in which murder and robbery form part of one transaction, the recent and unexplained possession of the stolen property by the accused is not only presumptive evidence against him on the charge of robbery but is also evidence against him on the charge of murder. **N** RAMJI *v.* EMPEROR, 20 CR. L. J. 783 **431**

——— **s. 304** **4 5**

——— **s. 379,** offence under, not of the same kind as one under s. 380. *See* CRIMINAL PROCEDURE CODE, s. 244 **159**

——— **s. 380,** offence under, not of the same kind as one under s. 379. *See* CRIMINAL PROCEDURE CODE, s. 234 **159**

Penal Code—concld.

——— **s. 392** **481**

——— **s. 411**—Person found in possession of stolen goods one year after theft, whether bound to explain possession. *See* EVIDENCE ACT, s. 114, Ill. *a*) **819**

——— **s. 420**—Cheating—Guilty knowledge—Burden of proof. *See* CRIMINAL PROCEDURE CODE, s. 437 **609**

Pleader and client—*Pleader, whether can effect compromise in respect of matters outside scope of suit—Compromise, validity of—Civil Procedure Code (Act V of 1908), s.* 47, *O. XXXVIII, rr* 5, 11—*Decree passed in suit—Suit, subsequent, in respect of same property, maintainability of—Attachment before judgment—Attachment after decree, whether necessary—Question of law, whether can be raised at any stage—Procedure—Evidence Act (I of 1872), s.* 35—*Report made by peon in execution proceedings, admissibility of.*

The authority of a Pleader to compromise a suit on behalf of his client, does not extend to his effecting a compromise in respect of matters outside the scope of the suit.

Where property is attached before judgment, the fact that a decree is made in the plaintiff's favour does not determine the attachment, which continues in full force.

A question of law raised upon facts which are on the record, can be raised at any stage of the suit.

Where a decree is obtained in respect of certain property, and a suit in respect of the same property is brought by a person, who is not the representative of the judgment debtor affected by the decree, before the decree is put in execution and there are no proceedings pending in which an application under section 47 of the Civil Procedure Code could be made, that section is no bar to the suit.

The peon's return in execution proceedings, being an official record made by a public servant in the discharge of his official duty, is admissible in evidence. **Pat** HERAMBA NATH BANDOPADHYA *v.* SURENDRA NATH MITRA, (1919) PAT. 465 **20**

Pleadings—*Adverse possession, title by, not set up in plaint—Plaintiff, whether can succeed on plea of adverse possession.*

The question whether a plaintiff can succeed on a title by adverse possession not set up in the plaint depends mainly on the facts of each particular case, and more particularly on whether the defendant has or has not been taken by surprise and whether he has had an opportunity of meeting the case so set up **C** BATA KRISTA PRAMANICK *v.* SHEBAITS OF THAKUR JOGENDRA NATH MAITY **639**

——— *Procedure—Issue not raised in pleading—Court, whether can frame issue.*

An issue which does not arise upon the pleadings of the parties ought not to be raised by the Court. The fact that the parties are ready with evidence upon the issue is no justification for raising and trying it. **C** NIROD KRISHNA PAL *v.* INDRA BHUSAN GUPTA **975**

Precedents, *value of—Application of rules to particular facts—Vendor and purchaser—Construction of document—Contract, when completed—Document to be drawn up by Vakil, whether condition precedent—Specific performance.*

Precedents—concld.

Where a general rule of construction has once been laid down by authority, a decision arising from its application to a particular set of facts cannot operate as a precedent, for the very remote chance of any two sets of facts being absolutely similar may be excluded. No Judge can be fettered by an attempt by another Judge to lay down any rule of construction based on his opinion on the facts of the case before him.

When a document forms merely the basis of a future agreement, it is open to either party to suggest fresh terms as to the price or any other matter. The mere fact, however, that an agreement provides that a bargain paper is to be made through a Vakil cannot of itself prove that there is a condition precedent to the agreement becoming effectual as a contract **B** GOVIND LAXMAN *v* HIRACHAND MANCHARAM, 21 BOM. L. R. 1047 **805**

———, value of. *See* CIVIL PROCEDURE CODE, s. 151 **252**

Pre-emption, *right of, nature of—Sale—Vendor entitled to only a portion of property sold—Pre-emptor, whether entitled to proportionate abatement in price.*

A right of pre-emption is a right of substitution, and the pre-emptor steps into the shoes of the vendee in respect of all the rights and obligations in respect of the sale transaction.

In the case of a sale of landed property where the vendor is found later to have owned only part, the purchaser, if he has acted *bona fide*, is not compelled to surrender the remnant portion of his purchase to a pre-emptor at a less sum than that which he paid for the entirety of his purchase, if the purchaser elects to abide by his bargain and retain the residue at the amount he paid for the whole. **P** BISHEN SINGH *v* BISHNI, 1[illegible] P. R. 1919 **566**

——— *Sale—Mortgage, whether sale—Stringency of terms, effect of—Appeal, second—Finding that transaction is not sale, whether can be disturbed.*

The onerous character of a mortgage does not necessarily lead to an inference that a sale was clothed in the form of a mortgage to defeat pre-emption

The stringency of the terms of the mortgage coupled with other evidence adduced may justify a conclusion that the mortgage was used as a cloak, but if the Court competent to express an opinion on the evidence, in the light of the probability suggested by the stringency of the terms, expresses an opinion adverse to the pre-emptor, its finding cannot be disturbed in second appeal. **O** MATA DIN *v.* KEWAL **892**

Presidency Towns Insolvency Act (III of 1909), ss. 9 (b), 55, 56— *Insolvency proceedings—Mortgage by insolvent on eve of bankruptcy, validity of—Good faith—Intention to delay or defeat creditors, absence of Mortgage, whether act of insolvency—Preference to mortgagee.*

The Official Assignee in an insolvency applied to have it declared that a mortgage executed by the insolvent on the eve of his bankruptcy was inoperative as against him The mortgage was executed by the insolvent's son and wife in addition to himself, the wife and son joining as they also mortgaged their interest in the mortgaged property. It purported to secure an antecedent debt, which was established, as also a new advance:

Held, that the matter was properly brought forward by way of motion in the bankruptcy, as the Official Assignee claimed to set aside the mortgage affecting the property of the insolvent and this was a claim on a title higher than that of the insolvent;

2) that the intention to delay or defeat other creditors not having been established, the mortgage was not an act of insolvency under section 9, sub-section *b*, of the Presidency Towns Insolvency Act;

(3) that as there was no ground for disputing the good faith of either party, the mortgage could not be said to be a voluntary transfer under section 55 of the Act:

4 that as it was not established that the mortgage was executed with the object of giving the mortgagee a preference over other creditors as contemplated in section 56 of the Act, it could not be said to be inoperative against the Official Assignee. **C** RAI MOHAN SHAW, *Re* **175**

——— **s. 36** *Examination of insolvent, how to be conducted—Creditor, whether can take part in examination—Examination of mortgagee from insolvent—Mortgagee, whether entitled to costs—Practice.*

When an insolvent is examined under section 36 of the Presidency Towns Insolvency Act, the creditors have no right to take part in the examination.

Where at the instance of certain creditors of an insolvent, a mortgagee from the insolvent prior to the insolvency is examined under section 36 of the Presidency Towns Insolvency Act, with a view to challenging the mortgage, and at such examination the mortgagee is represented by Attorney or Counsel, he is not entitled to any costs against the creditors at whose instance the examination is held. **C** ANSHU PROKASH GHOSE, *In the matter of*, 46 C. 795; 24 C. W. N. 68 **362**

——— **s. 38 (b)**—*Discharge of insolvent, suspension of, effect of—Final order, whether necessary—Practice of Bombay High Court—Practice contrary to law, whether can be upheld—Civil Procedure Code (Act V of 90), s 80—Injunction, suit for, against public officer—Notice, failure to give, effect of.*

A was adjudicated an insolvent and an order was made vesting his estate in the Official Assignee. Thereafter he applied for his discharge and an order was made accordingly, but under section 38 (*b*) of the Presidency Towns Insolvency Act the operation of the order was suspended for one year. Three years after the date of this order *A* acquired a business and the Official Assignee, in view of the fact that no final order of discharge had been made, took possession of *A*'s stock in trade and then restored possession and allowed him to continue his business on condition of his making payments for the benefit of his scheduled creditors. The Official Assignee then threatened to take possession and *A* filed the present suit to recover the sums which he had paid, for damages for trespass and for an injunction for the threatened trespass. Upon a preliminary objection being taken that as

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A had not given notice as required by section 80 of the Civil Procedure Code, the suit was not maintainable, he dropped his claim for damages and for the money paid:

Held, (1) that the suit in respect of the injunction for the threatened trespass was maintainable, even although the required notice under section 80 of the Civil Procedure Code, had not been given:

(2) that the order of discharge operated from the date mentioned therein, and that *A* was entitled to the injunction for which he prayed.

The practice of the Bombay High Court requiring an insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension is contrary to law.

Practice is a useful guide where a Statute uses a language of doubtful import, but a practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful **B** MURADALLY SHAMJI *v.* B. N. LANG, 21 BOM L. R 980 **627**

——— **s. 55**—Good Faith no ground for disputing—Voluntary transfer. *See* ANTE, s 9 (*b*) **175**

——— **s. 56**—Intention to delay or defeat creditors, absence of. *See* ANTE s. 9 *b* **175**

Principal and agent—*Agent empowered to conduct suit in any manner—Agreement to abide by special oath entered into by agent, whether binding on principal.*

An agent who is empowered to conduct a suit in any manner he may deem fit, even to the extent of withdrawing it or entering into a compromise, must be deemed to possess a power to bind his principal by an agreement to abide by a special oath entered into with the opposite party **O** JHABBU *v* ZAHID ALI, 22 O. C. 181; 1 U P L. R. (J. C.) 89 **453**

Privy Council—*Criminal jurisdiction—Interference by Board, when permissible.*

The Judicial Committee of the Privy Council is not a Court of Criminal Appeal, but there is a class of cases which falls within the category of the ruling in *Dillet, In re*, 1887) 12 App Cas. 459: 56 L. T 615; 36 W. R. 81; 16 Cox C. C. 24, in which the Sovereign is advised to interfere where there has been a miscarriage of justice referred for its meaning to the fundamental principles of justice, for instance, if there has been anything *coram non judice* **P C** BUGGA *v.* EMPEROR, (1919) M. W. N. 748; 20 CR. L. J. 799; 2 N. P. L. R. (P. C.) 26 **703**

Prize Court—*Vessel belonging to neutral having hostile commercial domicil, whether can be condemned—Orders in Council, effect of—Crown, right of, to alter law applicable to Prize Courts.*

Where it is found by a Prize Court that on the outbreak of war a claimant who is a neutral subject had his *commercial* domicil in enemy territory and that at the time of the capture of the vessel and for a long time after he had no intention of removing that domicil to a neutral country, the vessel must be condemned as lawful prize

While the Crown cannot by Orders in Council prescribe or alter the law to be administered by a Court of Prize, the Court would act on Orders in Council in every case in which they amount to a mitigation of the Crown's rights in favour of the enemy or neutral, as the case may be **B** THE KARADE IZ, 21 BOM. L R 944 **372**

Prize Court—concld.

Provincial Insolvency Act (III of 1907), s. 20—*Receiver, position of—Suit against Receiver—Sanction of Court, whether necessary Contract, joint—Insolvency of one co-contractor, whether absolves others Suit against solvent contractors, maintainability of*

A Receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy The whole of the property of the insolvent vests in him and he remains the owner thereof until he is discharged, and in this respect there is a difference between the appointment of such receiver and one appointed in an action. The sanction of the Court, therefore, is not necessary to the institution of a suit against a receiver appointed under the Provincial Insolvency Act.

A plea that a co-contractor was discharged by bankruptcy or an order of discharge is a good replication to a plea in abatement of the suit for non-joinder It is no answer to a claim that if one of the co-contractors becomes insolvent the others are not liable **C** AMRITA LAL GHOSE *v.* NARAIN CHANDRA, 30 C L. J 515 **973**

——— **s. 37** *Fraudulent preference, proof of, requisites of Burden of proof*

Where a transaction is impugned as amounting to fraudulent preference within the meaning of section 3 of the Provincial Insolvency Act, the burden lies on the Receiver, or the creditors who impugn the transfer, to make out that the transfer was made with a view to give preference It is not sufficient to prove that the transaction took place within three months of the insolvency, and that in fact it had the effect of giving preference to the transferee it must be shown positively that the transfer was made with a view to prefer the creditor to whom the transfer was made, and unless such an intention is made out, the more fact that the transfer would have such an effect is not sufficient to bring the case within the scope of the law **M** BAPPU REDDIAR *v.* OFFICIAL ASSIGNEE, TINNEVELLY, 37 M. L J. 246; (1919) M. W. N. 56: 10 L. W. 354 **642**

——— **s. 37**—*Fraudulent preference, what is—Payment made to creditor on eve of bankruptcy—Presumption—Burden of proof.*

An Insolvency Court is justified in holding that a payment to a creditor made by a person, who at the time of such payment is unable to pay his debts, must be taken as a payment with a view to prefer that creditor, if it is established that the payment is made of the debtor's own accord not in the ordinary course of business, and without any sort of pressure being brought to bear upon him.

In any event if a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors

The fact that the debtor was insolvent when he made the payment, and knew that he was insolvent, causes the onus of proof to shift, and it is for the creditor to whom the payment has been made to

Provincial Insolvency Act—concld.

show that the payment was not made with a view to prefer him. **P** LABHU RAM v. PURAN CHAND, 130 P. R. 1919 **421**

Provincial Small Cause Courts Act (IX of 1887), s. 15, Sch. II, Art. 33—*Maintenance, arrears of, assignment of—Suit to recover arrears—Jurisdiction of Small Cause Court—Assignment of maintenance due to member of* tarwad *or* Aliyasanthana *family, validity of—Transfer of Property Act (IV of 88), s. 6, scope and applicability of.*

A suit by an assignee of arrears of maintenance which had accrued due to the assignor for the recovery of such arrears is not cognizable by a Small Cause Court

Per *Seshagiri Aiyar, J.*—A right to maintenance which falls due to a member of a Malabar *tarwad* or an *Aliyasanthana* family is capable of assignment and is "property" within the meaning of section 6 (*a*) of the Transfer of Property Act, its assignment being not opposed either to the principles of sub-clauses *d* and *h* of the section or to the general law **M** SESHAPPA HEGGADE v. CHANDAYYA HEGGADE, 37 M. L. J. 402 **665**

—— **s. 17**—*Decree,* ex parte, *application to set aside—Deposit of decretal amount, when to be made.*

When an application is made under section 17 of the Provincial Small Cause Courts Act to set aside an *ex parte* decree, the deposit required by the section need not be made at the time of presenting the application. The provisions of the section not being mandatory, it would be a sufficient compliance therewith if the amount is deposited before the application is heard. **M** AKULA ACHIAH v. CHALLAPALLI LAKSHMINARASIMHAM, 1914 M. W. N. 637; 37 M. L. J. 433; 16 L. W. 474 **926**

—— **s. 25**—High Court, discretion of. *See* CIVIL PROCEDURE CODE, O XLVII, R 1 **44**

Public highway *Dedication, proof of.*

In order to establish a public right of way by proof of user alone, it is necessary to show that such a way leads from one public terminus to another. The right of way may, however, be held proved in a road leading merely to a private place of interest if it is shown that the owner has allowed the public to spend money in improving the road, in which case dedication may be inferred. **O** DHANI RAM v. ABDUL KARIM, 22 O. C 169 **441**

Punjab Land Revenue Act (XVII of 1887), ss. 116, 117, 158, cl. (xvii)—*Jurisdiction of Civil and Revenue Courts—Declaration that partition shall not affect plaintiff's interest, suit for, whether cognizable by Civil Court—Question of title.*

Where certain persons sue for a declaration that a partition of common land in a village effected by the Revenue Authorities should be declared inoperative so far as their interests are concerned, and the claim is based on the ground that the measure of right adopted by the Revenue Authorities was inaccurate, the question of the measure of right is one of title within the meaning of sections 116, 117 and 158, clause *xvii*, of the Punjab Land Revenue Act, and the suit is, therefore, cognisable by a Civil Court **P** CHHAJJU v. DALLU, 142 P. R. 1913 **419**

—— **ss. 117, 158, cl. (xvii)** **419**

Punjab Tenancy Act (XVI of 1887), ss 56, 59, 60, 111, 112—*Occupancy tenancy, alienation of—Agreement recorded in settlement record, whether can override provisions of Act—Intention of parties—Precedents, value of—Subordinate Courts, duty of*

The provisions of the Punjab Tenancy Act in regard to the alienation of, and succession to, an occupancy tenancy may be overridden by an agreement valid according to the provisions of sections 111 and 112 of the Act

An agreement entered in a settlement record must be interpreted in a reasonable manner, and as a whole with due reference to all the provisions which it contains: it cannot be construed so as to give in perpetuity to an occupancy tenant, his heirs and assigns an unrestricted power of alienating his tenancy, unless such an intention is expressed in clear and unambiguous language, uncontradicted by other provisions such as those regarding the treatment of the tenancy on failure of heirs.

It is always open to the subordinate Revenue Courts to consider previous decisions of the highest Revenue Court which appear to be relevant to the decision of a case pending before them and it is desirable that they should follow such decisions, even when unpublished, where it is perfectly certain that the facts are in all respects similar and the issue is the same. But unpublished rulings must be treated with more caution than published rulings. **P F C C** RAM CHAND v KISHAN CHAND, 2 P. R 1919 Rev. **531**

—— **ss. 59, 60, 111 and 112** **531**

Purakkudi, meaning of. *See* MADRAS ESTATES LAND ACT **303**

Registration Act (XVI of 1903), ss. 2 (7), 17, 49—*Agreement to grant lease on happening of contingency, whether agreement to lease—Registration, whether necessary—"Decree" in s 17 (2) (vi), meaning of—Agreement adjusting suit relating to matters beyond subject-matter of suit, whether compulsorily registrable—Procedure—Civil Procedure Code (Act XIV of 1882), s. 375—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3.*

An agreement that upon the happening of a contingent event a lease will be granted is not an agreement to lease within the terms of section 2 (7) of the Registration Act, and does not, therefore, require registration under section 17 (1) (*d*) of the Act. To fall within these sections a lease or an agreement to lease must be a document which effects an actual demise and operates as a lease *in præsenti*.

The word "decree" in section 17 (2) (*vi*) of the Registration Act must be construed in connection with the purpose of the statute, which was to provide for the public registration of documents. It is not confined to so much of a decree as may be operative.

Where, therefore, an agreement adjusting a suit went beyond the subject-matter of the suit by providing that in a certain contingency lands not included in the suit should be leased, and such agreement was recorded in a decree framed under section 375 of the Code of Civil Procedure, 1882:

Held, (1) that the agreement did not fall within section 7 (1) (*b*) of the Registration Act and that though it would otherwise fall under section 17 (1)

Registration Act—contd.

(b) of the Act it was excepted by the words "any decree of a Court" in sub-section (2) of the section:

(2) that even though the decree might be incapable of execution as a decree outside the lands of the suit, it might still be received in evidence of the agreement which it embodied. **P C** HEMANTA KUMARI DEBI *v.* MIDNAPORE ZEMINDARI CO., LD.; 47 M. L. J. 525; 7 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 30 **534**

——— **ss. 2 (7), 17, 43**—*Construction of s. 17—Construction of document—Agreement permitting a person to occupy land, whether lease Registration, whether necessary—"Undertaking to occupy" in s. 2 (7), what is.*

Section 17 of the Registration Act must be strictly construed, as taken in connection with section 49 of the Act it imposes serious disqualifications for non-observance of registration. Unless a document is clearly brought within the purview of the section, it should not be excluded from being treated as evidence.

A mere undertaking to occupy land contained in a document will not make the document compulsorily registrable, unless some interest or right in the thing let is created by the document

Defendant's father obtained possession of a piece of land under a written agreement from the plaintiff for the purpose of building a house on it, on the condition that the plaintiff would have no power to dispossess him during his life, but that on his death in case of a disagreement between his heirs and the plaintiff the latter would have a right to eject them on paying them the price of the materials:

Held, that the agreement was not a lease in any sense, nor was it an undertaking to occupy within the meaning of section 2 (7) of the Registration Act and that inasmuch as it created no interest in the land, it did not require registration under section 17 (*d*) of the Registration Act. **P** WARYAM SINGH *v.* BASANT SINGH, 124 P. R. 1919 **451**

——— **s. 17** **534**

——— **s. 17**—Construction of section. *See* ANTE, s. 2 (7) **451**

——— **s. 17 (1) (b)**—*Security bond executed in compliance with order of Court hypothecating immoveable property of value of more than Rs. 100, whether requires registration.*

Where execution of a decree is stayed conditionally on the judgment debtor's furnishing security, and the security bond executed hypothecates immoveable property exceeding Rs 0 in value, the bond requires registration under section 17 (1) (*b*) of the Registration Act **P** LAHORE SPINNING AND WEAVING MILLS CO., LTD. *v.* UTTAM CHAND, 122 P. R. 1919 **463**

——— **s. 17 (b)**—*Partition—Document reciting fact of partition, whether compulsorily registrable—Contract Act (IX of 1872), s. 1—Contract by minor, validity of—Ratification by minor, effect of.*

A document reciting the fact that certain immoveable property has already been partitioned and that each party has since been in possession of the share allotted to him at partition, does not come within the purview of section 17 (*b*) of the Registration Act and need not be registered.

Registration Act—concld

A contract by a minor is void and not voidable and cannot, therefore, be ratified by any subsequent act of the minor **L** AMAR NATH *v.* KHUDU MAL **123**

——— **s. 49** **451, 534**

——— **s. 90, sub-s. 1 (d)** *Lease by Government—Grants or assignments of interest, whether include lease by Government—Stipulation against erection of buildings on land demised in Malabar, legality of—Malabar Compensation for Tenants' Improvements Act (I Mad. of 1900), s. 19—Crown Grants Act (XV of 1895), ss. 2, 3—"Grant," meaning of—Interpretation of Statutes*—Ejusdem generis, *rule of, applicability of.*

The words "grants or assignments of interest" in section 90 (1) (*d*) of the Registration Act are comprehensive enough to include a lease by Government.

A stipulation, in a lease granted by Government of land situate in Malabar, that the lessee should not erect buildings thereon does not fall within the mischief of section 19 of the Malabar Compensation for Tenants' Improvements Act and is saved by section 3 of the Crown Grants Act.

The expression "grant" in section 2 of the Crown Grants Act is not restricted to the transfer of prerogative rights possessed by the Crown but denotes transfers of land of every description.

In construing expressions used in a section of a Statute, it must first be ascertained from the language of the section the class of cases which were intended to be affected If the intention is clear, the occasion for the introduction of the *ejusdem generis* rule of interpretation would not arise. **M** HALLINGAL MOOSA *v.* SECRETARY OF STATE FOR INDIA, 37 M. L. J. 332; 43 M. 65 **345**

Religious Endowments Act (XX of 1863), s. 10, *order under—Review, whether permissible—Inherent power of Court—Civil Procedure Code (Act V of 1908), ss. 141, 151.*

Inasmuch as there is no explicit provision in the Religious Endowments Act for a review, a District Judge has no power, under that Act, to review an order passed by him under section 10 of the Act, nor has he any such power under section 141 of the Civil Procedure Code.

The power to review is not inherent in a Court, and can only be exercised if it is permitted by Statute. **M** ANANTHARAJU SHETTY *v.* APPU HEGADE, 37 M. L. J. 62 **56**

——— **s. 14,** scope of. *See* CIVIL PROCEDURE CODE, s. 92 **605**

Revision—High Court, power of, to interfere with order made with jurisdiction. *See* CIVIL PROCEDURE CODE, s. 115 **441**

——— High Court, power of, when other remedies open. *See* GUARDIANS AND WARDS ACT, s. 9 (1) **563**

Rivaj-i-am, entry in, value of. *See* CUSTOM—ADOPTION **404**

———, entry in, value of. *See* CUSTOM—GUARDIANSHIP **435**

Sale of goods—*Transit by canal in boats—Shortage of water—Delay in delivery—Rescission of contract, right of vendee to—Impossibility of performance, doctrine of, limits of—Reasonable time performance in—Shipment, whether amounts to delivery—Contract Act (IX of 1872), ss. 51, 55, 56, 64, 73.*

Sale of goods - concld.

Plaintiffs agreed to purchase from 1st defendant 5,000 bags of Covelong salt at a fixed price and paid to st defendant as advance therefor Rs. 1,00 on 3 th November 1916 The conditions of the contract were *inter alia* that the st defendant was to despatch the salt by boats from Covelong to Elephant Gate Basin, Madras, through the Buckingham canal, and the amount due for each consignment was to be paid by the plaintiff before taking delivery at the Elephant Gate Basin. No time was fixed, however, for the delivery of the entire quantity of salt. The course of business adopted was that along with each consignment a watchman was sent by the vendor who was responsible for its custody. The despatch of the salt and its expected arrival in Madras were notified by the vendor, not to the purchasers, but to his own agents in Madras and, when it did arrive, the latter either sent a delivery order to the purchasers or sent one of their own men to meet the boats with the purchasers' representative and indicate that delivery was to be made to the purchasers The 1st defendant sent two consignments on 8th and 17th January 1917, totalling 740 bags, which were shipped on twelve canal boats. The remaining quantity was detained at Pappanchavidi, 1 miles from Covelong, as water in the canal was very low and the boats could proceed no further. The plaintiffs, after complaining of the delay in delivery of the balance of the stipulated salt, formally rescinded the contract on 20th February 1917, and brought the present action for damages. The defendants pleaded: (1) that shipment of the salt amounted to delivery, 2 that they could not be held liable for the contract becoming impossible of performance owing to the state of the canal, and (3) that they had substantially performed the contract and that the plaintiffs' action in rescinding it was premature:

Held, that the property in the goods did not pass on shipment but that the vendor kept them as his property until they were paid for and delivered and that the appropriation at Covelong was conditional only:

(2) that the absence of facilities in transit could not excuse defendant on the ground of impossibility of performance:

The principle of the Coronation cases, *Krell* v. *Henry*, (1903) 2 K B. 74 ; 72 L. J. K. B. 740, 89 L. T. 328; 19 T. L R 711; 52 W R 248, explained.

(3) that the defendant having substantially performed the contract and discharged his obligation and the delay being attributable to causes beyond his control, plaintiffs' repudiation was unjustifiable. **M** MAHOMED IBRAHIM MAHOMED JAFFIR AND CO. *v.* NALAM LAKSHMIKANTAM, 26 M L. T. 24 **125**

Set-off, nature of - Plaintiff, whether can plead limitation in answer to set-off. *See* CIVIL PROCEDURE CODE, O VIII. R 6 **234**

Specific Relief Act (I of 1877), s. 9 —Remedies of dispossessed co-sharer. *See* CO-SHARERS **569**

—— **s. 31** - *Rectification of instrument—Gift, deed of—Property, wrong description of—Title, whether perfected—Remedies open to transferee Declaration of title, suit for—Evidence Act (I of 1872), ss* 95, 96, 97—*Subsequent* bona fide *purchaser for value without notice, position of—Preference.*

Specific Relief Act—contd.

Section 31 of the Specific Relief Act is only an enabling section. It is open to a transferee to seek relief by rectification under this section, but that is not his only remedy He can protect his title as defendant without rectification He can sue for a declaration that the property belongs to him without seeking rectification, in which case he can avail himself of the provisions of sections 95 to 97 of the Evidence Act.

Where property is transferred to a person and the deed of transfer gives a wrong number or description of the property conveyed which does not belong to the transferor, the transferee is entitled to treat his title to the property that was really intended to be conveyed as complete at the time of the execution and registration of the document, and to plead misdescription as a defence in an action against him for the recovery of the property, invoking in aid the provisions of sections 95 to 97 of the Evidence Act.

A subsequent *bona fide* purchaser for value without notice of the property that was intended to be conveyed by the prior deed of transfer, will have preference as against the first transferee if the latter, by his act or omission, made it possible for the transferor to deal with the property the principle being that of two innocent transferees the one who has rendered it possible for the owner to deal with the property a second time must suffer for his negligence. **M** PALANIVELAPPA GOUNDAN *v.* NACHAPPA GOUNDAN **379**

—— **s. 38**—Contract with minor. *See* CONTRACT ACT, s. 11 **65**

—— **s. 39**—*Cancellation of instrument on ground of fraud—Fraud not carried out, effect of.*

Plaintiff sued for cancellation of a deed of mortgage executed by him in favour of the defendants, alleging that he had been induced to execute the deed by fraud and that there was no consideration for his contract It was found that the transaction was in fact fictitious and that plaintiff and defendants had conspired to concoct the mortgage to the detriment of plaintiff's reversioner:

Held, that inasmuch as the reversioner's rights would come into operation only on the death of the plaintiff, it could not be said that the purpose of the fraud had been carried into effect, and that, therefore, the plaintiff was entitled to get the deed cancelled **P** NABI BAKHSH *v.* MAULA, 126 P R. 1919 **454**

—— **s. 42**—Reversioner, whether can sue for declaration as to limited nature of widow's estate. *See* HINDU LAW—SUCCESSION **498**

—— **ss. 52, 54**—*Injunction—Suit by* uralans *of* devaswom *to restrain* samudayi *from management—Dismissal before suit, proof of, condition precedent*

An injunction cannot be asked for against a person whose employment, whatever its exact nature, so long as it continues, entitles him to the exercise of the rights proposed to be restrained.

Where the Uralans of a Malabar Devaswom sued for an injunction to restrain a Samudayi appointed by them from interfering with the management of the Devaswom and its properties without any allegation or proof of his dismissal:

Specific Relief Act—concld.

Held, that as the dismissal of the defendant was a condition essential to the grant of relief by way of injunction and as this was not alleged to have been fulfilled, the suit was incompetent. **M** DAMODARAN NAMBOODRI *v.* GOVINDAN NAIR, 37 M. L. J. 307 **229**

——— **s. 54** **229**

Succession Act (X of 1865), s. 100, applicability of, to Will made before Act. *See* HINDU LAW—WILL **779**

——— **ss. 101, 102**—*Hindu Wills Act (XXI of 1870), s. 3—Disposition creating life-estate and bequeathing ulterior estate to person on attaining age, validity of—Madras Hindu Transfers and Bequests Act (I of 1914), s. 2 (2)—"Time which is subsequent to such date," meaning of—Vesting after passing of Act, effect of.*

When by a disposition a previous life-estate is created, and the ulterior estate is bequeathed to a person on his attaining age, such disposition is valid.

Having regard to the terms of section 3 of the Hindu Wills Act, sections 101 and 102 of the Succession Act, which are applicable to Hindus, must be read as if they contained a proviso that the disposition must be of such a character as could have been made before the passing of the Hindu Wills Act, but this provision can be availed of only if the person who invokes its aid is not precluded by any law to which he is subject from availing himself of it.

The expression "at a time which is subsequent to such date" in sub-section 2 of section 2 of the Madras Hindu Transfers and Bequests Act, 1914, does not refer to any fixed period, and if the final vesting is to take place after the passing of the Act, the Act would validate such disposition. **M** SHANMUGA DEVAR *v.* SHANMUGA DEVAR **203**

——— **s. 102** **203**

Surety, execution of decree against—Limitation, commencement of. *See* CIVIL PROCEDURE CODE, s. 145 **187**

Tayermutti lands, meaning of. *See* CIVIL PROCEDURE CODE, s. 11 **33**

Transfer of Property Act (IV of 1882), s. 6, applicability of. *See* MUAFIDAR **459**

——— **s. 6,** scope and applicability of. *See* PROVINCIAL SMALL CAUSE COURTS ACT, s. 15 **665**

——— **s. 41,** applicability of. *See* CIVIL PROCEDURE CODE, s. 18 **579**

——— **s. 41**—*Transfer by ostensible owner—Transferee taking in good faith after enquiry—Real owner, position of—Estoppel—Intention to deceive, whether necessary.*

The object of section 41 of the Transfer of Property Act is to protect a *bona fide* transferee for good consideration, who has made proper inquiries, from being prejudiced by the conduct, however innocent, of the real owner in allowing the world at large to think some one else the owner of the property. In order to invoke the aid of this section it is not necessary to prove an intention on the part of the real owner to deceive, much less to deceive any particular person. **O** AZIZ-UN-NISA *v.* AHSAN ASHRAF, 22 O. C. 243 **970**

——— **s. 52**—*Civil Procedure Code (Act V of 1908), O. XXIII, r. 3*—Lis pendens, *doctrine of, applicability of, where suit terminated by compromise—Compromise, Court, whether bound to record—Chota Naypur Encumbered Estates Act (VI B. C. of 1876), ss 3, 9, 17, 19—Rules framed by Lieutenant-Governor under s. 9, rr. 5, 16—Estate under control of Manager—Holder of estate, whether can grant permanent lease—Lease, power to grant—Commissioner, whether can grant lease—Deputy Commissioner power of, to control Manager, extent of—Powers of Manager, construction of—Power to grant lease, whether includes power to enter into contract to lease—Contract, when completed—Letters and documents containing agreement, construction of.*

Transfer of Property Act—contd.

The doctrine of *lis pendens*, as embodied in section 52 of the Transfer of Property Act, applies to transfers during the pendency of a suit, even when that suit is terminated by a compromise decree; but in such cases the Court should be satisfied that the compromise is not a collusive arrangement entered into with the object of defeating a purchaser.

Where a transfer is made *pendente lite* under the authority of the Court within the terms of section 52 of the Transfer of Property Act, and subsequently the original parties to the suit arrive at a compromise, the Court before recording the compromise must consider whether it is a *bona fide* one or merely colourable with the object of preventing the transferee from setting up such defence to the action as might otherwise be open to the original defendant. If there is a real and substantial defence to the claim, the compromise is not a lawful agreement within the meaning of Order XXIII, rule 3 of the Civil Procedure Code, and the Court should refuse to record it and to pass a decree in accordance with the terms thereof.

By virtue of the provisions of section 3 of the Chota Nagpur Encumbered Estates Act, so long as an estate is under the control of the Manager, the holder of the estate is incompetent to mortgage charge, lease or alienate his immoveable property or any part thereof, and his action in the matter may be ignored.

The mere fact that by virtue of the provisions of rule 16 of the rules framed by the Lieutenant-Governor under section 19 of the Chota Nagpur Encumbered Estates Act, the power to grant leases vested in a Manager under section 17 of the Act is subject to the sanction of the Commissioner, does not in itself give the Commissioner power to grant a lease without consulting the Manager at all, much less can the Commissioner, unknown to the Manager, bind him by an agreement compelling him to exercise his statutory powers.

Section 9 of the Chota Nagpur Encumbered Estates Act contemplates that the Manager may be either the Deputy Commissioner himself or some one else. In the latter case the powers of the Deputy Commissioner are confined, by rule 5 of the rules framed by the Lieutenant-Governor under section 19 of the Act, to a general control over the management of another person. To say that in such a case the Deputy Commissioner may treat the Manager as non-existent and exercise his powers himself would be to extend the scope of the rule beyond its legitimate meaning.

Transfer of Property Act—contd.

The powers granted by the Chota Nagpur Encumbered Estates Act to a Manager should be construed as strictly as the powers of guardians and managers of minors.

It is not essential to the proper exercise of a statutory power to grant a lease that the person having this power should also have power to enter into a contract to lease.

The power to grant leases given to a Manager by section 17 of the Chota Nagpur Encumbered Estates Act does not include the power to enter into an executory contract to grant a lease.

If the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction, whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract, either because the conditions are unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the mere formal document may be ignored **Pat** HUKUM CHAND v. RAJA RAN BAHADUR SINGH, (1919) PAT. 305; 4 P. L. J. 589 **833**

——— **s. 52**—Lis pendens, *doctrine of, scope of—Appeal—Alienation pending appeal—Alienee, joinder of, as party—Compromise between original parties, whether binds alienee—Civil Procedure Code (Act V of 1908), O. XXII, rr.* 10, 11, *O. XXIII, r.* 3.

Under Order XXII, rules 10 and 11, of the Civil Procedure Code a transferee *pendente lite* is entitled to come on record and to conduct all proceedings from the date he is added as a party, though he is bound by all orders passed up to that date and cannot raise defences not open to his transferor. A mortgagee *pendente lite* is within the rules.

An alienee *pendente lite* is not bound by a compromise between the original parties to which he is not a party. The moment he is impleaded, the only detraction of rights to which he subjects himself is the result of the litigation which has been openly and in his presence tried and decided upon, and what could have been done by way of adjustment or compromise, if he is not before the Court, should not be allowed to interfere with his claim for a fair trial and a decision on the merits.

Per *Seshagiri Aiyar, J.*—The principle of *lis pendens* enunciated in section 52 of the Transfer of Property Act owes its origin to the maxim that, where the subject in dispute owing to contest passes into the custody of the judiciary, parties to it are under an obligation not to withdraw it from the protection of the Judge. **M** POLICHERLA VEERARAGHAVA REDDI v. CHERLA SUBBA REDDI, 10 L. W. 281; 37 M. L. J. 449; (1919) M. W. N. 699; 26 M. L. T. 339; 43 M. 37 **428**

——— **s. 52**—Transfer *pendente lite*—Transferee, whether can object. *See* FRAUD **572**

——— **s. 53**—Auction-purchaser, whether subsequent transferee. *See* EXECUTION OF DECREE **205**

——— **s. 54**—*Insolvency proceedings—Transfer by Official Receiver—Conveyance, deed of, whether necessary.*

Transfer of Property Act—contd.

The title of a purchaser of land from an Official Receiver, appointed under the provisions of the Provincial Insolvency Act, requires to be perfected by a proper conveyance executed by the Official Receiver and duly registered, and there is nothing to exempt such a conveyance from the operation of section 54 of the Transfer of Property Act. **C** ABDUL HASHIM v. AMAR KRISHNA SAHA, 46 C. 857 **121**

——— **s. 60**—Apportionment of claim. *See* HINDU LAW—WIDOW **587**

——— **ss. 106, 117**—*Lease, expiry of—Lessor holding over, position of—Notice to quit, whether necessary—Agricultural lease, applicability of s.* 106 *to.*

A lessee, who, after expiry of the term of his lease, holds over with the consent of the lessor, occupies the same character as he did under the expired lease, and has no right to set up any title adverse to that of the lessor and in derogation of the rights of the latter.

The mere consent of a landlord to a tenant holding over after the expiry of the term of his lease, during the pendency of negotiations for a fresh lease, does not create a contract of tenancy.

Except in so far as its provisions may be made specially applicable by the Local Government to agricultural leases, section 106 of the Transfer of Property Act has no application to such leases.

A tenant who holds over against the wishes of the landlord is not entitled to any notice to quit before a suit for ejectment is filed against him. **Pat** MOORE v. MAKHAN SINGH **180**

——— **s. 106**—*Lease terminable on happening of certain event—Notice by lessee terminating lease, effect of.*

Where a lease is terminable upon the happening of an event, as, *e. g.*, a default in the payment of rent, it cannot, in the absence of such event happening, be terminated by the lessee. A notice, therefore, in such a case sent by a tenant under section 106 of the Transfer of Property Act, terminating the lease, is of no value. **O** BISHESHWAR v. CHHEDI LAL **109**

——— **s. 108 (B) (e)**, scope of *See* LANDLORD AND TENANT **397**

——— **s. 109**—*"Transferee of any interest," meaning of—Person entitled to immediate reversion, whether can give notice to quit—Landlord, whether bound to inform tenant of assignment—Assignee of landlord's interest, whether can give notice to quit.*

The words "transferee of any interest" in section 109 of the Transfer of Property Act include the term lessee.

The rule of English law that the person entitled to the immediate reversion of the demised premises is the proper person to give notice to quit is applicable to India.

In a suit for recovery of rent and ejectment from the house it appeared that the defendants were monthly tenants of a house belonging to one *H.* On the 1st October 1917 *H.* leased the house to the plaintiff, who on the 10th February 1918 gave defendants a notice to vacate the house before the 16th March. The defendants refused to recognise plaintiff as their landlord:

Transfer of Property Act—concld.

Held, that the plaintiff was entitled to serve the defendants with a notice to quit the house and that it was not necessary for the landlord to inform the defendants that he had leased the house to the plaintiff. **L** PARBHU RAM *v.* TEK CHAND **865**

——— **s. 111 (d)**—*Lease—Merger, when arises —Mokarari lease, whether incumbrance—Bengal Land Revenue Sales Act (XI of 1859)—Bengal Tenancy Act (VIII B. C. of 1885).*

The entire interest of the lessee and the entire interest of the lessor must vest in the same person in the same right before it can be said that a lease of immoveable property has determined by merger within the meaning of clause (*d*) of section 111 of the Transfer of Property Act.

A *mokarari* is not an incumbrance at all except for the purposes of the Bengal Land Revenue Sales Act and the Bengal Tenancy Act. **Pat** NATHUNI PRASAD *v.* ANWAR KARIM **16**

——— **s. 111 (e)**—*Landlord and tenant—Surrender of tenancy for consideration, validity of—Registration, whether necessary.*

Where in execution of a rent decree the tenant judgment-debtor surrendered the tenancy to the landlord decree-holder, the latter agreeing to forego his claim for rents due:

Held, that the surrender, though for consideration, was operative, and that the provisions of the Transfer of Property Act did not require a registered instrument to evidence the surrender. **C** ABDUL MAJID *v.* HARI CHARN HALDER **17**

——— **s. 117** **180**

Trust, *charitable—Dedication of building for use by particular sect or class*—Cy-pres, *doctrine of, application of—Re-construction of building after death of founder, whether justifies application of cy-pres—Occasional use by objects of trust, whether justifies use by others at other times—Construction of document.*

The trustees of a charitable endowment cannot convert its funds to purposes other than those marked out by the instrument of trust or the scheme regulating the charity.

The trustees cannot make a *cy-pres* application on their own authority merely because they consider it desirable to do so.

Where a building is dedicated expressly for use by a particular sect or class or denomination of persons whenever they halt there, its occupation by other persons at other times, when it is not used by the class for whom it was founded, cannot be permitted.

The fact that a building founded for use by a particular class was afterwards re-constructed by members of another class or by the public, will not justify the application of the *cy-pres* doctrine, unless the sect for whom the building was intended has become extinct.

A follower of Vallabachari, founder of a sect, dedicated a building for use by 'Samastha Vallabha Kul':

Held, that the intention of the dedicator was to restrict the use of the building only to the descendants of the founder who were priests of that sect, and not to all Vallabha Vaishnavas. **M** GOVINDA DOSS *v.* GOVINDA DOSS, 10 L. W. 559; (1920) M. W. N. 168 **661**

Trustee, transfer by, effect of. *See* LIMITATION ACT, SCH. I, ART. 134 **168**

Under-proprietary holdings in Oudh, *confiscation and restoration of—Title acquired, nature of—Oudh Estates Act (I of 1869), Sch. II.*

Although under-proprietary holdings in Oudh were confiscated absolutely to Government by the Proclamation of 15th March 1858, the rights of the under-proprietors as they existed before the Proclamation were restored in 1859 by letters set out in Schedule II of the Oudh Estates Act and by the Settlement Court proceedings taken under the rules validated by Act XXVI of 1866, and the title acquired by the Settlement Court decrees was a title from the British Government but was the same title which was possessed by the claimants before the confiscation. The title was new in the sense that the grantor was new, but it was old in the sense that what was granted was what was held before. **O** OUDH BIHARI SINGH *v.* SURAJ BALI, 6 O. L. J. 394: 22 O. C. 201 **98**

Varapattu lands, meaning of. *See* CIVIL PROCEDURE CODE, S. 11 **33**

Varisalpattu lands, meaning of. *See* CIVIL PROCEDURE CODE, S. 11 **33**

Vendor and purchaser—*Consideration, payment of—Suit to recover unpaid consideration—Burden of proof.*

Where the plaintiff in a suit to recover the balance of consideration due on a sale sets up a definite agreement that the balance with interest was to be paid on a particular date, the burden of proving the alleged agreement rests upon the plaintiff. He must establish at least a *prima facie* title to the relief which he seeks, more specially where the vended property as well as the sale-deed have been given in possession to the defendant. Mere denial of the receipt of consideration is not sufficient to relieve the plaintiff and to shift the burden on to the vendee defendant. **Pat** RAMPAL RAM *v.* SUBA SINGH, 4 P. L. J. 517 **83**

——— Contract, breach of, by vendor—Purchaser, whether can be made to pay damages. *See* ARBITRATION **799**

Wajib-ul-arz, *construction of—Document loosely and carelessly worded—Official record, endorsement on, made by public servant in performance of duty, value of—Custom—Succession—Daughters, exclusion of*—Sankaldipi Brahmans.

In interpreting documents like *wajib-ul-arzes*, unless there are strong reasons to the contrary, the same word should be construed in the same sense wherever it occurs in the document.

Where the whole document is on the face of it loosely and carelessly worded, it has to be interpreted by taking it as a whole and seeing what on a natural construction it clearly means to lay down.

An endorsement on an official record signed by a public servant in the performance of his duties should, in the absence of any evidence to throw doubts on it, be presumed to be correct.

Among *Sankaldipi Brahmans* daughters are by custom excluded from inheritance. **O** KESRI KUMAR *v.* RAM RANI, 6 O. L. J. 431 **725**

WILL, *construction of, principle of—Intention—Hindu Law—Widow, devise in favour of—Estate taken by widow—*"Malik" *and "full proprietary right," meanings of—Gift over, validity of.*

Where one of the clauses in a Will was in these terms: "On my demise my present wife J.' shall get all these immoveable properties and become full owner and enjoy and hold possession thereof, with regard thereto, my daughter and daughter's sons or kinsmen shall not be competent to raise objection" and the Will further authorised the widow to alienate or sell any portion of the aforesaid immoveable properties, for the purpose of performance of religious acts or pilgrimages or necessary expenses, or the whole of the properties in the event of extreme necessity:

Held, that an absolute interest in the immoveable properties left by the testator was conferred on his widow.

The effect of the use of the word *malik* is to confer on the donee a heritable and alienable estate: the context may, however, qualify or cut down the full proprietary rights that the word *prima facie* imports.

WILL—concld.

The expression 'full proprietary right' implies absolute power of alienation.

Where a testator grants an absolute interest in the estate to his widow, the gift over of what might remain undisposed of by her would be inoperative in law.

The question in expounding a Will is, not what the testator meant, but what is the meaning of his words. The Court must discover what was the intention of the testator from the words he has used. Although it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, the Court cannot give effect to any intention which is not expressed or plainly implied in the language of the Will. Those who take under a Will are bound by the expressed intention of the testator. If that expressed intention is unfortunately different from what he really intended, so much the worse for those who wish the actual intention to prevail. **C** SULOCHANA DEBI *v.* JAGATTARINI DEBI 30 C. L. J. 51 **602**

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